

# Commonsense Solutions:

How State Laws Can Reduce  
Gun Deaths Associated with  
Mental Illness

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## EXECUTIVE SUMMARY

Guns in the hands of the dangerously mentally ill have taken the lives of too many people. Mass shootings, like the shooting in a parking lot in Tucson, Arizona in January 2011, and the shooting in a movie theater in Aurora, Colorado in July 2012, have brought this problem to the attention of the American public. Experts have objected to the media's emphasis on mentally ill mass shooters, because mental illness is not the cause of most forms of gun violence toward others. Nevertheless, mental illness certainly plays a role in this violence, as the recent surge in mass shootings demonstrates. In fact, mental illness plays an even greater role in gun suicides, many of which could be averted if guns were temporarily removed from the situation.

**Existing state laws do not do enough to remove access to guns from dangerously mentally ill people.** This report provides a series of proposals that state legislators should consider to address this problem and save lives. These proposals include:

- Complete reporting of all people prohibited from possessing firearms because of mental illness under federal law. By reporting these people, states can ensure that they cannot pass a background check to purchase a gun. This report provides details about the categories of people who should be reported and the mechanisms for reporting. Most states already have some version of this law, but these existing laws are filled with loopholes.
- Authorizing law enforcement officers to remove dangerous people's access to guns, with oversight from a court or administrative agency, and retain these guns until the person is no longer dangerous, with strong protections to prevent any abuse of this authority. Several states, including Connecticut and Indiana, have enacted versions of this law.
- Requiring schools, including colleges and universities, to report people identified as violent or suicidal to a court or administrative agency charged with reviewing these reports. These people then become tentatively prohibited from purchasing or possessing guns, but can seek a final decision in compliance with due process, and regain their gun eligibility automatically after a certain period of time. Illinois enacted a similar law in 2013.
- Allowing courts to issue "gun violence restraining orders" when concerned community members bring dangerous or suicidal people to their attention. A gun violence restraining order would temporarily prohibit a person identified as dangerous from possessing guns and would order the temporary removal of guns from his or her possession. Bills were introduced in several states in 2014 that would create a procedure to obtain these orders.
- Temporarily prohibiting people involuntarily hospitalized for mental illness under emergency circumstances from purchasing or possessing guns. A person prohibited under this law could petition a court to regain his or her gun at any time, and would automatically regain this eligibility after a number of years. California has a version of this law.

This report provides arguments in support of these proposals, along with the legal and factual background for each. It also provides a list of the features of a strong law on each topic. It is our hope that this report will provide a "toolkit" for legislators and advocates that want to move forward with these proposals.

# INTRODUCTION

America's experiences with mass shootings have led many people to speculate about the link between mental illness and gun violence. News reports after these shootings focused on the shooter's mental health, and legislators and activists have responded with calls to restrict access to firearms by the mentally ill. These calls have been met with opposition from a variety of groups, including gun rights advocates, mental health professionals, and advocates for the mentally ill themselves. Nevertheless, there are certain proposals that enjoy widespread support. This report is intended to explain those proposals and provide a manual for state legislators and activists that want to move forward.

## 1. THE ROLE OF MENTAL ILLNESS IN GUN VIOLENCE

Mental illness is a common disability that takes many forms.

- Data from the U.S. Department of Health and Human Services indicates that approximately 43 million adults (18% of adults) suffer from a diagnosable mental illness at some point each year.<sup>1</sup>
- More than nine million adults (4% of the adult population) suffer from a mental illness that mental health professionals would label "serious" each year.<sup>2</sup>
- Mental illness takes a variety of different forms, ranging from schizophrenia and other forms of psychosis, to mild forms of depression and anxiety that are familiar to many people.

While recent mass shootings have focused media attention on the role of mental illness in gun violence, in reality, violent crimes by the mentally ill play a small role in gun deaths overall.<sup>3</sup>

- Only approximately 4% of violence towards others is attributable to mental illness.<sup>4</sup>
- The vast majority of people who suffer from mental illness are never violent.
- Even people with severe mental illnesses may only be at an elevated risk of violence toward others at specific times, such as during a time of intense emotional disturbance or the person's first psychotic episode.<sup>5</sup>
- People who suffer from mental illness are more likely to be the victims, rather than the perpetrators, of violence.<sup>6</sup>

Nevertheless, reducing the number of these violent incidents is a worthy goal. It is indisputable that mental illnesses have played a role in many of the most recent mass shootings, and

most people desperately want these events to stop. Strong gun laws will help reduce these tragedies.

## 2. AMERICA'S SUICIDE EPIDEMIC

Despite the media's emphasis on mass shootings and violent crime, the most frequent occurrence that demonstrates the link between mental illness and gun violence is suicide. Suicides account for more than half of all gun deaths each year, and about half of suicides are performed with a gun.<sup>7</sup>

About 90% of people who die by suicide had a diagnosable mental illness,<sup>8</sup> and certain mental illnesses, such as depression, significantly increase the risk of suicide.<sup>9</sup> About 16 million adults suffer a major depressive episode each year. An estimated nine million adults (3.9%) have serious thoughts of suicide, and approximately 1.3 million attempt suicide annually.<sup>10</sup>

Suicides are violent, horrific acts that devastate the families, friends, and communities of the people who are lost. The evidence shows that suicides and suicide attempts often occur during a time of crisis, and that many suicides are impulsive acts: about 90% of people who live through a suicide attempt do not ultimately die by suicide.<sup>11</sup>

Suicide attempts with a gun are much more likely to be fatal than suicide attempts by other methods.<sup>12</sup> More than 90% of all suicide attempts with a firearm, if serious enough to require hospital treatment, result in death. Suicide attempts by jumping, by comparison, carry a 34% fatality rate; suicide attempts by drug poisoning carry a 2% fatality rate.<sup>13</sup>

The conclusion is obvious: many suicides and murder-suicides could be prevented if the person's access to a firearm was temporarily restricted at the time.

## 3. HOW WE GOT TO THE ERA OF MASS SHOOTINGS: A HISTORICAL PERSPECTIVE

As described below, the manner in which society has treated the mentally ill has changed dramatically over the course of our nation's history. The modern system in which the mentally ill are treated within the community whenever possible is unquestionably better than the prior system of widespread confinement. Nevertheless, existing laws that provide shockingly easy access to guns are incompatible with this system.

In the 1800s, people who showed signs of mental illness were quickly and brutally confined to institutions. During this time period, when treatments for mental illness were largely ineffective, people were often warehoused in asylums and subject to neglect and abuse.<sup>14</sup>

In the 1950s and 60s, new medications for mental illnesses proved effective, and there was a movement to "deinstitutionalize" the mentally ill. Laws were changed so that now, only people who have been found dangerous to self or others by a court or other judicial entity can be confined against their will for a long period of time.<sup>15</sup> As a result of this movement, many people suffering from mental illness have been released into the community. Between 1969 and 1998, the number of patients enrolled in 24-hour hospital and residential services dropped by half, and the mean length of stay decreased to 10 days.<sup>16</sup>

This result is much more consistent with the rights of people suffering from mental illness. However, mental health professionals emphasize the difficulty in determining whether a particular person will become dangerous.<sup>17</sup> As a result, many dangerous people are not confined in mental institutions. Because of our weak gun laws, these dangerous people often have access to guns and sometimes commit crimes and end up in jails and prisons. A backgrounder from the Treatment Advocacy Center, a non-profit that advocates for better treatment of mental illness, summarized four surveys that found that mass killings are on the rise, and about half of these killers suffered from untreated severe mental illness.<sup>18</sup>

After the massacre at the Washington Navy Yard in September 2013, Wayne LaPierre, Executive Vice President of the National Rifle Association, admitted that the massacre would not have happened if the shooter did not have access to a gun. Instead of supporting laws limiting access to guns, however, LaPierre's response was a much more radical attack on the rights of people suffering from mental illness. "They need to be committed," LaPierre said. "If they're

committed, they're not at the naval yard."<sup>19</sup>

We respectfully disagree. Society does not need to confine people suffering from mental illness in order to prevent mass shootings. Many of these tragedies could have been prevented if the person's access to guns was restricted at the time when the person's illness was at its worst. Stronger gun laws can reduce the number and severity of these horrible events while respecting the rights and dignity of the mentally ill.

## **4. A NOTE ON THE SECOND AMENDMENT**

Opponents of strong gun laws often claim that these laws violate the Second Amendment. In 2008, the Supreme Court held for the first time that the Second Amendment protects the individual right of "law-abiding, responsible citizens" to possess an operable handgun in the home for self-defense.<sup>20</sup> However, the Supreme Court cautioned that this right is "not unlimited," and provided examples of "presumptively lawful" regulations, including "longstanding prohibitions on the possession of firearms by felons and the mentally ill."<sup>21</sup> The Court further clarified that its list of presumptively valid regulations was "not exhaustive," meaning that other gun regulations may also be valid.<sup>22</sup>

Since the 2008 decision, courts across the country have been faced with challenges to many kinds of gun regulations. Courts have overwhelmingly upheld strong gun laws, including laws aimed at reducing access to guns by the dangerously mentally ill.<sup>23</sup> As a result, legislators should not hesitate to enact these kinds of laws.

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# Part I: What States Need to Do to Implement the Federal Law Regarding Guns and the Mentally Ill

Federal law prohibits a small group of dangerously mentally ill people from possessing guns. Even this minimal law is not self-implementing, however: states must take action to ensure that people who fall within the federal law do not have access to firearms.

In fact, in recent years, about half the states have taken significant steps to implement the federal law. In most states, however, these steps have not been sufficient. This section of this publication will provide a comprehensive explanation of all the laws that states must enact to put the federal law into practice.

## THE PROBLEM

In April 2007, 23-year-old Seung-Hui Cho shot and killed 32 people and injured 17 others before committing suicide on the campus of Virginia Tech in Blacksburg, Virginia.<sup>1</sup> The massacre at Virginia Tech continues to count as the most lethal mass shooting in our nation's history.

At the time of the massacre, Cho was prohibited from purchasing and possessing firearms under federal law because of a history of mental illness.<sup>2</sup> Cho was able to buy the guns he used in the massacre, however, because the state of Virginia had not properly submitted his name and identifying information to the background check system.<sup>3</sup>

Cho's story is not an isolated case. When people are involuntarily committed to mental institutions or a court finds them incompetent to stand trial or not guilty of a crime by reason of insanity, they become ineligible to possess firearms under federal law.<sup>4</sup> But states often fail to report these people to the background check system, and, therefore, they can still pass a background check and obtain firearms.<sup>5</sup>

After the Virginia Tech shooting, significant progress was made in adding records of the dangerously mentally ill to the background check system. The number of relevant mental illness records in the system increased over 700% between the Virginia Tech shooting and January 31, 2014.<sup>6</sup>

**Records of many dangerously mentally ill people are still missing from the system, however.** The greatest gains in the numbers of state mental illness records submitted to the system largely reflect the efforts of a small minority of states.<sup>7</sup> As of November 2013, there were still 12 states that have identified fewer than 100 people who are prohibited from firearm possession due to a history of mental illness.<sup>8</sup>

**When identifying records are submitted to the background check system, they can be effective at preventing firearm transfers by licensed dealers to dangerous people.**

Records in the system based on mental illness blocked 316 gun sales in Virginia in 2013. This represents a 47% increase from 2010, before Virginia had increased its reporting of such records.<sup>9</sup>

In 2007, Connecticut began reporting people who were prohibited from possessing firearms because of a history of mental illness to the background check system. The number of violent crimes committed by these people then fell by half.<sup>10</sup>

## THE LEGAL BACKGROUND

The Gun Control Act of 1968 prohibits any person from transferring a firearm to a person who has been “adjudicated as a mental defective” or “committed to a mental institution.”<sup>11</sup> Federal regulations provide definitions of these terms.<sup>12</sup>

Federal law requires licensed dealers (but not unlicensed private sellers) to conduct a background check prior to transfer of a firearm.<sup>13</sup> Background checks are performed through a search of the National Instant Criminal Background Check System (“NICS”).<sup>14</sup>

Federal law does not require states to submit information to NICS; participation is strictly voluntary.<sup>15</sup> However, effective background checks on prospective firearm purchasers depend on the existence of complete, accurate information in NICS.

### *NICS Improvement Amendments Act of 2007*

In January 2008, President Bush signed into law the NICS Improvement Amendments Act of 2007, which, among other things:

- Provided financial rewards and penalties to encourage states to provide information to NICS;<sup>16</sup> and
- Authorized grants to assist states in establishing and upgrading their reporting and background check systems.<sup>17</sup> In order to be eligible for the grants authorized by the Act, a state has to meet certain requirements.<sup>18</sup>

According to a report from Everytown for Gun Safety, 22 states obtained grants authorized by the Act between 2009 and 2013. States have used this funding to, among other things, automate the process of submitting records, digitize old records, and coordinate between courts and mental health facilities throughout the state.<sup>19</sup>

## PRIVACY AND ACCESS TO RECORDS

Federal privacy laws do not prohibit states from providing records to NICS. More specifically, the federal Health Insurance and Portability and Accountability Act of 1996 (HIPAA) and implementing regulations only restrict disclosure of protected health information by health care plans, providers, and clearinghouses, and specifically allow disclosures when required by state law.<sup>20</sup>

Although federal law does not hamper submission of records to NICS, there are federal regulations in place that provide strong confidentiality protections for information that it is sent to NICS. Access to data stored in NICS is limited to use in firearm purchaser background checks and other closely related law enforcement activities. The law imposes significant penalties for unauthorized access.<sup>21</sup>

Furthermore, when a person who tries to purchase a gun fails a background check, the system provides no information about the underlying cause for denial.<sup>22</sup> Although the person can determine the reason he or she was denied,<sup>23</sup> the seller and other witnesses have no access to this information.

## HOW STATE LAWS CAN ENSURE REPORTING TO NICS

Since the Virginia Tech shooting, about half of the states have enacted laws authorizing or requiring the submission of relevant mental illness records to NICS, bringing the total number of states with such laws to 40. Alaska, Arizona, Hawaii, Rhode Island, and South Dakota enacted laws on this topic in 2014.<sup>24</sup>

States that have enacted such laws have, in fact, subsequently submitted greater numbers of records.

97% of records submitted in the most recent six months of available data were submitted by states with laws in place.<sup>25</sup>

19 of the 20 states with the largest increase in submitted records over this six-month period had enacted reporting laws.<sup>26</sup>

Although tremendous progress has been made nationwide, as of July 2014, 10 states still have no law requiring or authorizing records to be sent to NICS when a person becomes ineligible to possess guns because of mental illness.<sup>27</sup> In addition, many of the state laws regarding reporting to NICS have gaping loopholes.

As a result, some states have submitted dramatically fewer records to NICS per capita than other states. As of November 2013:

- The ten highest-reporting states had each reported over 800 mental illness records per 100,000 residents.
- Minnesota and Arizona, which ranked midway among the states in terms of number of records reported, had each reported fewer than 250 mental illness records per 100,000 residents.
- Eighteen states had reported fewer than 100 such records per 100,000 residents.<sup>28</sup>

These dramatic differences represent real people who, although ineligible to purchase a gun because of serious mental illness, can still pass a background check. These dramatic differences also represent huge gaps in the law that states can close.

#### *Features of Strong State Laws on NICS Reporting*

The following eight categories of people fall within the federal categories who are prohibited from purchasing or possessing guns because of mental illness. The strongest state reporting laws ensure reporting of all of these categories of people.

Federal law prohibits any person from purchasing or possessing a gun if he or she has been “adjudicated as a mental defective” or “committed to a mental institution.”<sup>29</sup> As a result, a person should be reported to NICS, if he or she:

- Has been formally committed, involuntarily, as an inpatient for mental health treatment, even for a short amount of time;
- Has been formally committed, involuntarily, to outpatient mental health treatment;
- Has been appointed a guardian or conservator because the person lacks the capacity to manage his or her own affairs due to a mental disorder;
- Has been found “incompetent to stand trial”;
- Has been found “not guilty by reason of insanity”;
- Has been found “guilty but mentally ill”;
- Is prohibited from purchasing or possessing guns under state law; or
- Previously became prohibited under any of the above categories and his or her records are not already in NICS, unless eligibility to purchase and possess firearms has since been restored.

There are also additional categories of people that states may wish to consider reporting, as detailed at the end of this report.

As described below, there are strong reasons to ensure reporting of each of these categories of people.

## W1. PEOPLE FORMALLY COMMITTED, INVOLUNTARILY, AS AN INPATIENT FOR EVEN A SHORT AMOUNT OF TIME

At least two of the most recent mass shooters had previously been committed to a mental institution. Steven Kazmierczak had a long history of commitments to mental institutions before he shot and killed six people, including himself, and injured 21 more people at Northern Illinois University in February 2008.<sup>30</sup> Similarly, Eduardo Sencion, who shot and killed four people before turning the gun on himself in an IHOP restaurant in Carson City, Nevada in September 2011, had previously been committed to mental institutions several times.<sup>31</sup> In both of these instances, at least one of these commitments had been involuntary, but they had not prevented these people from obtaining guns.<sup>32</sup>

States have expressed confusion about which commitment procedures trigger a federal gun prohibition. This confusion has led to gaps in states' reporting of some people who have been committed to mental institutions.

**What is an involuntary commitment as an inpatient?** Every state has at least one formal procedure for involuntarily committing someone for treatment as an inpatient in a mental hospital. The procedure begins when another person, possibly a family member, a mental health professional, or a law enforcement officer, submits a petition to a court or other formal judicial body. The person has a full opportunity to participate in the hearing. The procedure is referred to as "civil" commitment because it is not a criminal proceeding.

In many states, the exact nature of a commitment proceeding depends on how long the person will be committed for. Some states require different procedures depending on the length of the commitment sought.

**What is the legal basis for treating these people as prohibited?** Courts have found that people who were committed, even for short periods of time, can fall within the prohibition on the possession of firearms for people "committed to a mental institution," provided the person received a full judicial hearing where evidence may be presented.<sup>33</sup> For example, in *Tyler v. Holder*, a federal district court upheld a gun prohibition for a person who had previously been committed for a period not to exceed 30 days.<sup>34</sup> Similarly, in *United States v. Dorsch*, the Eighth Circuit upheld a commitment under South Dakota law that lasted about three weeks.<sup>35</sup> The court in *Dorsch* emphasized that the person could have counsel appointed to him, seek an independent examination, present evidence and subpoena and cross-examine witnesses during a hearing prior to the commitment.<sup>36</sup> The court decisions confirm that a person who was committed to mental institution involuntarily is prohibited from possessing guns, provided that he or she received full procedural protections, even if the commitment lasted a short period.

**What do other states do?** All of the states that authorize or require reporting to NICS include within the groups of people to be reported at least some people confined to mental institutions as inpatients, although the length of the required confinement varies greatly. For example, Pennsylvania requires the reporting of people committed for five days,<sup>37</sup> and Washington requires the reporting of people committed for two weeks.<sup>38</sup> In Kansas, on the other hand, individuals who are committed are only reported in situations where the court can order a commitment that lasts three months.<sup>39</sup> The law in Colorado is similar to the law in Kansas.<sup>40</sup>

The federal law applies to all people formally committed involuntarily to a mental institution, regardless of the length of confinement. Consequently, states should report all these people to NICS.

## 2. PEOPLE INVOLUNTARILY COMMITTED TO OUTPATIENT MENTAL HEALTH TREATMENT

States have expressed considerable confusion regarding whether people committed to "outpatient" treatment are prohibited from purchasing or possessing guns under federal law. In April 2007, this confusion resulted in tragedy, when Seung-Hui Cho perpetrated the mass shooting at Virginia Tech. A Virginia special justice had declared Mr. Cho to be "an imminent danger" to himself as a result of mental illness on December 14, 2005, and ordered Mr. Cho to seek outpatient treatment. Nevertheless, because of a gap in Virginia's law, the state had not reported him to NICS.<sup>41</sup>

**What is an “outpatient commitment”?** Over the last century, the movement to “deinstitutionalize” the mentally ill has resulted in significantly less people confined in mental institutions. As part of this movement, in the 1980s, many states adopted “outpatient commitment” laws. These laws authorize courts to issue orders that require a person suffering from mental illness to adhere to treatment but do not require them to be confined inside an institution.

Courts generally issue outpatient commitment orders after determining that, without treatment, such as medication or therapy, a person is likely to become dangerous to self or others. According to the non-profit Treatment Advocacy Center, which advocates in favor of better treatment for the mentally ill, 45 states have outpatient commitment laws.<sup>42</sup>

**What is the legal basis for treating these people as prohibited?** As noted above, federal law prohibits a person from purchasing or possessing a gun if he or she has been “committed to a mental institution” or “adjudicated as a mental defective.” The federal law does not say “committed *in* a mental institution” but rather “committed *to* a mental institution.” People who are ordered to seek outpatient treatment are committed to mental institutions as outpatients. The public health community also refers to these people as “committed” as outpatients because of their mental illness.<sup>43</sup>

Furthermore, in January 2014, the Obama Administration began the process to update the regulatory definitions of these terms to explicitly include people who have been ordered to receive outpatient treatment.<sup>44</sup> As the Administration has pointed out in its Notice of Rulemaking, the plain language of the statute supports this interpretation.<sup>45</sup>

There is also a strong argument for an interpretation of the statute that would treat people committed as outpatients as having been “adjudicated a mental defective” within the meaning of the federal law.<sup>46</sup> People who have been “adjudicated a mental defective” are federally prohibited from possessing firearms, just as people formally committed to a mental institution. Most state laws that govern outpatient commitments require full court procedures and due process to make a determination regarding the individual’s mental illness and potential to cause harm in the community with and without treatment. These procedures fit the definition of an “adjudication.”

Prominent mental health professionals have also endorsed the view that people committed to outpatient treatment should be ineligible to purchase and possess firearms.<sup>47</sup>

**What do other states do?** Twenty states now take the view that people ordered by a court to obtain outpatient treatment fall within the federal gun prohibition and specifically mandate the reporting of at least some these people to the background check system.<sup>48</sup> Other states should also ensure that these people fall within their laws regarding reporting to NICS.

### **3. MENTALLY ILL PEOPLE APPOINTED A GUARDIAN OR CONSERVATOR BECAUSE THEY LACK THE CAPACITY TO MANAGE THEIR OWN AFFAIRS**

In July 2013, a police officer sold a gun to a 19-year-old man without a background check at a Starbucks in Reno, Nevada. After learning about the gun, the young man’s mother, Jill Schaller, became distraught and contacted officials because her son is periodically suicidal. In fact, the man was under a guardianship that made him prohibited from legally possessing a gun. However, an investigation revealed that, even if a background check had been conducted, he still would have been able to purchase the gun, because identifying information about him had not been properly reported to NICS.<sup>49</sup> Further investigation revealed that the same “glitch in the system” was responsible for the Nevada courts’ failure to report almost 2,000 dangerous people under guardianships to NICS. These people included a woman who wanted to kill her daughter-in-law, a man arrested dozens of times for assaults, and a student arrested twice in one year for violence at school and once for attacking his mother.<sup>50</sup>

**What is a guardianship or conservatorship?** While state laws differ, every state provides a process whereby a court or other lawful authority can appoint a “guardian” or “conservator” for another person, including an adult. In some cases, a guardian may be appointed simply because a person is physically incapacitated, even though the person still has the mental and physical capacity to safely own and possess guns.<sup>51</sup> However, some states use guardianships

as an alternative to commitments to ensure that seriously mentally ill people obtain the care they need and do not become dangerous to themselves or others.

**What is the legal basis for treating these people as prohibited?** Federal law prohibits anyone “adjudicated as a mental defective” from purchasing or possessing a firearm. Federal regulations currently define this term to include “A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease ...Lacks the mental capacity to contract or manage his own affairs.”<sup>52</sup>

**What do other states do?** 15 states specifically mandate the reporting of individuals appointed a guardian or conservator on this basis to NICS.<sup>53</sup>

Each state should consider whether people for whom guardians or conservators are appointed under their laws fall within the federal gun prohibitions. If federal law applies, the state should ensure that these people are reported to NICS.

## 4. PEOPLE FOUND “INCOMPETENT TO STAND TRIAL”

Courts and states have expressed confusion regarding whether federal law prohibits gun possession by people who have been found “incompetent to stand trial” in a criminal case.<sup>54</sup>

**What does “incompetent to stand trial” mean?** A criminal defendant can be found incompetent to stand trial if he or she is unable to understand the nature and consequences of the proceedings against him or her or is unable to assist in his or her own defense. The court makes this determination in a hearing based on a psychological evaluation. If the defendant is found incompetent to stand trial, the person is usually committed to a mental institution until his or her competency is restored, or until the completion of the maximum sentence for the crimes alleged, whichever is shorter.

**What is the legal basis for treating these people as prohibited?** Federal law prohibits anyone “adjudicated as a mental defective” from purchasing or possessing a firearm.<sup>55</sup> Federal regulations currently define the term “adjudicated as a mental defective” to include any determination by a court or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease ...Lacks the mental capacity to contract or manage his own affairs.”<sup>56</sup> The current federal regulation also specifies that the term includes, “Those persons found incompetent to stand trial .... pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.”<sup>57</sup>

This last sentence was added in 1997 upon the recommendation of the Department of Defense.<sup>58</sup> There is no reason why people found incompetent to stand trial in a military court should be treated differently from people found incompetent to stand trial in other courts. For this reason, in January 2014, the Obama Administration began the process to update the regulatory definitions of this term to explicitly include, among other people, all people found incompetent to stand trial by any court in a criminal case regardless of whether the case was before a federal, state, local or military court.<sup>59</sup>

In addition, because people found incompetent to stand trial are almost always committed to a mental institution until their competency is restored, they may also be prohibited from possessing guns because they have been “committed to a mental institution.”<sup>60</sup>

**What do other states do?** About half the states already explicitly require the reporting of people found incompetent to stand trial to the “NICS Index,” one of four databases that are searched as part of NICS.<sup>61</sup> Additional states may include these people within the criminal records that are searched as part of NICS.<sup>62</sup> All states should report any person found incompetent to stand trial to NICS.

## 5. PEOPLE FOUND NOT GUILTY BY REASON OF A MENTAL DISEASE OR DEFECT, LACK OF MENTAL RESPONSIBILITY, OR INSANITY

In February 2013, Alice Boland tried to fire a loaded handgun at the heads of two school staffers in Charleston, South Carolina. Thankfully, the handgun malfunctioned. Alice Boland had previously been found “not guilty due to mental insanity,” after she had threatened President George W. Bush. She was, however, still able to buy the gun she used in the incident because South Carolina had failed to provide her records to NICS.<sup>63</sup>

**What does “not guilty by reason of insanity” mean?** A defendant in a criminal trial may be found “not guilty only by reason of insanity” if he or she committed a crime, but a mental disorder made him or her unable to understand the nature and wrongfulness of his or her actions when he or she committed the crime. This is distinct from a determination that a defendant is not mentally competent to stand trial because it focuses on the defendant’s mental state at the time he or she committed a crime, rather than during trial.

**What is the legal basis for treating these people as prohibited?** Federal law prohibits anyone “adjudicated as a mental defective” from purchasing or possessing a firearm.<sup>64</sup> Federal regulations include within the definition of this term anyone who has been subject to a “finding of insanity by a court in a criminal case.”<sup>65</sup> Therefore, these people are ineligible to purchase or possess guns under federal law.

**What do other states do?** In May 2013, South Carolina responded to the incident described above by enacting a law requiring state courts to submit records of people found not guilty due to mental insanity to NICS. Over the next six months the state reported 8,815 records, and between October 2013 and February 2014, 55 people whose names had been reported under this law were blocked from buying guns.<sup>66</sup> In total, about half the states explicitly require the reporting of people found not guilty by reason of insanity to NICS.<sup>67</sup> Additional states may include these people within the criminal records that are searched as part of NICS.

States should report to NICS any person found not guilty by reason of a mental disease or defect, lack of mental responsibility, or insanity.

## 6. PEOPLE FOUND “GUILTY BUT MENTALLY ILL” OR “GUILTY EXCEPT FOR INSANITY”

States have expressed confusion regarding whether federal law prohibits gun possession by people who have been found “guilty but mentally ill” or “guilty except for insanity.”

**What does “guilty but mentally ill” mean?** In some jurisdictions, a person can also be found “guilty but mentally ill” or “guilty except for insanity” by a court in a criminal case.<sup>68</sup> This finding applies to a defendant who was unable to appreciate the nature or wrongfulness of the crime he or she committed, but does not meet criteria for a plea of not guilty by reason of insanity. A defendant found guilty but mentally ill is not relieved of responsibility for criminal conduct. As a result, if he or she recovers from mental illness, he or she must complete the remainder of the sentence.

**What is the legal basis for treating these people as prohibited?** Federal law prohibits anyone “adjudicated as a mental defective” from purchasing or possessing a firearm.<sup>69</sup> Federal regulations currently define this term to include a determination by a court or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease ...Lacks the mental capacity to contract or manage his own affairs.”<sup>70</sup> The regulations also include within the definition of this term anyone who has been subject to a “finding of insanity by a court in a criminal case.”<sup>71</sup>

In January 2014, the Obama Administration began the process of updating the federal regulations to explicitly include people found “guilty but mentally ill” within the definition of “adjudicated as a mental defective.”<sup>72</sup>

**What do other states do?** A few state laws specifically require courts to report people found guilty but mentally ill to the “NICS Index,” one of four databases that are searched as part of NICS.<sup>73</sup> Additional states may include these people within the criminal records that are searched as part of NICS.<sup>74</sup>

States should report anyone found “guilty but mentally ill” or “guilty except for insanity” to NICS.

## 7. PEOPLE PROHIBITED FROM POSSESSING GUNS BY STATE, AS WELL AS FEDERAL, LAW

Recent laws regarding reporting to NICS have focused on the groups of people who are prohibited from possessing firearms under federal law. States have passed laws that prohibit additional groups of people from possessing guns, however. The intent of these state laws is to keep guns from the hands of people who are too dangerous to possess firearms, even though they do not fall within the federal prohibitions. These laws can only accomplish this goal if information identifying these people is submitted to NICS.

**Who are people prohibited from possessing guns by state law?** Thirty-four states and D.C. have enacted their own laws prohibiting certain people from purchasing or possessing firearms because of mental illness. While many of these laws mirror the federal prohibition, several states have broadened the categories of mentally ill persons who are prohibited from possessing firearms beyond the federal minimum of “adjudicated as a mental defective” or “committed to a mental institution.” In 2013 alone, five states strengthened laws of this type: California, Connecticut, Illinois, Maryland, and New York.<sup>75</sup> In California, for example, people who are held for 72 hours for a mental health evaluation are prohibited from possessing a gun for up to five years, although he or she can petition for eligibility to possess a gun sooner.<sup>76</sup>

**What is the legal basis for treating these people as prohibited?** Federal law generally prohibits licensed gun dealers from selling or delivering a firearm to a person who is prohibited from purchasing or possessing firearms under state law.<sup>77</sup> Federal law also incorporates state law by requiring the background check system to deny a gun sale to anyone recognized by the system as prohibited from purchasing or possessing guns by state law.<sup>78</sup>

Notably, in 2012 the FBI began accepting into NICS records identifying people prohibited from purchasing or possessing firearms under state, as well as federal, law.<sup>79</sup>

**What do other states do?** The following states have laws that explicitly require the reporting of all people prohibited by state law from possessing firearms because of mental illness to NICS: Illinois, Nebraska, New Jersey, and Pennsylvania.<sup>80</sup> Additional states require the reporting of particular categories of people prohibited from possessing guns under their state laws.<sup>81</sup>

These laws help ensure that state gun laws are properly enforced by ensuring that people who are prohibited from possessing guns under state law are not able to pass a background check and purchase guns. Every state should ensure that it reports any person that it prohibits from purchasing or possessing firearms to NICS.

## 8. PEOPLE WHO PREVIOUSLY BECAME PROHIBITED FROM PURCHASING OR POSSESSING GUNS

One of the biggest factors that might lead a state to have a high number of mental health records in NICS is when the state began providing such records. However, some of the states that have the largest per capita number of mental health records in NICS did not report such records to NICS until recently. These states have undertaken the task of identifying prohibited people from old court records in order to report them to NICS or other databases.

**Why have these people not already been reported?** Many states that have enacted laws in recent years requiring courts to report people to NICS did not require reporting of similarly situated people in the past. As a result, these states have a large backlog of people who were recorded in court records as having been subject to a finding that triggers a gun prohibition, but who were never reported to NICS.

For example, a person may have been committed to a mental institution, or found not guilty by reason of insanity or incompetent to stand trial many years ago. As a result, he or she is ineligible to possess guns under federal law. However, the state never reported the person to NICS in part because this reporting was not required at the time.

**What is the legal basis for treating these people as prohibited?** Federal law continues to prohibit gun possession by a person previously “committed to a mental institution” or “adjudicated a mental defective” long after the commitment or adjudication occurred. Under the NICS Improvement Amendments Act, which was enacted in 2008, states may create programs that allow these people to regain their eligibility to possess firearms upon a petition to a court.<sup>82</sup> However, if a person previously committed to a mental institution or adjudicated a “mental defective” within the meaning of the federal law has not regained their gun eligibility through one of these state programs, they are still ineligible to possess guns, and their identifying information belongs in NICS.

**What do other states do?** In 2009, Texas enacted a law requiring courts to search through and submit 20 years’ worth of records by September 1, 2010,<sup>83</sup> making Texas a leader in the number of records submitted to NICS.<sup>84</sup> In October 2012, the Texas Office of Court Administration issued a report on the implementation of this law.<sup>85</sup> Similarly, Minnesota enacted a law in 2013 that requires courts to enter all persons civilly committed during the period from January 1, 1994, to September 28, 2010, into NICS by July 1, 2014.<sup>86</sup> South Carolina also enacted a law in 2013 that requires courts to search back through a minimum of ten years’ worth of records to identify individuals to be reported.<sup>87</sup>

Given the risk that a dangerously mentally ill person will obtain access to a gun, states should provide the resources necessary to identify and report people who have previously become prohibited from purchasing or possessing firearms and report these people to NICS.

## 9. OTHER CATEGORIES OF PEOPLE THAT SHOULD BE REPORTED TO NICS

Federal law prohibits further groups of people from possessing guns beyond those discussed above. States should consider whether the following additional groups of people fall within the federal gun prohibitions, and if they do, they should report them to NICS:

**Certain people with severe intellectual disabilities:** The federal definition of “adjudicated a mental defective” includes people whose mental condition causes them to lack the capacity to manage their own affairs.<sup>88</sup> Federal law and some state laws therefore prohibit some people who suffer from severe intellectual disabilities from possessing guns. Although the risk of intentional harm may be no greater than an average person, a state may also wish to consider the likelihood that a person will store and handle a gun safely, if unsupervised.

**People diverted to mental health courts:** States that have established “mental health diversion courts” or “mental health courts” should also consider whether determinations made by these courts trigger federal or state prohibitions on gun possession for the mentally ill. In some circumstances, these special courts issue orders requiring a person to undergo mental health treatment in exchange for dropping criminal charges against the person.<sup>89</sup>

**Drug and alcohol abusers:** Mental illness is closely associated with drug and alcohol abuse, and many people with severe mental illness also have problems with drugs and alcohol. The federal definition of “committed to a mental institution” includes some people who have been institutionalized involuntarily for drug or alcohol abuse.<sup>90</sup> In addition, federal law prohibits anyone who is an “an unlawful user of or addicted to a controlled substance” from possessing

**Domestic abusers:** Domestic violence offenders and domestic abusers subject to protective orders are ineligible to possess guns under federal law. Few states provide complete information about these domestic abusers to NICS, however, states should consider including these groups of people in their laws regarding reporting to NICS.<sup>91</sup>

The reporting of people with relevant mental health histories for the purpose of firearm background checks is usually a two-step process. Courts or mental health institutions usually report information to a centralized state agency, and the state agency may then forward the information to NICS and/or other law enforcement agencies that conduct background checks.

The strongest state laws regarding the reporting of people to NICS establish a process for reporting that includes the following features:

**Reporting of prohibited people is mandatory.** The strongest laws explicitly require, rather than simply authorize, courts or mental health facilities to report prohibited people. 30 states have laws that make it mandatory for courts to provide mental health information to NICS directly or through a centralized state agency for the purpose of transmitting this information to NICS.<sup>92</sup>

The following states' laws explicitly authorize, but do not require, reporting to NICS: Colorado, Florida, Nebraska, Missouri, Pennsylvania, and West Virginia.<sup>93</sup> Courts and mental health facilities are more likely to properly report prohibited people if they are subject to a legal requirement.

**Court clerks and/or mental health facilities are charged with reporting.** Court clerks can best report most people who fall within most prohibited categories. As a result, most state laws regarding reporting to NICS charge courts or court clerks with this responsibility. In other states, mental health facilities, rather than courts, hold the records of these events. Still other states utilize records from both courts and mental health facilities.

The following states utilize reports from mental health facilities for firearm purchaser background checks: California, Delaware, Hawaii, Illinois, Maryland, Massachusetts, New York, Ohio, Oregon, Washington and West Virginia. Each state must determine which kind entity is in the best position to report people in each of the various categories in that state, and require reporting by all those entities.

**A complete collection of records is kept by a state agency as well as NICS.** The strongest state laws require courts or mental health facilities to report to a designated state agency, which must immediately forward this information to NICS. It is important for each state to have a centralized record of all prohibited people in that state, so that the state can easily identify the source of a record if the individual requests it. The state agency can also oversee reporting by courts or mental health facilities, and ensure that every entity charged with reporting is fulfilling this duty.

**Reporting must occur within a short time period.** About half the states' NICS reporting laws require courts, agencies, or mental health officials to report mental health information within a specified time frame. This time frame ranges from "immediately" to within 30 days. The strongest laws require reporting within two business days or less. Otherwise, a person may be able to buy a gun simply because his or her record has not yet been sent.

**Written agreements between the agencies involved may facilitate record-sharing.** Two states, Illinois and Connecticut, have enacted laws requiring certain state agencies to enter into a Memorandum of Understanding ("MOU") with the FBI regarding submittal of information to NICS. These kinds of laws can set forth the responsibilities of the various agencies and

help ensure that records that are shared are used only for firearm purchaser background checks and criminal investigations.

**If the state needs NARIP funding to improve reporting, the state must have a proper relief from disabilities program.** In most states, effective reporting to NICS requires the development of information-sharing systems for the collection and transmittal of the relevant records. As described above, effective reporting may also involve undertaking substantial projects to collect and report old records.

The NICS Act Record Improvement Program (NARIP) provides direct financial assistance to states for improving their infrastructure for collecting and submitting records.<sup>94</sup> NARIP was created pursuant to the NICS Improvement Amendments Act of 2007 (“NICS Act”), the federal law enacted in response to the Virginia Tech shooting. NARIP is the largest source of funding to support state efforts to improve record reporting.

In order to be eligible for NARIP funding, a state must first enact a “relief from disability” program that meets the requirements of the NICS Act.<sup>95</sup> The Consortium for Risk-Based Firearms Policy has developed model language for a relief from disabilities program that meet the NICS Act’s requirements and simultaneously protects public safety.<sup>96</sup> In addition, the Bureau of Alcohol, Tobacco, Firearms & Explosives has developed a checklist for states to determine whether their relief from disabilities program meets the Act’s requirements.<sup>97</sup>

**State privacy rules make an explicit exception for reporting to NICS.** Most states have privacy laws that protect confidential patient information and/or court records regarding mental illness. States that enact NICS reporting laws often include an explicit exception to these laws for reporting to NICS. These laws may limit disclosures so that only the information that is necessary for firearm purchaser background checks is disclosed.

An example of a law that includes many of these features is included in Appendix A.

In addition, the Bureau of Justice Statistics has established a series of “Promising Practices for Improved Record Reporting,” based on successful programs in various states. These practices include:

- Creating an automated system for record reporting;<sup>98</sup>
- Providing training and outreach to the people charged with reporting responsibilities;<sup>99</sup>
- Creating a SharePoint site or other similar web-based tool to facilitate communication among people involved in record reporting;<sup>100</sup>
- Creating visual flow charts to document where data currently resides and how it is transmitted to NICS;<sup>101</sup> and
- Creating a system to automate old records and utilize temporary staff to input these records.<sup>102</sup>

## CONCLUSION

There are a variety of steps that states can take to improve NICS reporting to keep guns out of the hands of the dangerously mentally ill. Each state should carefully analyze its existing laws and practices to determine where the gaps in NICS reporting exist. This document provides a manual for states to perform this analysis and the tools they will need to close these gaps.

## (ENDNOTES)

1. Mass Shootings at Virginia Tech, April 16, 2007, Addendum to the *Report of the Review Panel Presented to Governor Timothy M. Kaine* 48 (Nov. 2009), at <http://scholar.lib.vt.edu/prevail/docs/April16ReportRev20100106.pdf>.
2. A Virginia special justice declared Mr. Cho to be “an imminent danger” to himself as a result of mental illness on December 14, 2005, and directed Mr. Cho to seek outpatient treatment. *Id.* at 48, 71.
3. *Id.* at 71-73.
4. 18 U.S.C. § 922(d)(4), (t). Sales by unlicensed sellers are not subject to background checks under federal law. For additional information on sales by unlicensed sellers, see Law Center to Prevent Gun Violence, *Universal Background Checks & the Private Sale Loophole Policy Summary*, at <http://smartgunlaws.org/universal-gun-background-checks-policy-summary/>.
5. See 28 C.F.R. § 25.4. Case law suggests that a federal statute requiring states to disclose records to the FBI would violate the Tenth Amendment. In *Printz v. U.S.*, 521 U.S. 898 (1997), a 5-4 decision, the Supreme Court struck down the interim provisions of the Brady Act obligating local law enforcement officers to conduct background checks on prospective handgun purchasers. The Court held that Congress cannot compel state officials to enact or enforce a federal regulatory program.
6. Federal Bureau of Investigation, Dep’t of Justice, *National Instant Criminal Background Checks System 2007 Operation Report*, at [http://www.fbi.gov/about-us/cjis/nics/reports/2007-operations-report/ops\\_report\\_2007](http://www.fbi.gov/about-us/cjis/nics/reports/2007-operations-report/ops_report_2007) (As of December 31, 2007, there were 518,499 records based on a prohibiting mental health history maintained in the NICS Index.) and *Active Records in the NICS Index as of April 30, 2014*, at <http://www.fbi.gov/about-us/cjis/nics/reports/nics-index-040514.pdf> (3,440,997 records). See also Federal Bureau of Investigation, Dep’t of Justice, *National Instant Criminal Background Checks System 2006 Operation Report* at [http://www.fbi.gov/about-us/cjis/nics/reports/2006-operations-report/ops\\_report\\_2006.htm](http://www.fbi.gov/about-us/cjis/nics/reports/2006-operations-report/ops_report_2006.htm) (298,571 records as of December 2006).
7. U.S. General Accounting Office, *GAO-12-684, Gun Control—Sharing Promising Practices and Assessing Incentives Could Better Position Justice to Assist States in Providing Records for Background Checks*, at 9-10 (July 2012), at <http://www.gao.gov/assets/600/592452.pdf>.
8. Everytown for Gun Safety, *Closing the Gaps: Strengthening the Background Check System to Keep Guns Away from the Dangerously Mentally Ill* (May 2014), at [http://everytown.org/article/closing-the-gaps/?source=fbno\\_closingthe-gaps&utm\\_source=fb\\_n&utm\\_medium=o&utm\\_campaign=closingthegaps](http://everytown.org/article/closing-the-gaps/?source=fbno_closingthe-gaps&utm_source=fb_n&utm_medium=o&utm_campaign=closingthegaps).
9. *Id.*
10. Jeffrey W. Swanson, *Preventing Gun Violence Involving People with Serious Mental Illness, in Reducing Gun Violence in America: Informing Policy with Evidence and Analysis* (Johns Hopkins Bloomberg School of Public Health, Center for Gun Policy and Research, edited by Daniel W. Webster and Jon S. Vernick, 2013).
11. 18 U.S.C. § 922(d)(4). Such persons are prohibited from possessing firearms. 18 U.S.C. § 922(g)(4).
12. 27 C.F.R. § 478.11.
13. 18 U.S.C. § 922(t).
14. *Id.* In most states, dealers request background checks by contacting the FBI, which performs these background checks by searching NICS. Only 13 states – called Point of Contact states – require dealers to contact a state agency, which searches NICS and other in-state databases for information regarding the prospective purchaser. *Id.*
15. See 28 C.F.R. § 25.4; U.S. General Accounting Office, *GAO-12-684, Gun Control—Sharing Promising Practices and Assessing Incentives Could Better Position Justice to Assist States in Providing Records for Background Checks* 7 (July 2012), at <http://www.gao.gov/products/GAO-12-684>.
16. Pub. L. No. 110-180, §§ 102, 104, 121 Stat. 2559 (2008).
17. *Id.*, § 103.
18. *Id.*, § 103(c). In order to be eligible for the grants authorized by the Act, a state had to implement a program that allows a person who falls within the mental prohibited categories described above to petition for restoration of his or her firearms eligibility and requires that such petitions be granted “pursuant to State law and in accordance with the principles of due process, if the circumstances regarding the disabilities ... and the person’s record and reputation, are such that the person will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.” *Id.*, § 105.
19. Everytown for Gun Safety, *Closing the Gaps: Strengthening the Background Check System to Keep Guns Away from the Dangerously Mentally Ill* 8-9 (May 2014), at [http://everytown.org/article/closing-the-gaps/?source=fbno\\_closingthe-gaps&utm\\_source=fb\\_n&utm\\_medium=o&utm\\_campaign=closingthegaps](http://everytown.org/article/closing-the-gaps/?source=fbno_closingthe-gaps&utm_source=fb_n&utm_medium=o&utm_campaign=closingthegaps).
20. 45 C.F.R. § 164.104. See Letter from Secretary of Health and Human Services, Kathleen Sebellius to Senator Mark R. Warner, Aug. 8, 2012 at [http://images.politico.com/global/2014/01/03/warner\\_letter\\_signed.html](http://images.politico.com/global/2014/01/03/warner_letter_signed.html). In response to calls from President Obama, in 2013 the Department of Health and Human Services began the rulemaking process to amend the regulations that implement HIPAA to directly address mental health reporting to NICS. Office of the Secretary, Dep’t of Health and Human Services, *Advanced Notice of Proposed Rulemaking, HIPAA Privacy Rule and the National Instant Criminal Background Check System (NICS)*, 78 Fed. Reg. 23872 (April 23, 2013), at <https://www.federalregister.gov/articles/2013/04/23/2013-09602/hipaa-privacy-rule-and-the-national-instant-criminal-background-check-system-nics>.
21. 28 C.F.R. § 25.1, *et seq.*
22. 28 C.F.R., §25.6.
23. 28 C.F.R., §25.10.
24. Alaska H.B. 366 (signed by the Governor July 10, 2014); Arizona H.B. 2322 (became law April 30, 2014), Hawaii H.B. 2246 (signed by Governor June 16, 2014), Rhode Island H.B. 7939 (enacted July 3, 2014); S.D. H.B. 1229 (signed by the Governor March 14, 2014).
25. Everytown for Gun Safety, *Closing the Gaps: Strengthening the Background Check System to Keep Guns Away from the Dangerously Mentally Ill* (May 2014), at [http://everytown.org/article/closing-the-gaps/?source=fbno\\_closingthe-gaps&utm\\_source=fb\\_n&utm\\_medium=o&utm\\_campaign=closingthegaps](http://everytown.org/article/closing-the-gaps/?source=fbno_closingthe-gaps&utm_source=fb_n&utm_medium=o&utm_campaign=closingthegaps).
26. Everytown for Gun Safety, *Closing the Gaps: Strengthening the Background Check System to Keep Guns Away from the Dangerously Mentally Ill* (May 2014), at [http://everytown.org/article/closing-the-gaps/?source=fbno\\_closingthe-gaps&utm\\_source=fb\\_n&utm\\_medium=o&utm\\_campaign=closingthegaps](http://everytown.org/article/closing-the-gaps/?source=fbno_closingthe-gaps&utm_source=fb_n&utm_medium=o&utm_campaign=closingthegaps).
27. The following five states have no relevant law: Montana, New Hampshire, New Mexico, Vermont, and Wyoming. In addition, the following five states’ laws do not address disclosure to NICS, although they acknowledge that they collect mental health records for use in firearm purchaser background checks: Arkansas, California, Michigan, Ohio, and Utah. See Law Center to Prevent Gun Violence, *See Mental Health Reporting Policy Summary*, at <http://smartgunlaws.org/mental-health-reporting-policy-summary/>. Alaska, Arizona, Hawaii, Rhode Island, and South Dakota enacted laws on this topic in Alaska H.B. 366 (signed by the Governor July 10, 2014); Arizona H.B. 2322 (became law April 30, 2014), Hawaii H.B. 2246 (signed by Governor June 16, 2014), Rhode Island H.B. 7939 (enacted July 3, 2014); S.D. H.B. 1229 (signed by the Governor March 14, 2014).
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  34. 2013 U.S. Dist. LEXIS 11511 (W.D. Mich. 2013).
  35. 363 F.3d 784 (8th Cir. 2004).
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  39. Kan. Stat. § 59-2966. The Law Center has not conducted an analysis of the duration of the required confinement in all 50 states.
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  52. 27 C.F.R. § 478.11. See *Petramala v. Department of Justice*, 2011 U.S. Dist. LEXIS 99638 (D. Ariz. 2011) (finding that the federal gun prohibition applies to a person who has been found incompetent to stand trial and subject to a guardianship).
  53. Id.
  54. See *Petramala v. Department of Justice*, 2011 U.S. Dist. LEXIS 99638 (D. Ariz. 2011) (finding that the federal gun prohibition applies to a person who has been found incompetent to stand trial and subject to a guardianship). But see *State v. Buchanan*, 924 A.2d 422, 424 (N.H. 2007) (finding that a person who was found incompetent to stand trial was not prohibited from possessing guns).
  55. 18 U.S.C. § 922(g)(4).
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  57. 27 C.F.R. § 478.11.
  58. See Amended Definition of "Adjudicated as a Mental Defective" and "Committed to a Mental Institution", 79 Fed. Reg. 774, 774 (proposed January 7, 2014).
  59. See Amended Definition of "Adjudicated as a Mental Defective" and "Committed to a Mental Institution", 79 Fed. Reg. 774 (proposed January 7, 2014) (to be codified at 27 C.F.R. § 478.11).
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- (2) (authorizes, rather than requires, reporting to NICS); Ind. Code Ann. § 11-10-4-3; and 2014 S.D. H.B. 1229 (codified as S.D. Codified Laws §§ 27A-7-1, 27A-10-9.1).
68. See, e.g., Alaska Stat. § 12.47.030, Ga. Code § 17-7-131.
  69. 18 U.S.C. § 922(g)(4).
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  73. See, e.g., Ind. Code § 35-36-2-5(f); Nev. Rev. Stat. Ann. § 175.533(3); Oregon: Or. Rev. Stat. § 181.740.
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  93. Colorado and Nebraska’s laws require reporting to NICS when a formerly mentally ill person’s eligibility to possess firearms is restored. Colo. Rev. Stat. § 13-5-142; Neb. Rev. Stat. § 69-2409.01. These provisions indicate that at least some reporting of mental health records to NICS is authorized.
  94. Pub. L. No. 110-180, §§ 10, 121 Stat. 2559 (2008).
  95. More specifically, the state program must: Allow a person who has been adjudicated a mental defective or committed to a mental institution to apply to the state for “relief” from the federal gun prohibition; Provide that a state court or other lawful authority shall grant a person this “relief” (thereby making the person once again eligible to purchase and possess firearms), “pursuant to State law” and in accordance with due process; Provide that a state court or other lawful authority will grant the relief if the circumstances regarding the adjudication or commitment, and the person’s record and reputation, are “such that the person will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest”; and Permit a person whose application for relief is denied to file a petition with the appropriate state court for judicial review of the denial. Id.
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## Part II: How States Should Go Further to Remove Access to Guns from the Dangerously Mentally Ill

As many of the recent mass shootings demonstrate, federal law alone is inadequate to prevent the possession of guns by many dangerously mentally ill people. Even when a state reports all people prohibited from possessing guns by federal law, many dangerously mentally ill people still fall through the cracks. The following sections of this report describe some of the additional laws that states can enact to restrict access to guns in these situations.

The proposals provided in this Part share a common theme: the reporting of dangerous people by community members to the authorities, so that temporary gun restrictions can be imposed pending further evaluation. The community members involved – law enforcement officers, school authorities, family, friends, and mental health institutions – can report people who are acting violently or threatening suicide. Under the proposals set forth in this Part, law enforcement agencies and court must review these reports from community members so that access to guns can be removed if appropriate. We have endeavored to incorporate significant procedural and privacy protections in each of these proposals, as well as a mechanism for the person to regain his or her eligibility to possess guns after the danger has passed. By enacting laws like these, states can further public safety and save lives, while also respecting the rights and dignity of the individual.

### LAW ENFORCEMENT INTERVENTIONS FOR GUNS IN THE HANDS OF THE MENTALLY ILL

When private citizens become concerned about another person's behavior, they often call on law enforcement agencies and the courts to intervene. As a result, law enforcement officers sometimes encounter people who appear suicidal or violent. Officers in this situation are often unable to immediately remove guns from these people because of gaps in the law, and even when officers do remove guns, they must often return them shortly thereafter. States have begun to respond to this problem.

#### THE PROBLEM

In early 2004, police officers were called to the home of Kenneth C. Anderson, who paramedics said had become combative. Deeming Mr. Anderson delusional and dangerous, the officers seized nine of his guns, and took him to a hospital for a mental health evaluation. He was diagnosed with paranoid schizophrenia but not committed, and his guns were returned upon his request because officers found no legal grounds to retain them. Then, in August 2004, Officer Timothy ("Jake") Laird responded to reports of gunfire in Indianapolis' south side.

He found Mr. Anderson stalking the block with an SKS assault rifle and two handguns. The encounter resulted in the deaths of Officer Laird and Mr. Anderson and injuries to four other officers. Police officers later learned that Mr. Anderson had also just killed his mother in her home.<sup>1</sup>

In response to this tragedy, in 2005, Indiana enacted H.B. 1776, known as the "[Jake Laird law](#)." This law identifies the circumstances in which an officer may seize guns from a dangerous person and provides a procedure for officers to seek to retain these guns.<sup>2</sup> Few other states have similar laws, however.

Research has found that a person who has committed violent or suicidal acts in the past is significantly more likely to commit similar acts in the future. In fact, past violent or suicidal acts are recognized as the best predictor of future violence, far exceeding mental illness and other factors.<sup>3</sup> Warning signs that attract the attention of law enforcement are particularly indicative of a potential for future violence.

[Law enforcement officers' authority to remove firearms](#) when they encounter a potentially violent or suicidal person is not always clear. Under well-established constitutional law, law enforcement officers may temporarily remove a person's guns if the person is arrested or appears ready to commit a specific crime.<sup>4</sup> In some cases, however, a person's erratic behavior does not foretell a specific crime, or the person appears primarily to be in danger of harming him- or herself.<sup>5</sup>

Even when officers remove guns from a person in these situations, officers can rarely retain the guns for more than a short period of time. According to a New York Times article based on a review of more than 1,000 court and police records, this gap in the law means that officers must often return guns to people even though the officers have good reason to believe the people are dangerous.<sup>6</sup>

States have begun to address this problem, however. States like Indiana and Connecticut now give law enforcement officers authority to temporarily remove and retain guns when there is probable cause that the person is suicidal or violent, along with formalized court procedures to ensure this authority is used properly.

## STATE LAWS THAT ADDRESS THIS PROBLEM

A handful of states have enacted laws that give law enforcement officers authority to remove guns when a person is manifestly dangerous. Other states should adopt similar laws.

- The [Indiana law](#) mentioned above is arguably the strongest. In January 2011, Indianapolis police said they utilized the Indiana law 372 times to seize guns,<sup>7</sup> and in 2013, an Indiana Court of Appeals upheld this law against claims that it was unconstitutional.<sup>8</sup>
- [Connecticut adopted a similar law](#) after another horrible shooting. In 1998, Matthew Beck, an employee of the Connecticut State Lottery, shot and killed four co-workers before turning the gun on himself. There were many red flags in Mr. Beck's case, and his parents had reached out to law enforcement officers, but the officers determined that they had no authority to remove his guns.<sup>9</sup> In response to this shooting,
- Connecticut adopted a law that allows officers to seek a warrant to remove guns in this kind of situation and retain them for up to one year.<sup>10</sup> Police officers have reportedly removed over 2,000 guns from hundreds of people pursuant to this law.<sup>11</sup> This law has been criticized, however, for not allowing law enforcement to retain guns for long enough.<sup>12</sup>
- [Illinois enacted a new law in 2013](#) that requires law enforcement officers to report any person who demonstrates threatening, violent, suicidal, or assaultive behavior.<sup>13</sup> The person then loses his or her eligibility to possess a gun and must surrender guns already in his or her possession, but can easily appeal to regain his or her gun eligibility.<sup>14</sup> This law, like the Connecticut and Indiana laws, also includes other important safeguards against abuse of these powers by law enforcement.<sup>15</sup>
- In 2009, Alabama amended its law regarding emergency situations to generally authorize a law enforcement officer to disarm a dangerous individual and even retain the gun after discharging the individual if, at the discretion of the officer, "the individual poses a threat to himself or herself or to others."<sup>16</sup> Other states' laws fail to provide this kind of authority.<sup>17</sup>

Most states fail to provide law enforcement authority to remove firearms even if the person's behavior is so dangerous that law enforcement officers take him or her into custody for a mental health evaluation. Unlike most states, California explicitly authorizes a law enforcement officer to remove guns in this situation.<sup>18</sup> Texas enacted a similar law in 2013 that also allows the law enforcement agency to retain the firearms for up to 30 days.<sup>19</sup>

In 2014, U.S. Rep. Mike Thompson (CA-5), chair of the House Gun Violence Prevention Task Force introduced the Promoting Healthy Minds for Safer Communities Act. Among other things, this bill would make certain grants available to states if they adopt a law similar to the Connecticut and Indiana laws described above.<sup>20</sup>

Finally, about a third of the states explicitly authorize law enforcement officers to remove firearms when they arrive at the scene of a domestic violence incident, under certain circumstances.<sup>21</sup> These laws should be expanded to cover other situations where a person's dangerousness is evident.

## FEATURES OF A STRONG LAW AUTHORIZING LAW ENFORCEMENT TO REMOVE GUNS FROM DANGEROUS PEOPLE

Below are the features of a strong law to authorize law enforcement to remove a person's access to guns if he or she is violent or suicidal, while also complying with constitutional considerations.

- **Procedures for an Officer to Seek a Warrant for Gun Removal:** A law enforcement officer can seek a warrant to search for and seize any firearm in the possession of a dangerous person. In order to issue the warrant, the court must determine probable cause that the individual is dangerous and possesses a firearm.
- **Emergency Gun Removals:** A law enforcement officer may seize firearms from any individual whom the law enforcement officer believes to be dangerous without obtaining a warrant, so long as the officer informs a court immediately thereafter and describes why the officer believes that the individual is dangerous. The court must immediately review this information and may order retention of the firearm for a short period of time based on probable cause that the person is dangerous. In Indiana, the court may order retention of the firearm for no more than 14 days, at which point a hearing must be held.
- **Standard of Dangerousness:** For the purposes of this law, a person is "dangerous" if he or she poses a significant risk of personal injury to himself or herself or others. In determining whether a person is dangerous and gun removal is warranted, law enforcement officers and courts should be able to consider all relevant evidence, including whether the person has:
  - Previously acted violently or threatened to act violently towards others;
  - Previously threatened or attempted to harm him- or herself or attempt suicide;
  - Recently abused controlled substances or alcohol;
  - Recklessly stored, used, or displayed a firearm; or
  - Shown a lack of impulse control.<sup>22</sup>
- **Initial Hearing:** When a firearm has been seized with or without a warrant as described above, the court must hold a hearing within a reasonable time to determine whether to return or retain the firearm. In Indiana, the hearing must be held within 14 days. At this hearing, law enforcement bears the burden to prove whether the person is dangerous by clear and convincing evidence.
- **Retention of the Firearm and Subsequent Hearings:** If law enforcement retains a firearm after the initial hearing, the person may petition for return of the firearm at regular intervals thereafter. In Indiana, the person may petition for return of the firearm once every six months, and if the firearm continues to be retained for five years, law enforcement may dispose of it.
- **Officer Reporting of Dangerous People:** A law enforcement officer must report to a court (or an administrative agency that acts like a court) whenever he or she becomes aware that a person is dangerous, even if the officer does not know whether the person currently possesses firearms. In Illinois, officers must provide the State Police with these reports.

- The court or other agency must consider the report within 24 hours, and may tentatively prohibit the person from purchasing or possessing firearms immediately to prevent the harm that might result if the person continues to have access to firearms.
- The court or other agency must immediately notify the person that he or she is tentatively prohibited from purchasing or possessing guns and may seek a hearing as described above. The notice must specify the procedures for the person to seek a hearing, and to surrender any guns he or she already owns.
- The person may seek a hearing at any time, and he or she regains his or her gun eligibility automatically after a certain number of years even without a hearing.
- Reporting for Background Checks: A court or agency that prohibits a person from purchasing or possessing a firearm or issues a warrant as described above must report the person to the National Instant Criminal Background Check System, so that the person cannot pass a background check to purchase a gun during the period while the warrant or order is valid.
- Mental Health First Aid Training: Law enforcement officers receive training in “mental health first aid” so they can properly identify the signs of mental illness and respond appropriately. The state must provide funding for this training. This training will assist the officers in carrying out their duties under this law.
- Immunity and Accountability: A law enforcement officer who removes guns or reports a person as dangerous or fails to report a person as dangerous in a good faith effort to comply with these requirements may not generally be held criminally, civilly, or professionally liable. However, law enforcement officials may be subject to criminal, civil, and professional penalties for willful or wanton misconduct, including knowingly providing false information in a petition or report regarding dangerousness.
- Background Checks: A background check must be conducted for every sale of a gun. Without a background check, people prohibited from possessing guns, such as felons, domestic abusers, dangerously mentally ill people, as well as people reported as dangerous by law enforcement, can easily obtain guns.<sup>23</sup>
- Ammunition: Each provision of the law should apply to ammunition as well as firearms.

For an example of an existing law containing many of these features, see Ind. Code Ann. §§ 35-47-14-5 – 35-47-14-9.<sup>24</sup>

## CONCLUSION

States can enact strong laws that authorize law enforcement to act to prevent tragedies. Law enforcement officers who encounter violent or suicidal behavior should be able to immediately remove guns from the situation, subject to court oversight. Officers should also be able to retain those guns temporarily until a court has determined that the danger has passed. Carefully crafted legislation can accomplish this goal, and lives can be saved if states have the courage to adopt sensible laws on this topic.

## (ENDNOTES)

1. Tragedy Prompts Calls To Strengthen Ind. Gun Laws, The Indy Channel (Jan. 11, 2011), at <http://www.theindychannel.com/news/tragedy-prompts-calls-to-strengthen-ind-gun-laws>. Indianapolis, Metropolitan Police Department, Officer Timothy "Jake" Laird - Died August 18, 2004, at <http://www.indy.gov/eGov/City/DPS/IMPD/About/Memoriam/Pages/tlaird.aspx>. Note that the law was renumbered and minor amendments were made in 2006. See 2006 Ind. H.B. 1040.
2. Ind. Code Ann. §§ 35-47-14-5 – 35-47-14-9. The text of the Indiana law is available here: <http://www.in.gov/legislative/ic/2010/title35/ar47/ch14.pdf>.
3. Consortium for Risk-Based Firearms Policy, Guns, Public Health, and Mental Illness: An Evidence-Based Approach for State Policy 8, 22 (Dec. 2013), at <http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/GPHMI-State.pdf>.
4. Terry v. Ohio, 392 U.S. 1 (1968). Officers who wish to remove guns may sometimes arrest the person for a minor crime such as "breach of the peace" or a similar offense, a phenomenon that contributes to the unfortunate "criminalization" of the mentally ill. Linda A. Teplin, Keeping the Peace: Police Discretion and Mentally Ill Persons, at <https://www.ncjrs.gov/pdffiles1/jr000244c.pdf>.
5. Under the laws in many states, attempting suicide is not a crime, so it is not clear whether officers have the authority to remove guns from a person who appears suicidal. Sutherland v. City of Milwaukee, 2014 U.S. App. LEXIS 8774 (7th Cir. Wis. May 9, 2014).
6. Michael Luo, When the Right to Bear Arms Includes the Mentally Ill, N.Y. Times (Dec. 21, 2013), at [http://www.nytimes.com/2013/12/22/us/when-the-right-to-bear-arms-includes-the-mentally-ill.html?\\_r=0](http://www.nytimes.com/2013/12/22/us/when-the-right-to-bear-arms-includes-the-mentally-ill.html?_r=0).
7. Tragedy Prompts Calls To Strengthen Ind. Gun Laws, The Indy Channel (Jan. 11, 2011), at <http://www.theindychannel.com/news/tragedy-prompts-calls-to-strengthen-ind-gun-laws>. In addition, a study published in the journal Psychiatric Services describes the first two years of implementation of the law. George F. Parker, Application of a Firearm Seizure Law Aimed at Dangerous Persons: Outcomes From the First Two Years, Psychiatric Services (2010) at <http://ps.psychiatryonline.org/article.aspx?articleid=101359>. The study found that in over 65% of the cases in which guns were seized under the law, law enforcement officers also transported the person for involuntarily hospitalization at the time the guns were removed.
8. Redington v. Indiana, 992 N.E.2d 823 (Ind. Ct. App. 2013), trans. denied (rejecting challenges based on the Second Amendment, the Indiana right to bear arms, the takings clause of the U.S. Constitution, and vagueness). The Indiana Supreme Court subsequently refused to hear an appeal of the case. 997 N.E.2d 356 (Nov. 7, 2013).
9. Michelle Tuccitto Sullo, More than 2,000 guns seized since Connecticut gun law took effect, New Haven Register (Jan. 7, 2013), at <http://www.nhregister.com/general-news/20130107/more-than-2000-guns-seized-since-connecticut-gun-law-took-effect-documents>.
10. Conn. Gen. Stat. § 29-38c. The text of the Connecticut law is available here: [http://www.cga.ct.gov/current/pub/chap\\_529](http://www.cga.ct.gov/current/pub/chap_529). Click on the link for section 29-38c .
11. Michelle Tuccitto Sullo, More than 2,000 guns seized since Connecticut gun law took effect, New Haven Register (Jan. 7, 2013), at <http://www.nhregister.com/general-news/20130107/more-than-2000-guns-seized-since-connecticut-gun-law-took-effect-documents>. A 2008 report to the Connecticut Legislature regarding implementation of this law is available here: <http://www.cga.ct.gov/2008/rpt/2008-R-0280.htm>.
12. The requirement in the Connecticut law that the risk be "imminent" has made it difficult for courts to allow the continued retention of guns under the law, according to the December 2013 New York Times investigation referenced above. See Michael Luo, When the Right to Bear Arms Includes the Mentally Ill, N.Y. Times (Dec. 21, 2013), at [http://www.nytimes.com/2013/12/22/us/when-the-right-to-bear-arms-includes-the-mentally-ill.html?\\_r=0](http://www.nytimes.com/2013/12/22/us/when-the-right-to-bear-arms-includes-the-mentally-ill.html?_r=0). In this respect, the Connecticut law is significantly weaker than the Indiana law. However, unlike in Indiana, the Connecticut State Police reports people who are subject to a warrant under this law to the background check system in order to prevent them from purchasing any further firearms while the warrant is in effect. Id.
13. 405 Ill. Comp. Stat. 5/6-103.3. 430 Ill. Comp. Stat. 65/1.1, 65/8.1(d)(2). This report must be made within 24 hours unless it would interfere with an ongoing or pending criminal investigation. 405 Ill. Comp. Stat. 5/6-103.3.
14. 430 Ill. Comp. Stat. 65/8 - 65/10. The Director of the State Police can reverse the decision, after a hearing, if the person is not likely to act in a dangerous manner, and allowing the person access to a gun would not be contrary to the public interest.
15. 430 Ill. Comp. Stat. 65/8.1(d)(2), 66/110. The law also has strong provisions to protect the confidentiality of the person whose information is reported under this law. 405 Ill. Comp. Stat 5/6-103.3, 430 Ill. Comp. Stat. 65/8.1.
16. Ala. Code § 31-9-10(d)(2).
17. Cf. Cal Gov Code § 8571.5; La. Rev. Stat. § 14:329.6(H); Tenn. Code § 39-17-1351(t); Tex. Gov't Code § 411.207.
18. Cal. Welf. & Inst. Code §§ 8102. In addition, in California, people who are taken into custody for transport to a mental health facility are not immediately reported to the background check system, but this reporting may happen very soon thereafter. Under the California law, a person becomes prohibited from possessing firearms and is reported if the professional in charge of the facility assesses that the person cannot be properly served without being detained for at least 72 hours, and the person is a danger to self or others as a result of a mental disorder. Cal Welf. & Inst. Code § 8103(f). Cf. 2009 Fla. AG LEXIS 5; Op. Att'y Gen. Fla. 2009-04 (finding that officers must return firearms when a person is released after a mental health evaluation).
19. Tex. Health and Safety Code § 573.001, Tex. Crim. Proc. Code Art. 18.191. The text of the law is available here: <http://www.capitol.state.tx.us/tlodocs/83R/billtext/pdf/SB01189F.pdf>.
20. More specifically, in order to be eligible for the grants, the state would have to adopt a law or regulation that gives state and local law enforcement the authority to seize firearms or ammunition pursuant to a warrant, where there is probable cause to believe that the individual in possession of these weapons poses an elevated risk of harm to self or others. A court may determine whether a person poses an elevated risk of harm to self or others by considering whether the person:
  21. Has caused harm to self or others,
  22. Has detailed plans to do so,
  23. Has a history of substance abuse, or
  24. Lacks impulse control.
25. H.R. 4783 § 40.
- 26.
27. Law Center to Prevent Gun Violence, Domestic Violence and Firearms Policy Summary, at <http://smartgunlaws.org/domestic-violence-firearms-policy-summary/>.
28. These factors are based on the Connecticut law and federal bill. See Conn. Gen. Stat. § 29-38c, H.R. 4783 § 40 (2014).
29. Law Center to Prevent Gun Violence, Universal Background Checks and the Private Sale Loophole Policy Summary, at <http://smartgunlaws.org/universal-gun-background-checks-policy-summary/>.
30. Note that the law was renumbered and minor amendments were made in 2006. See 2006 Ind. H.B. 1040.

## TEMPORARY GUN RESTRICTIONS FOR DANGEROUS PEOPLE REPORTED BY

School authorities, including college and university administrators as well as authorities in K-12 schools, are often acutely aware of the young people within the community at the highest risk for violence.<sup>1</sup> The individuals who committed the atrocities at Tucson and Aurora, for example, were known to school authorities as a threat. In too many of these situations, however, school officials respond by simply removing the person from campus. No law generally prevents people identified by school authorities as dangerous from access to guns. Illinois enacted a ground-breaking law to fill this gap in 2013, however, as described below. Other states should consider similar measures.

### THE PROBLEM

Jared Lee Loughner was a student at Pima Community College until four months before he shot and killed six people and wounded 13 others, including Representative Gabrielle Giffords, in a parking lot in Tucson, Arizona. In the year before the shooting, campus police had five contacts with him for classroom and library disruptions. The college eventually suspended Loughner and told him that he could return only if a mental health professional agreed he was not dangerous.<sup>2</sup> At one point, college officials recommended his parents take away his shotgun, and they did so, but no further action was taken to restrict his access to guns.<sup>3</sup>

Similarly, James Holmes was a graduate student at the University of Colorado before he killed 12 people and injured 70 others in a movie theater in Aurora, Colorado in 2012. A University psychiatrist had reported Holmes as potentially dangerous to at least one member of the University's threat assessment team, but Holmes withdrew from the University not long after the report, so neither the psychiatrist nor the University's threat assessment team took any further action regarding him.<sup>4</sup>

Many severe mental illnesses first manifest themselves in adolescence,<sup>5</sup> and three-quarters of mental illnesses appear by the age of 24.<sup>6</sup> While mental illness alone rarely causes a person to be violent, small sub-groups of the severely mentally ill, including people undergoing the first episode of psychosis, may show violent tendencies.<sup>7</sup> In fact, violent and threatening or suicidal behavior is a better indicator of similar behavior in the future than mental illness alone.<sup>8</sup>

For young people, these facts take on special significance. Of the mass shootings carried out in the last twenty years (1982-2012), 19 were perpetrated by students or individuals under the age of 26.<sup>9</sup> According to renowned expert Jeffrey Swanson, "Suicide is the third leading cause of death in Americans aged 15-24 years, perhaps not coincidentally the age group when

young people typically go off to college, join the military, and experience a first episode of major mental illness if it is bound to happen.”<sup>10</sup>

When a person reaches age 18, he or she may leave behind the support structure of family and other caretakers, such as teachers, doctors and therapists. These community members often played a crucial role in ensuring that troubled individuals receive the help they need. In the absence of these community members, colleges and universities are expected to pick up the slack. Unfortunately, when officials at these institutions become aware of a person’s violent or suicidal behavior, the college or university’s response is often to seek the person’s removal from the campus, with little regard for the safety of the larger community.<sup>11</sup>

Under federal law, a person suffering from mental illness does not become prohibited from purchasing and possessing a gun unless and until he or she has undergone one of a series of specific, formalized proceedings regarding his or her mental illness.<sup>12</sup> For example, a person loses his or her federal gun eligibility if he or she is formally and involuntarily committed to a mental institution, or found not guilty by reason of insanity. Many people with obvious suicidal tendencies do not fall within these categories. Similarly, a person who has behaved in a violent manner towards others is not prohibited from possessing guns under federal law unless he or she has been convicted of a felony or domestic violence misdemeanor.<sup>13</sup>

Young people who do not fall within the prohibited categories are automatically eligible to purchase and possess firearms as soon as they reach the minimum age. As a result, under current federal law, a new adult can pass a background check and buy a gun from a licensed dealer, even if school authorities know that he or she is severely mentally ill, or more importantly, violent and dangerous.

## HOW ILLINOIS HAS FILLED THIS GAP IN THE LAW

In 2013, Illinois enacted the “School Administrator Reporting of Mental Health Clear and Present Danger Determinations Law.”<sup>14</sup> This ground-breaking legislation requires schools to report violent and threatening people to the State Police,<sup>15</sup> and prohibits these people from purchasing or possessing firearms until law enforcement has had the opportunity to conduct a further evaluation.<sup>16</sup>

More specifically, in Illinois, a person cannot own a firearm unless he or she has a license called a Firearm Owner’s Identification, or “FOID” Card.<sup>17</sup> The 2013 law requires certain school administrators or other professionals to report any person who demonstrates threatening physical or verbal behavior, such as violent, suicidal, or assaultive threats, actions, or other behavior,<sup>18</sup> and allows the State Police to deny the person a FOID Card or revoke the person’s FOID Card if he or she has been so reported.<sup>19</sup>

Any person whose FOID Card is revoked or denied under these provisions can appeal, and the Director of the State Police can reverse the decision, after a hearing, if the person is not likely to act in a dangerous manner, and allowing the person access to a gun would not be contrary to the public interest.<sup>20</sup> A person who receives notice that his or her FOID card is revoked has 48 hours to identify where his or her firearms will be maintained while he or she is prohibited from possessing them.<sup>21</sup>

A school administrator is responsible for ensuring that dangerous people are reported under this new law if he or she is the principal of a public school, or the chief administrative officer of a private school or public or private community college, college, or university.<sup>22</sup> The Illinois law includes important safeguards to protect these professionals, while also holding them accountable for abuse of this power.<sup>23</sup> The law also has strong provisions to protect the confidentiality of the information reported.<sup>24</sup>

Most states lack a licensing scheme similar to Illinois’ requirement that a gun owner have a valid FOID Card. There are many strong arguments for such a licensing scheme.<sup>25</sup> Nevertheless, even a state that chooses not to require the licensing of gun owners may still prohibit gun possession by people who school authorities have identified as violent or dangerous.

## FEATURES OF A STRONG SCHOOL REPORTING LAW

Below are the features of a strong law to restrict access to guns by people who school authorities have identified as violent or dangerous.

- **Who Must Be Reported:** Schools must report to a designated law enforcement agency any person who demonstrates threatening physical or verbal behavior, such as violent, suicidal, or assaultive threats, actions, or other behavior. This may include any person for whom the school has recommended expulsion, suspension, or withdrawal based on this behavior.
- **Which Schools Must Report:** All private and public secondary schools, community colleges, technical schools, colleges and universities are subject to this reporting requirement. The chief school administrator of each school must ensure that reporting occurs.
- **Law Enforcement Responsibilities:** A centralized state law enforcement agency, such as the State Police, is charged with receiving these reports.
  - The law enforcement agency must immediately verify the source and accuracy of the report, while respecting the confidentiality of the person reported.
  - Law enforcement officials may not disclose information that schools report pursuant to this requirement for any purpose other than gun eligibility.
- **Tentative Gun Prohibition:** If the law enforcement agency's investigation confirms the school's report, the person may become tentatively prohibited from purchasing or possessing firearms. If the law enforcement agency tentatively prohibits the person from purchasing or possessing guns, it must immediately:
  - Report the person to the National Instant Criminal Background Check System so that he or she is not able to pass a background check to purchase a gun.
  - Notify the person that he or she is tentatively prohibited from purchasing or possessing firearms, the procedure for surrender of guns already in his or her possession, and the opportunity to seek a hearing.
- **Surrender of Guns:** A person who becomes tentatively prohibited from purchasing or possessing firearms in this manner must immediately surrender his or her guns to a local law enforcement agency, which is charged with storing them while the person is ineligible to possess them. The person may be required to pay reasonable fees for storage.
- **Hearing:** A person who has become tentatively prohibited from purchasing or possessing firearms in this manner may seek a hearing before either a judicial or quasi-judicial body (a court, or an administrative agency that acts like a court) at any time.
  - A person who seeks a hearing in this manner is provided a hearing within a short period of time, such as 14 or 30 days. Law enforcement may use this time to further investigate the person's suitability to possess a firearm.
  - At the hearing, the state (i.e., a law enforcement agency) bears the burden to establish that the person is likely to act in a dangerous manner or that allowing the person access to firearms would be contrary to the public interest.
  - A person who has sought a hearing and been denied his or her gun eligibility at the hearing is eligible to re-contest the issue after a specified period of time. He or she may automatically regain his or her gun eligibility even without a hearing at a certain age or after a certain number of years.
- **Immunity and Accountability:** A school administrator or law enforcement officer that reports a person pursuant to these requirements may not generally be held criminally, civilly, or professionally liable for the reporting. However, school staff and law enforcement officers may be held accountable and subject to criminal, civil and professional penalties for willful or wanton misconduct, such as knowingly providing false information in a report.
- **Mental Health First Aid Training:** School staff and law enforcement officers receive training in "mental health first aid" so they can properly identify the signs of mental illness and respond appropriately. The state must provide funding for this training. This training will assist the school staff and law enforcement officers in carrying out their duties under this law.
- **Background Checks:** A background check must be conducted for every sale of a gun. Without a background check, people prohibited from possessing guns, such as felons, domestic abusers, and dangerously mentally ill people, can easily obtain guns.<sup>26</sup>
- **Ammunition:** Each provision of the law should apply to ammunition as well as firearms.
- An example of the Illinois law that includes many of these features is provided as Appendix B.

## CONCLUSION

States can enact strong laws that utilize the knowledge of school administrators to prevent tragedies. A young person whose violent or suicidal behavior comes to the attention of school or campus officials is at a high risk of committing a future violent act or suicide attempt. A person who has been identified in this way should not be able to access guns without further evaluation. Carefully crafted legislation can accomplish this goal, and lives can be saved if states have the courage to adopt sensible laws on this topic.

**(ENDNOTES)**

1. See Art Levine, Could a LA-Style Threat Assessment Team Have Thwarted the Isla Vista, Seattle or Oregon Shooting Sprees? The Huffington Post, June 22, 2014 at [http://www.huffingtonpost.com/art-levine/could-a-la-style-threat-a\\_b\\_5518901.html](http://www.huffingtonpost.com/art-levine/could-a-la-style-threat-a_b_5518901.html).
2. CBS News, Who is Jared Loughner? Friends Reveal Alienation, Jan. 10, 2011, at <http://www.cbsnews.com/news/who-is-jared-loughner-friends-reveal-alienation/>.
3. Michael Martinez and Chelsea J. Carter, New details: Loughner's parents took gun, disabled car to keep him home, March 28, 2013, at <http://www.cnn.com/2013/03/27/justice/arizona-loughner-details/>.
4. Mark Greenblatt, Psychiatrist Called Threat Team About Aurora Shooting Suspect James Holmes, abcnews.com, Aug. 1, 2012 at <http://abcnews.go.com/US/james-holmes-psychiatrist-schools-threat-assessment-team/story?id=16908862>.
5. See Deborah D. Rogers, Campus lifestyles, easy access to guns: A cocktail for violence at US colleges, Bangor Daily News Opinion, May 18, 2014, at <http://bangordailynews.com/2014/05/18/opinion/contributors/campus-lifestyles-easy-access-to-guns-a-cocktail-for-violence-at-us-colleges/>.
6. National Institute of Mental Health, Mental Illness Exacts Heavy Toll, Beginning in Youth, June 6, 2005, at <http://www.nimh.nih.gov/news/science-news/2005/mental-illness-exacts-heavy-toll-beginning-in-youth.shtml>. Barack Obama, Now is the Time, (January 16, 2013) at <http://www.whitehouse.gov/issues/preventing-gun-violence>.
7. Consortium for Risk-Based Firearms Policy, Guns, Public Health, and Mental Illness: An Evidence-Based Approach for State Policy 7 (Dec. 2013), at <http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/GPHMI-State.pdf>.
8. Id. at 8.
9. Mark Follman, Gavin Aronsen, and Deanna Pan, A Guide to Mass Shootings in America Mother Jones, May 24, 2014 at <http://www.motherjones.com/politics/2012/07/mass-shootings-map?page=2>.
10. Jeffrey Swanson, et al., Mental illness and reduction of gun violence and suicide: bringing epidemiologic research to policy, *Annals of Epidemiology* (April 30, 2014), at [http://www.annalsofepidemiology.org/article/S1047-2797\(14\)00147-1/fulltext](http://www.annalsofepidemiology.org/article/S1047-2797(14)00147-1/fulltext).
11. Katie J.M. Baker, How Colleges Flunk Mental Health, *Newsweek*, February 11, 2014, at <http://www.newsweek.com/2014/02/14/how-colleges-flunk-mental-health-245492.html>.
12. 18 U.S.C. § 922.
13. 18 U.S.C. § 922.
14. 2013 Ill. ALS 63 §§ 130-170. The text of the original Illinois law can be found here: <http://www.ilga.gov/legislation/publicacts/98/098-0063.htm>. Minor changes were made in a subsequent bill. 2013 Ill. ALS 600 § 10. A lawsuit is pending in the federal district court for the Northern District of Illinois in which a person claims he was improperly denied a FOID Card under these provisions. However, on March 20, 2014, the court dismissed a facial challenge to the law, on the grounds that the plaintiff lacked standing to bring such a claim. *Rhein v. Pryor*, 2014 U.S. Dist. LEXIS 36305 (N.D. Ill. Mar. 20, 2014)
15. 405 Ill. Comp. Stat. 5/6-103.3, 430 Ill. Comp. Stat. 65/8.1(d)(2), 66/105.
16. 430 Ill. Comp. Stat. 65/8(f).
17. 430 Ill. Comp. Stat. 65/4(a)(3).
18. 405 Ill. Comp. Stat. 5/6-103.3, 430 Ill. Comp. Stat. 65/1.1, 65/8.1(d)(2), 66/105.
19. 430 Ill. Comp. Stat. 65/8(f).
20. 430 Ill. Comp. Stat. 65/10.
21. 430 Ill. Comp. Stat. 65/9, 65/9.5. If the person fails to do this, law enforcement may seek a warrant to seize the person's FOID Card and firearms. 430 Ill. Comp. Stat. 65/9.5.
22. 430 Ill. Comp. Stat. 66/105.
23. Namely, the administrator may not be held criminally, civilly, or professionally liable, except for willful or wanton misconduct. 430 Ill. Comp. Stat. 65/8.1(d)(2), 66/110.
24. The State Police is prohibited from disclosing this information except for the purposes of firearm purchaser background checks, and even then, only as much as necessary for that purpose. 405 Ill. Comp. Stat 5/6-103.3, 430 Ill. Comp. Stat. 65/8.1.
25. See Law Center to Prevent Gun Violence, Licensing of Gun Owners & Purchasers Policy Summary, at <http://smartgunlaws.org/licensing-of-gun-owners-purchasers-policy-summary/>.
26. Law Center to Prevent Gun Violence, Universal Background Checks and the Private Sale Loophole Policy Summary, at <http://smartgunlaws.org/universal-gun-background-checks-policy-summary/>.

# GUN VIOLENCE RESTRAINING ORDERS

After many of the recent mass shootings, news reports discovered that community members noted warning signs before the shootings, but nothing was done to remove the shooter's access to guns. In fact, our current legal framework, which allows almost anyone to purchase and possess a gun, provides very few opportunities for community members in this situation to take action regarding a person's access to guns. In response to this gap in the law, academic researchers and gun violence prevention advocates have begun to call for new laws that will allow community members to seek "gun violence restraining orders" that would temporarily restrict a person's access to guns.

## THE PROBLEM

**In many of the recent mass shootings, community members noted warning signs beforehand but there was nothing they could do to remove the shooter's access to guns before the tragedy.** Family members are the people most often in this position, such as the parents of Eliot Rodger, who killed six people in the college town of Isla Vista, California, before killing himself. Rodger's parents contacted his therapist about three weeks before his killing spree with concerns about his behavior and YouTube videos, and the therapist contacted the police, who interviewed him. Nothing was done to remove his access to guns, however.<sup>1</sup>

Similarly, Jared Lee Loughner shot and killed six people and wounded 13 others, including Representative Gabrielle Giffords, in a parking lot in Tucson in January 2011. At one point, his parents had become so concerned about his behavior that they took away his shotgun, but they could not take any further action to restrict his access to guns.<sup>2</sup>

A person entering a mental health crisis often exhibits signs that may alert community members to the person's mental state. For example, 80% of people considering suicide give some sign of their intentions<sup>3</sup> and 38 out of the 62 mass shooters in the last twenty years were reported as displaying signs of dangerous mental health problems prior to the killings.<sup>4</sup> In many of these shootings, people who knew the shooter observed these signs, but federal and state laws provided no clear legal process to restrict his or her access to guns, even temporarily. As a result, there was no direct way for these people to prevent these acts of violence.

Under federal law, a person suffering from mental illness is not prohibited from purchasing and possessing a gun unless he or she has been formally committed to a mental institution, found not guilty by reason of insanity, or undergone some other formalized court proceeding regarding his or her mental illness. Similarly, a person who has committed a violent act towards others is not prohibited from possessing guns under federal law until he or she has been convicted of a felony or domestic violence misdemeanor.<sup>5</sup>

**State legislators have begun to respond to this problem.** Bills have been introduced in three states that would allow someone to petition a court for a "gun violence restraining order" (GVRO) that would remove a person's access to guns if he or she poses a significant risk of personal injury to him- or herself or others by possessing guns. Academic researchers and

legislative staffers have been developing variations of this proposal for years, but the recent surge in mass shootings has brought this idea into the public eye.

## ORIGINS OF THE GVRO CONCEPT

The concept of using restraining orders to restrict access to guns by dangerous people arises from the domestic violence context. Every state has a law that allows a victim of domestic abuse to seek a restraining order (or “protective order”) from a court. Domestic violence restraining orders generally prohibit the abuser from further acts of abuse, and may also prohibit the abuser from any contact with the victim.

Federal law prohibits people subject to certain domestic violence restraining orders from purchasing or possessing firearms. Many states have similar laws. About half of the states also authorize or require a court that is issuing a domestic violence protective order to require the abuser to surrender firearms that he or she may already have in his or her possession.<sup>6</sup>

Academic researchers, including prominent experts in psychiatry and the law, have expressed support for extending courts’ authority to issue orders that restrict access to guns to other situations. These researchers have found that a person who is engaging in certain kinds of behavior, such as violence or self-harm or the ongoing abuse of drugs or alcohol, is significantly more likely to commit another act of violence towards him- or herself or others within the near future. This behavior should act as a “red flag” that the person might soon commit an act of violence.<sup>7</sup> In fact, research has shown that these behaviors are a stronger predictor of future violence than mental illness.<sup>8</sup> As a result, people who have exhibited these behaviors should be temporarily restricted from access to guns. A law allowing for GVROs would provide an opportunity to restrict access to guns when a person has demonstrated these behaviors.

More specifically, when a person is demonstrating violent or threatening behavior generally, even without ongoing abuse of a specific victim, a court should be able to temporarily restrict the person’s access to guns. Similarly, a court should be able to temporarily remove a person’s access to guns if he or she is actively abusing alcohol or illegal drugs. A court order restricting a person’s access to guns may also be appropriate when a person is demonstrating an intent to harm themselves.

In December 2013, the Consortium for Risk-Based Firearms Policy, a group of the nation’s leading researchers, practitioners and advocates in gun violence prevention and mental health, released a report endorsing this proposal.<sup>9</sup> Then, after the Isla Vista shooting, bills were introduced in California, Michigan and New Jersey that would allow a court to issue a GVRO.<sup>10</sup> Bills have also been introduced at the federal level that would provide financial incentives for states to create GVRO procedures.<sup>11</sup>

## FEATURES OF A STRONG GVRO LAW

Based on an analysis of the GVRO bills introduced in 2014, it appears that a strong state law that would allow a court to issue a GVRO would include the following features:

- **Procedure for Seeking a GVRO:** A person can seek a GVRO to prohibit a dangerous person from purchasing or possessing a gun by submitting a form to a court. The state should develop the form to be used. The form should give the petitioner an opportunity to describe the facts and circumstances necessitating the GVRO and, if the petitioner knows that the dangerous person already owns firearms, to describe the firearms. The Michigan and California bills would require this procedure.
- **Who May Seek a GVRO:** Any person should be able to bring a petition for a GVRO, regardless of his or her relationship with the person who would be restrained from possessing guns under the GVRO. As originally introduced, the New Jersey and California bills included this feature. The Michigan bill is narrower, but would still allow any person with a “close” relationship to the dangerous person to seek a GVRO.
- **Standard for Issuing a GVRO:** A court should be able to issue a GVRO against a person if it finds probable cause to believe that the person would pose a significant risk of personal injury to himself or herself or others if he or she possessed a firearm. The Michigan and New Jersey bills would require this standard of proof.

- **Evidence for the Court's Determination:** The court should be able to consider all relevant evidence in determining whether to issue a GVRO, including whether the person has:
  - Previously threats of violent or acts of violence by the person against others;
  - Previous threats or attempts by the person to harm him- or herself;
  - Recent or ongoing abuse of controlled substances or alcohol by the person; or
  - The reckless storage, use, or display of firearm by the person.<sup>185</sup>

The court should accept evidence in any form, including in the form of an affidavit or oral testimony from the petitioner and any witnesses. The California bill contains this feature.

- **Immediate GVROs:** The court must consider any petition for a GVRO within 24 hours and should be able to issue a GVRO immediately to prevent the harm that might result if the person continues to have access to firearms. When determining whether to issue a GVRO before notice to the person, the court must consider the risk that he or she may attempt to conceal guns that are already in his or her possession.<sup>13</sup>
- **Hearing and Duration:** A GVRO issued without a hearing should only be valid until the court can hold a hearing where the person can participate. At the hearing, the court should be able to issue a GVRO for a longer period. Under the original California bill, a GVRO issued at a hearing would expire after one year, although the petitioner or law enforcement can then ask the court to renew it for a longer period.
- **Surrender of Guns:** A person who is served with a GVRO is required to immediately surrender all firearms in his or her possession. Law enforcement must provide the person with a receipt and take these weapons into custody for the duration of the GVRO. The California bill requires the restrained person to immediately surrender all firearms and ammunition to law enforcement or sell them to a licensed dealer. In either circumstance, the restrained person must obtain a receipt, which must be filed with law enforcement and the court that issued the order.
- **Search Warrant:** When the court issues a GVRO, it should also be able to issue a warrant so that law enforcement officers can perform a search for any firearms that person already has. More specifically, this warrant should be available if the court finds probable cause to believe the person already has guns at the location to be searched. Both the Michigan and California bills authorize a court issuing a GVRO to issue a warrant to search for and seize firearms in the person's possession.
- **Protections for Co-Habitants:** The law should provide that a gun may not be seized pursuant to a warrant if the gun is owned by someone other than the person subject to the GVRO and is stored so that he or she doesn't have access to it. Also, a gun safe owned solely by someone else may not be searched. The California, Michigan, and New Jersey bills all include this feature.
- **Notice to Law Enforcement:** Law enforcement should be notified when a petition for a GVRO is filed, so that law enforcement can determine whether the dangerous person already has a gun. California's bill includes this provision. Law enforcement may also have other relevant evidence that can assist the court in determining whether to issue a GVRO.
- **Penalty for False Petitions:** The law should impose a criminal penalty on any person who files a petition for a GVRO that contains statements the person knows are false. The California and Michigan bills include this provision.
- **Reporting for Background Checks:** Upon issuing a GVRO, the court must ensure that records identifying the person who is restrained from having a gun are promptly submitted to the background check system. This requirement will help ensure that the person cannot purchase any new guns. The California and New Jersey bills include this feature.
- **Background Checks:** A background check must be conducted for every sale of a gun, including sales from unlicensed sellers. Without a background check, people prohibited from possessing guns, such as felons, domestic abusers, dangerously mentally ill people, as well as people subject to gun violence restraining orders, can easily obtain guns.<sup>14</sup>
- **Ammunition:** Each provision of the law should apply to ammunition as well as firearms. This is a feature of the California bill.

For an example of a bill that contains many of these features, see [New Jersey Assembly Bill 3370 \(2014\)](#).

## CONCLUSION

**G**un violence restraining orders represent a common sense way to reduce gun violence. States should enact laws that allow concerned community members to seek these orders, and courts should be authorized to issue them, so that access to guns can be temporarily limited in dangerous situations.

**(ENDNOTES)**

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7. Consortium for Risk-Based Firearms Policy, Guns, Public Health, and Mental Illness: An Evidence-Based Approach for State Policy 7-8, 22 (Dec. 2013), at <http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/GPHMI-State.pdf>.
8. Id. at 8.
9. Id. at 24-31.
10. California A.B. 1014 (amended May 28, 2011); Michigan H.B. 5688 (introduced June 12, 2014); New Jersey A.B. 3370/S.B. 2162 (introduced June 9, 2014).
11. Pause for Safety Act of 2014, H.R. 4806 (Capps), S.B. 2445 (Boxer).
12. The Consortium's report suggests as additional factors that a court may consider: the person's history of adherence to prescribed psychiatric medications, and prior involuntary commitment to a psychiatric facility as an inpatient or outpatient. Consortium for Risk-Based Firearms Policy, Guns, Public Health, and Mental Illness: An Evidence-Based Approach for State Policy 30 (Dec. 2013), at <http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/GPHMI-State.pdf>. Note that people committed involuntary to a psychiatric facility are already prohibited from possessing firearms under federal law. 18 U.S.C. § 922.
13. In the domestic violence context, a court may issue a restraining order without notice to the person to be restrained if: (1) the order is based upon sworn testimony or affidavits containing detailed allegations based on personal knowledge, (2) immediate and irreparable injury will result from the delay required to give the person notice or from the notice itself, and (3) the person receives a prompt post-deprivation hearing. See *Blazel v. Bradley*, 698 F. Supp. 756 (W.D. Wis. 1988).
14. Law Center to Prevent Gun Violence, Universal Background Checks and the Private Sale Loophole Policy Summary, at <http://smartgunlaws.org/universal-gun-background-checks-policy-summary/>.

# TEMPORARY GUN RESTRICTIONS FOR PEOPLE INVOLUNTARILY HOSPITALIZED FOR MENTAL HEALTH EVALUATIONS

Federal law only prohibits gun possession by a person who has been involuntarily hospitalized for mental illness if he or she is formally committed. Every state allows a person to be involuntarily hospitalized for a short time before a formal commitment, however, and research indicates that a person who has been involuntarily hospitalized for even a short time may be dangerous. For this reason, [California](#) temporarily prohibits a person in this situation from accessing guns, with significant procedural protections. Other states should follow suit.

## THE PROBLEM

Many acts of violence have been committed by dangerous people who had previously been hospitalized for emergency mental health evaluations, but who were not prohibited from possessing guns by federal law. For example:

- In 2000, a sheriff's deputy in Clallam County, Washington responded to a call that a mentally ill man was outside yelling. The sheriff's deputy was then confronted, shot, and killed by a delusional man who had been held several times in the past for 72-hour mental health evaluations. Local mental health officials had never sought a court order to have him formally committed. As a result, federal law did not prohibit him from possessing guns.<sup>1</sup>
- Similarly, Jennifer San Marco, who killed seven people at a postal facility in Goleta, California in 2006, had previously been held for a three-day evaluation at a mental hospital in New Mexico, but was never formally committed.<sup>2</sup>
- Sujatha Guduru, who shot and killed her own daughter in Florida in March 2014, had also previously been held for a short-term mental health evaluation. As her attorney pointed out, because the authorities did not seek to formally commit her, the federal gun prohibition did not apply.<sup>3</sup>

When a person suffers a mental illness so severe that he or she becomes violent or suicidal, our current mental health system responds through a series of steps. There are two main phases:

- **Phase One (Emergency Hospitalization):** In the first phase, the person is taken into custody, usually with the assistance of law enforcement and mental health professionals, and may be hospitalized involuntarily for a short period of time. During this period, mental health professionals provide emergency care and evaluate the person to determine whether a formal, longer-term commitment is necessary.

- **Phase Two (Formal Commitment):** Under most state standards, a person cannot be formally committed unless he or she continues to be dangerous to self or others and refuses to be hospitalized voluntarily. If the mental health professional determines that a formal commitment is necessary, the professional or another person may petition a court and a formal judicial proceeding occurs.

Federal law does not prohibit people who have been hospitalized for mental illness from possessing guns unless they have been committed through a formal court proceeding (Phase Two, above).<sup>4</sup> There are a number of reasons why a person who is violent or suicidal may not be formally committed, however. For one thing, many members of the mental health community strongly prefer to treat people who suffer from mental illness voluntarily and without confining them.

Significant research indicates, however, that people who have been hospitalized involuntarily for even a short period are at an elevated risk of violence to self or others. A short-term involuntary hospitalization is a **“meaningful and reliable indicator of an individual’s dangerousness,”** according to the Consortium for Risk-Based Firearms Policy, a group of the nation’s leading researchers, practitioners and advocates in gun violence prevention and mental health.<sup>5</sup> As a result, the Consortium has publicly endorsed temporary gun prohibitions for people who have been involuntarily hospitalized in this manner.<sup>6</sup>

A study performed in Connecticut found that only 7% of people who had been hospitalized at some time in the past for serious mental illness fell within the federal gun prohibitions.<sup>7</sup> To prevent tragedies like those described above, **states must temporarily restrict gun access to people who have been involuntarily hospitalized, even if they have not been formally committed.**

## HOW CALIFORNIA HAS FILLED THIS GAP IN THE LAW

**In the early 1990s, California adopted a strong law on this topic.** This law temporarily prohibits purchase or possession of a firearm by any person who has been taken into custody and placed in a county mental health facility. The gun prohibition applies if the professional in charge of the facility has assessed that the person cannot be properly served without being detained and evaluated for at least 72 hours and the person is a danger to himself or herself or others as a result of a mental disorder.<sup>8</sup>

This kind of emergency hospitalization does not trigger the federal prohibition against firearm possession due to mental illness because these people have not yet undergone a formal, adversarial commitment procedure. Thanks to state law, however, a person in this situation in California may not purchase or possess a gun for up to five years.<sup>9</sup> In addition:

- People prohibited from gun possession pursuant to this provision are reported to the California Department of Justice, so they cannot pass a background check to purchase a firearm.<sup>10</sup> Mental health facilities that make these reports are immune from civil lawsuits based on these reports.<sup>11</sup>
- If a person in this category is found to be in possession of a firearm when he or she is prohibited, a law enforcement officer must confiscate the firearm and file a petition to retain it. The person receives notice of the petition and may seek a hearing to contest the gun removal.<sup>12</sup>
- A person who is subject to this prohibition under California law may also petition a court to have the prohibition removed and his or her gun eligibility restored before the five-year period is over. At the hearing, the state bears the burden to show, by a preponderance of the evidence, that the person “would not be likely to use firearms in a safe and lawful manner.”<sup>13</sup>

**California appellate courts have repeatedly upheld the state’s law.**<sup>14</sup> In addition, a 2012 decision by the First Circuit Court of Appeals indicates that the availability of a procedure for restoration of the person’s firearms eligibility may be necessary to avoid Second Amendment or due process concerns.<sup>15</sup> The decision also indicates, however, that a law that includes this procedure will be upheld.<sup>16</sup>

In December 2013, the Consortium for Risk-Based Firearms Policy released a report recommending that states enact laws similar to the California law.<sup>17</sup>

## Features of a Strong Law to Restrict Guns to People Involuntarily Hospitalized for Mental Health Evaluations

Below are the main features of a law to temporarily prohibit a person who has been hospitalized under emergency circumstances for mental illness from purchasing or possessing guns. This checklist was derived from the California law and the Consortium's report described above.

- **Gun Prohibition:** A person becomes prohibited from purchasing or possessing a gun when he or she is detained in a mental health facility for emergency treatment based on a clinical evaluation conducted by a mental health practitioner and confirmed by a physician upon entry to the facility.
- **Duration of the Prohibition:** A person prohibited in this manner remains ineligible to purchase or possess a gun for at least one year,<sup>18</sup> but for no longer than five years. A person can regain his or her eligibility to purchase and possess guns before the five-year period is up through the procedures described below.
- **Restoration Procedures:** After the one-year period, a person can seek to purchase or possess a gun if he or she follows these procedures:
  - **Petition for Restoration:** The person can petition a court or an administrative agency that acts like a court for restoration of his or her gun eligibility.
  - **Professional Opinion:** The petition must be accompanied by the opinion of a psychiatrist or doctoral-level clinical psychologist regarding the risk of the person becoming dangerous in the future.
  - **Hearing:** The person is provided a hearing before the court or agency within a reasonable amount of time.
  - **Burden of Proof:** At the hearing, the state bears the burden of proving that the person continues to present a significantly elevated risk of becoming a danger to self or others.
  - **Result:** If the state meets its burden of proof at the hearing, the person remains prohibited from purchasing or possessing firearms until the five-year period is over. If the state fails to meet its burden of proof at the hearing, the person immediately regains his or her eligibility to purchase or possess firearms.

The Consortium's report referenced above explains these elements in detail and contains recommended language for a restoration procedure.<sup>19</sup>

- **Reporting for Background Checks:** Whenever a person becomes prohibited from purchasing or possessing firearms because he or she is detained at a mental health facility as described above, the mental health facility, or a state agency that collects this information, must report the person to the National Instant Criminal Background Check System, so that the person cannot pass a background check to purchase a gun during the prohibited period.
- **Removal of Guns Already in the Person's Possession:** When a person is taken into custody for a mental health evaluation as described above, law enforcement officers must immediately remove any guns in his or her possession. The officers must provide the person with a receipt and a notice regarding the procedures for regaining the firearms. The officers must also file a petition for a hearing to retain these guns beyond a short period of time. The hearing proceeds like the hearing described above.
- **Confidentiality:** The fact that a person is prohibited from purchasing or possessing firearms because of his or her mental health history is private information. This information may only be disclosed as necessary for the purposes of firearm purchaser background checks and the proper enforcement of gun laws.
- **Immunity and Accountability:** Mental health professionals and law enforcement officers that comply with these requirements may not be held criminally, civilly, or professionally liable for these actions, except in the case of willful or wanton misconduct.
- **Background Checks:** A background check must be conducted for every sale of a gun, including sales conducted by unlicensed sellers. Without a background check requirement, people prohibited from possessing guns, such as felons, domestic abusers and the dangerously mentally ill, can easily obtain them.<sup>20</sup>
- **Ammunition:** Each provision of the law should apply to ammunition as well as firearms.

For an example of a law that has many of these features, see [California Welfare & Institutions Code § 8100 et seq.](#)

## CONCLUSION

States can prevent tragedies by enacting strong laws that restrict gun access by the dangerously mentally ill. When a person has suffered from an episode of mental illness so severe that he or she is involuntarily detained in a mental health facility, the state should temporarily prohibit the person from possessing guns. Through careful legislative drafting, states can accomplish this goal while also respecting the Second Amendment and the rights and dignity of the mentally ill.

## NOTE ON BACKGROUND CHECKS

Each of the proposals set forth in this report will save lives. However, the effectiveness of these laws depends on having a strong background check system that treats almost all firearms sales and transfers the same.

Currently, there is a loophole in federal law. The law requires federally licensed firearms dealers, known as FFLs, to conduct background checks on gun purchasers, but it does not require unlicensed, “private” sellers to do so.[i]

The lack of a background check requirement for sales by unlicensed, private sellers is known as the “private sale loophole.” It is estimated that up to 40% of all firearms sold in the U.S. are transferred through this loophole without a background check.[ii] These private sales include transfers made through the Internet, at gun shows, and through classified ads.

The private sale loophole means that in most states, guns can easily fall into the hands of dangerous people, even people who are prohibited from gun ownership and have been included in the background check system. This may include felons, domestic abusers and the dangerously mentally ill as identified through the proposals in this report. A system that requires background checks on some firearms transactions but not others reduces the effectiveness of all other gun laws.

In the absence of action at the federal level, it is up to states to close this loophole, and 17 states have extended the background check requirement to at least some private sales.[iii]

The proposals in this publication do not extend the situations in which a background check is required. Instead, these proposals would extend the categories of people who would be denied a gun if they underwent a background check.

A background check should be conducted for the vast majority of gun sales, including sales conducted by unlicensed sellers. A comprehensive background check, used in conjunction with the proposals set forth in this publication, will prevent many dangerous people from accessing guns, and will save many lives.

**(ENDNOTES)**

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6. Id.
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## NOTE ON MENTAL HEALTH FIRST AID

One result of the media's recent attention to mass shootings has been renewed calls for improved mental health care, especially early intervention and treatment both in adults and youth. One part of this approach involves "Mental Health First Aid," governmental programs that train community members and law enforcement so they can better identify and respond to mental illnesses. While this is a worthy goal, Mental Health First Aid does not alone restrict access to guns when a person is dangerous. As a result, it must be utilized in conjunction with strong gun laws in order to effectively reduce gun violence.

### THE PROBLEM

Only approximately 4% of violence towards others is attributable to mental illness.<sup>1</sup> Nevertheless, as news reports indicate, untreated mental illness may be a contributing factor towards some mass shootings. Mental illness also plays a large role in suicides,<sup>2</sup> which account for almost 60% of gun deaths each year.<sup>3</sup>

Many Americans who suffer from mental illness go untreated. About 1 in 5 adults suffer from some form of mental illness each year, and the average time between a person's first episode of mental illness and treatment is about ten years.<sup>4</sup>

Studies have shown that early intervention is an essential element to better mental health care. The sooner an individual gets help, the more likely he or she is to have a positive outcome.<sup>5</sup> However, few people have the training and knowledge about how to identify and help a person in crisis.

People who may act as good Samaritans may also be concerned about liability and potentially harming, rather than aiding, the individual, especially if the assessment is done without the person's consent. Proper training can reduce these concerns.

### ORIGINS OF THE MENTAL HEALTH FIRST AID CONCEPT

The concept of Mental Health First Aid originated in Australia in 2001. It was developed by a psychologist and his wife, a nurse with a long history of depression and whose first suicide attempt was at the age of fifteen. They consulted specialists for five years, developing a program for early identification and intervention of mental health disorders. The National Council on Mental Health, the Maryland State Department of Mental Health and Hygiene, and the Missouri Department of Mental Health worked with the program's founders to bring the Mental Health First Aid training to the United States in 2008-2009.<sup>6</sup>

Mental Health First Aid is an eight-to-twelve hour course that trains individuals to recognize risk factors and warning signs of mental health concerns. Using a variety of simulations, stu-

dents learn how to assess a mental health crisis, select interventions, provide initial help, and connect those at risk with resources for support.<sup>7</sup>

Following the tragedy in Sandy Hook, President Obama released a report entitled *Now Is the Time*, which outlined a plan for protection of communities from gun violence, including a call for Mental Health First Aid training for teachers and educational staff to help young people with mental health disorders.<sup>8</sup>

Two differing bills that have passed in both the Senate and the House would provide funding for programs to train community members in Mental Health First Aid. The Mental Health First Aid Act of 2013, which was introduced by Congressman Ron Barber (D-AZ), would authorize \$20 million in grants to train emergency services personnel, law enforcement, educational organizations, students, parents, faith community leaders, and veterans.<sup>9</sup>

Additionally, the 2014 budget enacted by Congress outlined two key grant programs for Mental Health First Aid training through Project AWARE. The first will allocate \$38.8 million to support to expand the capacity of state education agencies to provide adequate training and resources for mental health treatment for school-aged youth.<sup>10</sup> The second will award \$9.4 million to local education agencies to support training for adults who interact with youth regularly to detect to mental illness and encourage treatment.<sup>11</sup>

State legislators have also used this approach. While most states have some form of Mental Health First Aid training, California, Missouri, and Minnesota are among states with the most active programs.

- California passed a ballot initiative in 2004 under Proposition 63 which increased taxes to fund mental health programs.<sup>12</sup> Although the language does not explicitly recognize Mental Health First Aid, it makes reference to an almost identical system of early intervention training programs, focusing especially on children aged 0-25 years living in underserved communities.<sup>13</sup>
- Missouri has 244 instructors and approximately 13,500 residents that have completed Mental Health First Aid training.<sup>14</sup> Missouri's program was made possible by the Mental Health Earnings Fund, enacted in 2011, which defined the rules, regulations, and procedure whereby funding could be obtained.<sup>15</sup>
- Minnesota has been offering free Mental Health First Aid classes since 2009, as made possible by the National Alliance on Mental Illness of Minnesota and funding allocated by the state legislature.<sup>16</sup> So far, the state has trained 824 people, and the state legislature has appropriated an additional \$45,000 for Mental Health First Aid training geared towards teenagers and young adults.<sup>17</sup>

As of December 2013, more than 140,000 people across the country have been trained in Mental Health First Aid by a network of 3,000 certified instructors.<sup>18</sup>

Despite these successes, there is limited research linking Mental Health First Aid training to a reduction in gun violence or suicides. One study found that for the fiscal year of 2009-2010 following the enactment of Prop 63, there were fewer Californians admitted to long term facilities, fewer emergency room visits, and fewer incarcerations, providing an off-set of \$63 million in potential psychiatric and physical health care costs.<sup>19</sup>

## LIMITATIONS OF THIS APPROACH

While improved mental health care is a worthy goal, it is important to remember that the vast majority of people who suffer from mental illness and who will benefit from improved mental health care are neither violent nor suicidal.<sup>20</sup> Studies have demonstrated that violent and threatening or suicidal behavior is a far better indicator of similar behavior in the future than mental illness.<sup>21</sup>

Furthermore, for people who are violent or suicidal, Mental Health First Aid training and other approaches to improved mental health care do not restrict access to guns. Without strong gun laws, people who are at a high risk of relapse, even those whose relapse may involve violence or suicide, will still have access to guns.

(ENDNOTES)

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14. Candi Helseth "Mental Health First Aid Offers Helping Hand in Rural Communities," Rural Assistance Center, May 15, 2014, at <http://www.raonline.org/rural-monitor/mental-health-first-aid/>.
15. Mo. Stat. § 630.053.
16. Dan Kraker, Participation Soaring in Minn. Mental Health First Aid Classes, MPR News, Jun. 4, 2013, at <http://www.mprnews.org/story/2013/06/04/health/mental-health-first-aid-classes>.
17. Id.
18. Mental Health First Aid, National Council for Behavioral Health, at <http://www.thenationalcouncil.org/about/mental-health-first-aid/>.
19. Darrell Steinberg, *supra* note 13. However, it should be noted that the study focused on funding for a range of mental health programs, not just Mental Health First Aid training.
20. Consortium for Risk-Based Firearms Policy, *supra* note 2.
21. Id. at 8.

## APPENDIX A

### SAMPLE LANGUAGE ON NICS REPORTING

**Disclaimer:** Any jurisdiction seeking to enact a new law should consult with counsel to ensure consistency with constitutional and legal requirements specific to the particular state. While we have endeavored to present the strongest existing language for this appendix, we make no representation about its suitability for a particular state or the appropriateness of every provision.

*The following excerpts from Texas law were current as of July 18, 2014.*

**Please note:** Like all laws, this one has gaps. The primary gaps in this law are that it does not apply to people committed to mental institutions as outpatients and people prohibited from possessing guns under state law.

#### TEX. GOV'T CODE § 411.052

- (a) In this section, "federal prohibited person information" means information that identifies an individual as:
  - (1) a person ordered by a court to receive inpatient mental health services under Chapter 574, Health and Safety Code;
  - (2) a person acquitted in a criminal case by reason of insanity or lack of mental responsibility, regardless of whether the person is ordered by a court to receive inpatient treatment or residential care under Chapter 46C, Code of Criminal Procedure;
  - (3) a person determined to have mental retardation and committed by a court for long-term placement in a residential care facility under Chapter 593, Health and Safety Code;
  - (4) an incapacitated adult individual for whom a court has appointed a guardian of the individual under Chapter XIII, Probate Code, based on the determination that the person lacks the mental capacity to manage the person's affairs; or
  - (5) a person determined to be incompetent to stand trial under Chapter 46B, Code of Criminal Procedure.
- (b) The department by rule shall establish a procedure to provide federal prohibited person information to the Federal Bureau of Investigation for use with the National Instant Criminal Background Check System. Except as otherwise provided by state law, the department may disseminate federal prohibited person information under this subsection only to the extent necessary to allow the Federal Bureau of Investigation to collect and maintain a list of persons who are prohibited under federal law from engaging in certain activities with respect to a firearm.
- (c) The department shall grant access to federal prohibited person information to the person who is the subject of the information.
- (d) Federal prohibited person information maintained by the department is confidential information for the use of the department and, except as otherwise provided by this section and other state law, may not be disseminated by the department.
- (e) The department by rule shall establish a procedure to correct department records and transmit those corrected records to the Federal Bureau of Investigation when a person provides:
  - (1) a copy of a judicial order or finding that a person is no longer an incapacitated adult or is entitled to relief from disabilities under Section 574.088, Health and Safety Code; or
  - (2) proof that the person has obtained notice of relief from disabilities under 18 U.S.C. Section 925."

#### TEX. GOV'T CODE § 411.0521

- (a) The clerk of the court shall prepare and forward to the department the information described by Subsection (b) not later than the 30th day after the date the court:
  - (1) orders a person to receive inpatient mental health services under Chapter 574, Health and Safety Code;
  - (2) acquits a person in a criminal case by reason of insanity or lack of mental responsibility, regardless of whether the person is ordered to receive inpatient treatment or residential care under Chapter 46C, Code of Criminal Procedure;
  - (3) commits a person determined to have mental retardation for long-term placement in a residential care facility under Chapter 593, Health and Safety Code;
  - (4) appoints a guardian of the incapacitated adult individual under Chapter XIII, Probate Code, based on the determination that the person lacks the mental capacity to manage the person's affairs;
  - (5) determines a person is incompetent to stand trial under Chapter 46B, Code of Criminal Procedure; or
  - (6) finds a person is entitled to relief from disabilities under Section 574.088, Health and Safety Code.
- (b) The clerk of the court shall prepare and forward the following information under Subsection (a):
  - (1) the complete name, race, and sex of the person;

- (2) any known identifying number of the person, including social security number, driver's license number, or state identification number;
  - (3) the person's date of birth; and
  - (4) the federal prohibited person information that is the basis of the report required by this section.
- (c) If practicable, the clerk of the court shall forward to the department the information described by Subsection
- (b) in an electronic format prescribed by the department. (d) If an order previously reported to the department under Subsection (a) is reversed by order of any court, the clerk shall notify the department of the reversal not later than 30 days after the clerk receives the mandate from the appellate court.
- (e) The duty of a clerk to prepare and forward information under this section is not affected by:
- (1) any subsequent appeal of the court order;
  - (2) any subsequent modification of the court order; or
  - (3) the expiration of the court order."

## 2009 TEX. ALS 950 § 3

"Each clerk of the court shall prepare and forward information for each order issued on or after September 1, 1989, to the Department of Public Safety as required by Section 411.0521, Government Code, as added by this Act. Not later than September 1, 2010, each clerk of the court shall prepare and forward information for any court orders issued on or after September 1, 1989, and before September 1, 2009."

## APPENDIX B

### SAMPLE LANGUAGE FOR A TEMPORARY GUN RESTRICTION FOR DANGEROUS PEOPLE REPORTED BY SCHOOLS

**Disclaimer:** Any jurisdiction seeking to enact a new law should consult with counsel to ensure consistency with constitutional and legal requirements specific to the particular state. While we have endeavored to present the strongest existing language for this appendix, we make no representation about its suitability for a particular state or the appropriateness of every provision.

*The following excerpts from Illinois law were current as of July 18, 2014.*

**Please note:** Like all laws, this one has gaps. Please see the list in this report for additional features of a strong law on this topic.

#### 405 ILL. COMP. STAT. 5/6-103.3

"If a person is determined to pose a clear and present danger to himself, herself, or to others by a ... school administrator, then the ... school administrator shall notify the Department of State Police, within 24 hours of making the determination that the person poses a clear and present danger. ... Information disclosed under this Section shall remain privileged and confidential, and shall not be re-disclosed, except as required under subsection (e) of Section 3.1 of the Firearm Owners Identification Card Act [430 ILCS 65/3.1], nor used for any other purpose. The method of providing this information shall guarantee that the information is not released beyond that which is necessary for the purpose of this Section and shall be provided by rule by the Department of Human Services. The identity of the person reporting under this Section shall not be disclosed to the subject of the report. The ...school administrator making the determination and his or her employer shall not be held criminally, civilly, or professionally liable for making or not making the notification required under this Section, except for willful or wanton misconduct. ...

#### 430 ILL. COMP. STAT. 66/100

"Sections 100 through 110 may be cited as the School Administrator Reporting of Mental Health Clear and Present Danger Determinations Law."

#### 430 ILL. COMP. STAT. 66/105

"It is the duty of the principal of a public elementary or secondary school, or his or her designee, and the chief administrative officer of a private elementary or secondary school or a public or private community college, college, or university, or his or her designee, to report to the Department of State Police when a student is determined to pose a clear and present danger to himself, herself, or to others, within 24 hours of the determination."

#### 430 ILL. COMP. STAT. 66/110

"A principal or chief administrative officer, or the designee of a principal or chief administrative officer, making the determination and reporting . . . shall not be held criminally, civilly, or professionally liable, except for willful or wanton misconduct."

#### 430 ILL. COMP. STAT. 65/8-1(D)(2)

"If a person is determined to pose a clear and present danger to himself, herself, or to others by a . . . school administrator, then the . . . school administrator shall, within 24 hours of making the determination, notify the Department of State Police that the person

poses a clear and present danger.” And “The Department of State Police shall determine whether to revoke the person’s Firearm Owner’s Identification Card under Section 8 of this Act.” The “school administrator making the determination and his or her employer shall not be held criminally, civilly, or professionally liable for making or not making the notification required under this subsection, except for willful or wanton misconduct.”

### **430 ILL. COMP. STAT. 65/1-1**

“Clear and present danger” means a person who . . . demonstrates threatening physical or verbal behavior, such as violent, suicidal, or assaultive threats, actions, or other behavior, as determined by a . . . school administrator.”

### **430 ILL. COMP. STAT. 65/3.1(E)(2)**

“The Department of State Police and the Department of Human Services shall, in accordance with State and federal law regarding confidentiality, enter into a memorandum of understanding with the Federal Bureau of Investigation for the purpose of implementing the National Instant Criminal Background Check System in the State. The Department of State Police shall report the name, date of birth, and physical description of any person prohibited from possessing a firearm pursuant to the Firearm Owners Identification Card Act or 18 U.S.C. 922(g) and (n) to the National Instant Criminal Background Check System Index, Denied Persons Files.”

### **430 ILL. COMP. STAT. 65/8(F)**

Police have the “authority to deny an application for or to revoke and seize a Firearm Owner’s Identification Card (“FOID”) . . . if the Department finds that the applicant . . . poses a clear and present danger” to himself, herself, or “any other person or persons.”

### **430 ILL. COMP. STAT. 65/9**

If a person’s FOID card is revoked pursuant to §8(f), the Department must provide the individual with “a written notice . . . stating specifically the grounds upon which . . . his [or her] Identification Card has been revoked . . . [and] the person’s right to administrative or judicial review.”

### **430 ILL. COMP. STAT. 65/10**

“(a) Whenever an application for a Firearm Owner’s Identification Card is denied, ... or whenever such a Card is revoked or seized as provided for in Section 8 of this Act [430 ILCS 65/8], the aggrieved party may appeal to the Director of State Police for a hearing upon such denial, revocation or seizure, ...

(f) Any person who ... was determined to be subject to the provisions of subsections ... (f), ... of Section 8 of this Act may apply to the Department of State Police requesting relief from that prohibition. The Director shall grant the relief if it is established by a preponderance of the evidence that the person will not be likely to act in a manner dangerous to public safety and that granting relief would not be contrary to the public interest. In making this determination, the Director shall receive evidence concerning (i) the circumstances regarding the firearms disabilities from which relief is sought; (ii) the petitioner’s mental health and criminal history records, if any; (iii) the petitioner’s reputation, developed at a minimum through character witness statements, testimony, or other character evidence; and (iv) changes in the petitioner’s condition or circumstances since the disqualifying events relevant to the relief sought. If relief is granted under this subsection or by order of a court under this Section, the Director shall as soon as practicable but in no case later than 15 business days, update, correct, modify, or remove the person’s record in any database that the Department of State Police makes available to the National Instant Criminal Background Check System and notify the United States Attorney General that the basis for the record being made available no longer applies. The Department of State Police shall adopt rules for the administration of this Section.”