

# **WHITE PAPER:**

## **Restricting Access to Firearms by Persons With Mental Health Commitments in Washington State**



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## **I. INTRODUCTION**

The April 16, 2007, killing of 32 persons by a mentally ill student at Virginia Tech focused national attention on federal and state restrictions on firearms purchases by persons with serious mental health histories. The Virginia Tech assailant, Seung Hui Cho, was able to purchase firearms from a dealer in Virginia because a previous court order requiring him to receive outpatient mental health treatment had not been entered in either state or federal databases. Under federal law, Cho should have been barred from buying or possessing a firearm because he had been “adjudicated as a mental defective.” Cho purchased the firearms despite Virginia’s active participation in the National Instant Criminal Background Check System (NICS).<sup>1</sup>

A similar incident occurred on May 20, 2007, in Moscow, Idaho, where an individual killed his wife, a law enforcement officer, a church sexton and himself. Three others, including two law enforcement officers, were wounded. The shooter had previously received court-ordered mental health evaluations but was not involuntarily committed. Earlier that month, his case was continued on the condition that he obtain counseling and not possess firearms.<sup>2</sup> Other reports noted that it was illegal for him to possess firearms because he had been previously convicted of domestic battery.<sup>3</sup>

Like Virginia, Washington is also a leader among the 23 states that participate in NICS. Washington began working with federal authorities in 2003 and made an initial submission of 47,000 names into the database. Washington is one of only four states that consistently submit records to NICS. Nonetheless, gaps exist in Washington’s reporting. It remains possible that an individual, who is prohibited from possessing a firearm under federal law due to a mental health court order, may still purchase a firearm through a firearms dealer because state and federal background checks will not produce any record of court orders prohibiting the possession of firearms.

### **A. A Failed Background Check.**

On April 14, 2007, just two days before the shootings at Virginia Tech, Seattle could have had its own massacre by an individual with a serious mental health history. In this case, the background check system failed, but quick police response helped to avert what could have been a massacre. At 2:30 p.m., Seattle Police received a report of a young male in the Central District wearing a camouflage sweater, blue jeans and a bulletproof vest. He was reported to be carrying a black handgun. According to the police report, a witness reported the suspect as pacing, yelling and talking to himself. Seattle Post-Intelligencer columnist Robert Jamieson was having coffee nearby at the time. One witness told him that the individual muttered “bang bang.”<sup>4</sup> The police report describes a neighbor fleeing inside her home and the suspect waiving a gun and shouting “Where are you running to?” The suspect remained in front of her home talking to himself. When officers arrived, they identified the suspect as 20-year old J.S. Instead of a handgun, J.S. had a black semi-automatic STG-2000-C rifle, with the butt of the rifle removed, tucked into his waistband. His waistband also held a clip with 22 rounds of 7.62 mm ammunition capable of piercing armor.

Officers ran a state computer check on J.S. and determined that he was ineligible to possess firearms. The state Department of Licensing (DOL) firearms database simply says “ineligible” and does not provide police with more information. A follow-up call to King County Mental Health revealed that J.S. had several civil commitments, making him ineligible under both state and federal law to possess a firearm. The civil commitment order was faxed to the local precinct. J.S. was arrested and subsequently charged with unlawful possession of a firearm, a felony, and unlawful display of a weapon.

In one respect, the system worked. J.S. had received an involuntary commitment as a minor to Fairfax Hospital in 2004 resulting in a 14-day inpatient order and a subsequent order for 180 days of less restrictive treatment. In 2006, J.S. was committed as an adult resulting in a 14-day inpatient order and a subsequent order for 90 days of less restrictive treatment. Although neither of the 14-day orders are disqualifying under state law, the long-term orders are disqualifying. These orders were forwarded to DOL for inclusion in its firearms database.

Although the long-term orders were contained in DOL’s database, the database was not checked when J.S. purchased his STG-2000-C rifle from a Seattle gun shop. In Washington, state background checks are performed on persons who apply to purchase handguns or obtain concealed pistol licenses. Long-gun purchases involve no state background checks. Rather, for long-gun purchases, the dealer must check the NICS, operated by the Federal Bureau of Investigation (FBI). According to investigators who reviewed the J.S. case, the dealer did a NICS check. J.S.’s record, however, had not been submitted to the federal database, therefore his purchase of the rifle was allowed to proceed. Police later recovered another rifle from J.S. who had purchased the weapon from a Seattle pawn shop; this purchase had also been allowed to proceed.<sup>5</sup> J.S.’s case was subsequently referred from Superior Court to the King County District Mental Health Court where he is actively case-managed by court staff and mental health treatment providers. The Seattle Police Department submitted his record to NICS.

## **B. The Washington Firearms and Mental Health Workgroup.**

In May 2007, Attorney General Rob McKenna convened a workgroup of AGO staff to perform a comprehensive survey of relevant state and federal laws and regulations focusing on mental health and gun ownership.<sup>6</sup> The workgroup was also charged with identifying laws that prohibit gun possession for reasons other than mental health. The workgroup was asked to describe how current state and federal laws and regulations are being administered. Finally, the workgroup was charged with identifying the following:

- (1) areas of potential legal conflict between state and federal law,
- (2) areas of impractical overlap or inefficiency, and
- (3) voids or loopholes that preclude fulfilling the intent of the respective laws.

To accomplish these objectives, the workgroup has met to review state and federal law, discussed application of those laws with state agency clients (Washington State Patrol, Department of Licensing, and Department of Social and Health Services, Administrative Office of the Courts) and has consulted with Seattle Police Department, the Washington Association of Prosecuting Attorneys, and the Washington Association of Sheriffs and Police Chiefs, and other individuals.

This paper:

- a. Provides an overview of both state and federal laws that prohibit firearm possession following entry of a mental health court order;
- b. Identifies key differences between state and federal law;
- c. Discusses the structure of state and federal background check systems;
- d. Makes findings and recommendations in regard to gaps and obstacles to fulfilling the purposes of those laws; and
- e. Provides options for both client state agencies and the Attorney General in regards to administrative improvements and legislative changes that may help advance public safety.

## **II. THE LEGAL FRAMEWORK FOR CIVIL COMMITMENT AND FIREARM RESTRICTIONS.**

### **A. Civil Commitment in Washington State.**

Before reviewing how state and federal law bars individuals with civil commitments and other mental health findings from possessing firearms, a brief review of the state civil commitment structure may be helpful. Washington's Involuntary Treatment Act (ITA) imposes an initial detention and a series of progressively longer court-ordered periods of treatment culminating in 180-day commitments to state hospitals that can be successively ordered. Less restrictive placement in the community can be ordered anywhere in the chain of commitments, either as an alternative to inpatient treatment or as a condition of discharge. The system has the following features:

#### **Adults**

- 72-hour detention by Designated Mental Health Professional (no judicial review). RCW 71.05.180.
- 14-day detention in a local community hospital or evaluation and treatment facility. RCW 71.05.240.
- 90-day detention (order usually obtained by counties prior to transfer to state hospital). Treatment generally occurs in a state hospital. RCW 71.05.280 and .320.

- 90-day less restrictive order for community treatment. RCW 71.05.320 and .340.
- 180-day detention. Treatment is generally in a state hospital. RCW 71.05.320.
- 180-day less restrictive order for community treatment. RCW 71.05.320 and .340.

### **Minors**

- 72-hour detention at evaluation and treatment facility (no judicial review). RCW 71.34.720.
- 14-day detention at local community hospital evaluation and treatment facility. RCW 71.34.730.
- 180-day detention at state hospital or other Children’s Long Term Inpatient Program facility. RCW 71.34.750.
- 180-day less restrictive order for community treatment. RCW 71.34.770.

Related to civil commitments are those cases where individuals are found incompetent to stand trial for misdemeanor and felony acts. RCW 10.77.090. In these cases, criminal charges may be dismissed and patients convert to 90-day (misdemeanor) or 180-day (felony) civil commitments under ch. 71.05 RCW, if the state proves the civil commitment criteria.

Lastly, in addition to civil commitment, individuals charged with a crime may be found not guilty by reason of insanity (NGRI). RCW 10.77.030, .060-080. To establish such a defense, the person must show by a preponderance of the evidence that a “mental disease or defect” affected the person at the time of the offense, and that he or she was “unable to perceive the nature and quality of the act” with which he or she was charged, or was unable to “tell right from wrong.” RCW 9A.12.010. Persons making such a defense may be committed to a hospital for evaluation. RCW 10.77.060(1)(a). If the person is found NGRI, that person may be committed to a state hospital for mental health treatment for a period of time not to exceed the maximum sentence the person could have received for the crime. RCW 10.77.025.

### **B. Washington Is Increasing Its Use of Diversion Mental Health Courts.**

Washington is increasing its use of “diversion” from the criminal system and inpatient commitment through the use of municipal and district “mental health courts.” RCW 2.28.180. “Diversion” can take several forms. First, when competency is at issue and the person has been evaluated and found not competent to stand trial, courts previously had discretion to refer the individual for either evaluation at a state hospital or evaluation by local mental health authorities for subsequent commitment under ch. 71.05. Former RCW 10.77.090(d). In the 2007 legislative session, the legislature emphasized more formal diversion procedures, to be codified in changes to ch. 10.77 RCW and ch. 71.05 RCW. Ch. 375, Laws of 2007 (ESSB 5533). These changes mean that fewer misdemeanor cases will result in the defendant being sent to a state hospital for civil commitment under ch. 71.05 RCW. Rather, individuals against whom charges have been dismissed, and who have performed acts not considered to be a “serious offense,” may be

referred for a local mental health evaluation and are not necessarily remanded to the custody of DSHS. Ch. 375, Laws of 2007, Sec. 5.

The second type of “diversion” is less formal and does not occur under ch. 10.77 RCW. Both the Seattle Municipal Court and the King County District Court operate mental health courts, as do courts in Clark and Thurston Counties.<sup>7</sup> In the Seattle Municipal Mental Health Court, an individual charged with a misdemeanor agrees to a continuance and eventual dismissal of charges in return for conditions of release or deferred sentence that involve voluntary mental health treatment. Social work and other “wrap-around” services are provided to enable individuals to succeed in the community.

Table 1: Types of Mental Health Interventions as Applied to Adults and Minors.

Mental health interventions.	Adult.	Minor.
Voluntary inpatient or outpatient treatment.	X	X
72-hour evaluation (no judicial review).	X	X
14-day inpatient commitment.	X	X
90-day inpatient commitment.	X	
90-day less restrictive.	X	
180-day inpatient commitment.	X	X
180-day less restrictive.	X	X
Not guilty by reason of insanity.	X	
Incompetent to stand trial.	X	X
Mental health court diversion.	X	

### C. Washington State Firearm Restrictions Based on Mental Health Commitments.

Firearms are regulated under state law by Ch. 9.41 RCW (Firearms and Dangerous Weapons). The operative link between Washington’s firearm restrictions and Washington’s mental health commitment structure is found in RCW 9.41.040, which provides:

A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person . . . has in his or her possession, or has in his or her control **any firearm**:

- (i) After having previously been convicted or found **not guilty by reason of insanity** in this state or elsewhere of any felony...

- (ii) **After having previously been involuntarily committed for mental health treatment under RCW 71.05.320, \*71.34.090, chapter 10.77 RCW, or equivalent statutes of another jurisdiction, unless his or her right to possess a firearm has been restored as provided in RCW 9.41.047;**

RCW 9.41.040 (2)(a) (emphases added).

Under this statute, possession of any type of firearm is prohibited if the individual has the following mental health findings:

- Not guilty by reason of insanity for a felony charge;
- Involuntary commitment for 90 or 180 days under the adult civil commitment statute (ch. 71.05 RCW);
- Involuntarily committed for 180 days under the minor civil commitment statute (ch. 71.34 RCW);
- 90 or 180-day “less restrictive” orders. RCW 71.05.240, *Morris v. Blaker*, 118 Wn.2d 133 (1992); or
- Not competent to stand trial under ch. 10.77 RCW.

The civil commitment statute cross-references the firearm prohibition in several places. First, the civil commitment statute provides that if involuntary treatment is ordered beyond the 14-day period, the court shall provide the detained person with notice that the person will be barred from possession of firearms. RCW 71.05.240. Second, the civil commitment statute provides that detained individuals retain all rights not denied them under the statute, “except as chapter 9.41 RCW may limit the right of a person to purchase or possess a firearm or to qualify for a concealed pistol license.” RCW 71.05.360(1)(a). Lastly, the civil commitment statute contains an exception to the rule of strict confidentiality that permits law enforcement access to limited information for purposes of enforcing the prohibition on firearm possession. RCW 71.05.390(17). This exception was enacted by the legislature in 2005, as part of legislation that added not guilty by reason of insanity to the categories of mental health findings that prohibit firearm possession. Ch. 453, Laws of 2005 (ESHB 1687). (The minor civil commitment statute contains the same provision for release of limited information to law enforcement. RCW 71.34.340(16). It is, however, the only reference to firearms in ch. 71.34 RCW.)

It is a “class B” felony to possess a firearm if the individual has been found not guilty by reason of insanity following charges of a “serious offense.” RCW 9.41.040(1)(b). “Serious offenses” include crimes of violence and 14 other felonies. RCW 9.41.010(12)(a)-(o). It is a “class C” felony to possess a firearm if the individual has been committed or found not guilty by reason of insanity under other listed statutes. RCW 9.41.040 (2)(b). The maximum sentences for Class B and Class C felonies are ten years and five years, respectively. RCW 9A.20.021(1)(b),(c).

Under Washington law, certain mental health evaluations, commitments and court programs do not result in a firearms prohibition. Washington law places no firearm restrictions on adults or minors who have been detained for 72-hour evaluations or who have been subject to 14-day involuntary commitment orders.

The lack of firearm restrictions for individuals detained for short-term evaluations and commitments can be frustrating and tragic. In 2000, a delusional man with a history of firing guns into the air shot and killed a Clallam County sheriff's deputy who responded to a call that the mentally ill man was outside yelling. The man had several 72-hour evaluations, but local mental health officials apparently never sought a court order for involuntary treatment.<sup>8</sup> Even under federal law, an evaluation period that lacks due process and judicial review, such as Washington's 72-hour evaluation period, will not result in a firearm prohibition. As discussed below, however, a key distinction between Washington law and federal law is that a court-ordered 14-day detention will make an individual federally-ineligible to possess a firearm.

In addition, there are no statutory firearm restrictions tied to participation in a growing number of "diversion" mental health courts discussed above.<sup>9</sup> *See* ESSB 5533, Sec. 5 (2007). One condition of participation is typically an agreement to possess no weapons. However, there are no state statutory restrictions that tie participation in mental health court to a prohibition on possessing firearms. Thus, the names of those who participate are not submitted to DOL. Federal restrictions may apply if there is a court finding that the person suffers from a mental illness or impaired functioning. Such a finding would be necessary for the person to be "adjudicated as a mental defective" under the Gun Control Act, and therefore federally ineligible to possess firearms. For example, the Seattle Municipal Court judgment and sentence standard form order contains no finding by the court that the individual suffers from a mental disorder or mental illness. One report by the federal Bureau of Justice Statistics noted, "State and Federal authorities should have accurate and complete records on persons who fall within the purview of the Gun Control Act if they are processed through the mental health courts."<sup>10</sup> It is unclear what steps, if any, have been taken to accomplish reporting of these dispositions.

#### **D. Federal Law Prohibits Persons With Serious Mental Health Histories From Possessing Firearms.**

Like state law, federal law also prohibits certain persons from possessing firearms. Among the prohibited categories are persons with serious mental health histories.<sup>11</sup>

It shall be unlawful for any person— . . . who has been **adjudicated as a mental defective** or who has been **committed to a mental institution**; . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(4) (Gun Control Act of 1968) (emphasis added).

In addition, federally licensed firearms dealers are prohibited from transferring firearms or ammunition to an individual who is barred from possessing a firearm. 18 U.S.C. § 922(d).

The terms “adjudicated as a mental defective” and “committed to a mental institution” are defined by federal rule:

**Adjudicated as a mental defective.**

- (a) 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: (1) Is a danger to himself or to others; or (2) Lacks the mental capacity to contract or manage his own affairs.
- (b) The term shall include-- (1) A finding of insanity by a court in a criminal case; and (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. §§ 850a, 876b.

27 C.F.R. § 478.11.

**Committed to a mental institution.**

A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

27 C.F.R. § 478.11.

The federal courts have developed a small body of case law that interprets whether or not an individual has been “committed to a mental institution” and is therefore subject to federal criminal prosecution for unlawful possession of a firearm. These decisions are fact-specific and tend to involve an examination of state civil commitment laws, as each are structured differently and involve judicial involvement at various stages. In general, the decisions reflect a requirement for due process in the civil commitment scheme, regardless of whether the commitment decision is made by a court, board or commission. Some courts have gone so far as to say that “emergency detention” without judicial review constitutes “committed to a mental institution,” however, that is a minority view.<sup>12</sup>

**E. Comparing State and Federal Law.**

Distinctions between state and federal law prohibiting firearm possession may appear puzzling at first because this area of federal law is generally more restrictive than state law. The Virginia Tech Review Panel noted ambiguity in Virginia law in regard to whether a person like Seung Hui Cho, found to be a danger to himself, but ordered to undergo outpatient rather than inpatient treatment, was barred from possessing a firearm.<sup>13</sup> There is no such ambiguity under

federal law. An order of a Virginia special justice finding Cho a danger to himself meant that he had been “adjudicated as a mental defective.”<sup>14</sup> The panel noted:

There does not seem to have been an appreciation in setting up this process that the federal mental health standards were different than those of the state or that the practice deprived the federal database of information it needed in order to make the system effective.<sup>15</sup>

The Washington legislature has explicitly recognized differences in state and federal law. Washington pistol purchase application forms are required to have the following disclaimer:

The application shall contain a warning substantially as follows:

CAUTION: Although state and local laws do not differ, federal law and state law on the possession of firearms differ. If you are prohibited by federal law from possessing a firearm, you may be prosecuted in federal court. State permission to purchase a firearm is not a defense to a federal prosecution.

RCW 9.41.090(5). *See* RCW 9.41.070(4) (similar language required for application for concealed pistol licenses).

Based on the definitions in federal rules and federal court decisions, Washington State’s 72-hour detention under RCW 71.05.180 is not considered “committed to a mental institution” because the decision is made solely by a Designated Mental Health Professional and there is no judicial review prior to emergency detention. Washington also has a provision for court-ordered “non-emergency” 72-hour detentions. RCW 71.05.150. These detentions are unlikely to be considered “committed to a mental institution” because the court orders such an evaluation based only on an *ex parte* showing by the Designated Mental Health Professional. There is no opportunity for due process until the 72-hour evaluation period expires and the individual appears in court pursuant to a petition for 14 days of involuntary treatment.

State court orders for 14-day, 90-day and 180-day detention, as well as commitments for competency restoration under Ch. 10.77 RCW, would be considered “committed to a mental institution.” A person who admits himself/herself for voluntary mental health treatment is *not* considered “committed to a mental institution.”

Less restrictive orders requiring a person to undergo community treatment and adhere to conditions, ordered in lieu of inpatient treatment would be considered “adjudicated as a mental defective.” This is akin to the order that Mr. Cho received in Virginia. The findings of incompetency to stand trial under Ch. 10.77 RCW and findings of not guilty by reason of insanity would also be considered “adjudicated as a mental defective.”

**1. Under Washington law, 14-day commitment orders are not prohibitive.**

The most significant distinction between state and federal laws is that 14-day commitments are not considered disqualifying under Washington law but such orders are disqualifying under federal law.

**2. Restoration of rights under state and federal law.**

Another distinction between state and federal law is restoration of firearm rights. State law provides a process for restoration wherein a disqualified person may petition a superior court for restoration of firearm rights. RCW 9.41.047(3). DSHS has two WACs for restoration.<sup>16</sup> Washington statutes also recognize any federal restoration or “relief from disabilities.” RCW 9.41.070(3). The statutory provision for restoration is required by case law. The state Firearms Act previously had no provision for restoration of rights for persons involuntarily committed, however, it did allow restorations for persons convicted of crimes. The Washington State Supreme Court found this a violation of equal protection. *Morris v. Blaker*, 118 Wn.2d 133, 147-148 (1992). The court applied the same reasoning for cases under ch. 10.77 RCW (incompetent to stand trial and not guilty by reason of insanity). *State v. Ruff*, 122 Wn.2d 731 (1993).

The question of federal relief from disabilities is more complex. Although federal law has a provision for relief from the prohibition, the federal disqualification is effectively permanent. Federal law provides that a person may seek relief from the U.S. Attorney General if a federal disability has been imposed. 18 U.S.C. § 925(c). The Bureau of Alcohol Tobacco and Firearms (ATF) has authority to investigate requests for relief. 27 C.F.R. § 478.144(c). But Congress has not funded ATF review of relief applications. Therefore, in practice, relief from federal firearm disabilities is not available. The U.S. Supreme Court has held that absence of ATF administrative review precludes an individual’s right to subsequent judicial review of ATF’s inaction. *U.S. v. Bean*, 537 U.S. 71 (2002). Federal authorities are clear that federal relief is not available. One federal guidance sheet states “ONCE A PERSON IS PROHIBITED DUE TO THIS PROHIBITION, THEY WILL BE PROHIBITED FOR LIFE.”<sup>17</sup> In a letter to state attorneys general following the Virginia Tech shootings, the ATF director noted that “the firearms disability is permanent.”<sup>18</sup> A bill in Congress may change the federal policy by proposing that restoration of state rights would remove the federal disqualification.

Table 2 compares the major features of state and federal law.

Mental health intervention, commitment or finding.	State law firearms disqualification. RCW 9.41.040.	Federal law firearms disqualification. 18 U.S.C. § 922(g)(4).
72-hour evaluation.	No.	No.
14-day inpatient commitment.	No.	Yes.
90-day inpatient commitment.	Yes.	Yes.
90-day less restrictive.	Yes.	Yes.
180-day inpatient commitment.	Yes.	Yes.
180-day less restrictive.	Yes.	Yes.
Voluntary inpatient or outpatient treatment.	No.	No.
Not guilty by reason of insanity.	Yes.	Yes.
Incompetent to stand trial.	Yes.	Yes.
Mental health court diversion.	No.	Yes, if court order finds a mental illness.
Restoration of firearm rights.	Yes.	No.

Washington and federal firearm restrictions are reasonably well aligned. The major distinction is Washington’s 14-day commitment period. The other distinction involves orders by Washington’s “diversion” courts or “mental health courts” of lesser jurisdiction, which are not considered prohibitive under state law. Restoration provisions also differ, however as discussed below, this is an area where Congress may change federal law to require state restoration and federal recognition of state restorations.

### 3. The question of federal preemption.

Congress did not preempt state law when it enacted the Gun Control Act. 18 U.S.C. § 927. If Congress has not claimed exclusive jurisdiction over an area of regulation, state law in that area will only be preempted if it conflicts directly with federal law (conflict preemption). Conflict occurs when compliance with both federal and state law is impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Washington state and federal firearm laws are not in conflict because nothing in state law attempts to curtail federal efforts to restrict guns to individuals prohibited from possessing them under federal law. State law simply has an absence of prohibition for individuals with 14-day commitments. Such a person may lawfully possess a firearm under Washington law, but that possession would be unlawful under federal law. The two laws can operate independently.

### **Recommendations:**

- *Washington's firearm statute should be amended to prohibit individuals who have been involuntarily committed for 14 days from possessing a firearm. This would align Washington law with federal law.*
- *Washington's firearm statute should be amended to prohibit individuals who participate in mental health court proceedings from possessing a firearm. While such a prohibition may discourage some persons from participating, those persons should not be considered candidates for participation if they are unwilling to forego their firearm rights.*

### **III. WASHINGTON'S BACKGROUND CHECK SYSTEM FOR FIREARMS.**

It is one thing to statutorily restrict certain individuals from possessing firearms under state law. It is quite another task to develop a system that practically prevents them from obtaining firearms through a variety of lawful channels that may include firearms dealers, pawn shops or gun shows. Washington's firearms statute has additional provisions that assist state and local authorities in stopping guns from falling into the wrong hands.

- Issuance of concealed pistol licenses by local law enforcement subject to background checks (RCW 9.41.047);
- Regulation of dealer sales of pistols and a five-day wait period if the purchaser has no concealed pistol license (RCW 9.41.047);
- A waiver of confidentiality upon applying to purchase a pistol, and a directive to the Department of Social and Health Services, mental health institutions, and "health care facilities" to release information about an individual to determine eligibility to possess or be issued a concealed weapons license (RCW 9.41.094, .097);
- Authority for courts to order surrender and forfeiture of a firearm in the possession of a person who may not lawfully possess it (RCW 9.41.098 and 9.41.800);
- Regulation of state firearms dealers (RCW 9.41.100, .110);
- Good faith immunity for state and local governments or private agencies involved in the sale or transfer of firearms and the issuance of a concealed weapons license (RCW 9.41.0975); and
- It is important to recognize that state and local authorities do not regulate "long-gun" transfers or sales. Local law enforcement and DOL receive no information about persons who attempt or complete long-gun purchases. Dealers must conduct background checks with federal authorities before the transfer may proceed.

Based on our review of Washington’s firearm background check system, improvements should be made in the following areas:

- **Courts should submit records of ineligibility to DOL on a more complete and consistent basis.** Confidence in the firearm background check system could be improved with complete and consistent reporting by courts to the DOL firearms database.
  - **One pattern form for firearms ineligibility should apply to all mental health cases.** Consistency and timeliness in reporting ineligibility to DOL’s database could be achieved with the development and use of one pattern form that applies to all applicable mental health proceedings.
  - **The background check system for pistol transfers and concealed pistol licenses is fragmented.** State background checks are performed by local law enforcement agencies that check multiple databases. This is time consuming and labor-intensive. Washington has no centralized check system.
  - **Law enforcement needs better access to mental health records.** Officers on the street have no immediate access to records that provide information about whether a person is restricted from possessing a firearm due to mental health prohibitions, despite the fact that the legislature has granted law enforcement authority to access such information.
  - **Washington should develop a surrender and forfeiture program for mental health cases.** Once a person is prohibited from possessing a firearm due to a mental health commitment, authorities should have an effective system to remove any firearms from their home.
  - **Washington should attempt to address the issue of background checks at gun shows and pawn shops.** Policy makers should consider the development of instant background checks at guns shows, and ensure that pawnbrokers perform background checks and keep records of gun sales.
- A. Courts Should Submit Records of Ineligibility to DOL on a More Complete and Consistent Basis.**

Ch. 9.41 RCW dictates several key practices by courts that make mental health findings. A convicting or committing court shall “notify the person, orally and in writing, that the person must immediately surrender any concealed pistol license and that the person may not possess a firearm unless his or her right to do so is restored by a court of record. For purposes of this section a convicting court includes a court in which a person has been found not guilty by reason of insanity.” RCW 9.41.047(1). Further, courts must also forward a copy of the person’s driver’s license or identicard, or comparable information, to the DOL, along with the date of conviction or commitment. *Id.*

Once DOL receives the Notice of Ineligibility to Possess a Firearm from the court, DOL checks the name of the individual and date of birth against its Firearms Database. If no record is found, DOL creates a record of ineligibility. If a record of a handgun transfer or concealed pistol license does exist, DOL notifies the law enforcement jurisdiction where the individual resides and informs them of the ineligibility due to mental commitment.<sup>19</sup> After law enforcement verifies the information, law enforcement is asked to remove the firearm or revoke a firearms license. Although DOL destroys paper notices sent by the courts within two months, it retains an electronic version of the record which is made available to law enforcement through the State Patrol ACCESS system for use in conducting background checks for handgun transfers and concealed pistol licenses.<sup>20</sup>

The Notice of Ineligibility to Possess a Firearm is critical to the effectiveness of the state firearm background check system. If there is no notice to the individual during the court proceeding that he or she is barred from possessing a firearm, subsequent prosecution for unlawful possession of a firearm is unlikely to succeed. More importantly, if a notice of ineligibility is not sent by the court to the DOL for inclusion in its Firearms Database, law enforcement will not know whether or not the person currently possesses a firearm or whether a subsequent application for transfer of a pistol or concealed pistol license should be denied.

Participants in this workgroup identified several areas that require improvement, principally in court practices. Following a civil commitment or other disqualifying court order, there is concern that court clerks do not routinely send Notices of Ineligibility to Possess a Firearm to the state DOL for inclusion in DOL's database. Failure to do so, or to do so timely, has undermined law enforcement's confidence in the accuracy and completeness of the DOL database. For example, a sample of 31 NGRI court records from a cross-section of counties was checked to determine inclusion in the DOL Firearm Database. Only eight (or about one-quarter of the cases) were received by DOL for inclusion in its Firearms Database. This small review suggests that court clerks are not routinely sending Notices of Ineligibility to Possess a Firearm to DOL as required by RCW 9.41.047(1). (The NGRI records may, however, appear as convictions in ACCESS, which is also run as part of a firearms background check.)

The Virginia Tech Review Panel noted similar problems in Virginia, where court clerks in some jurisdictions do not send copies of court orders and a notice of ineligibility for inclusion in a state police database.<sup>21</sup>

Court clerks have a high workload and may not be trained in the urgency of sending ineligibility to possess notices to DOL. DOL has conducted training for court clerks, however, these may not be frequent enough to influence practice in all jurisdictions.

Finally, RCW 9.41.047 does not specify a time frame by which court clerks must send notices of ineligibility to possess a firearm to DOL. By contrast, the statute for domestic violence protection orders requires clerks to forward protection orders to law enforcement "on or before the next judicial day" and requires law enforcement to "forthwith" enter the order into a computerized database. RCW 26.50.100(1).

### **Recommendations:**

- *Administrative Office of the Courts (AOC) and the Department of Licensing (DOL) should work together to verify the completeness of the DOL Firearms Database and fill any gaps in records held by DOL. DOL should consider additional cross-checks of records held by the Department of Social and Health Services (DSHS) under disclosures allowed for program evaluation.*<sup>22</sup>
- *A timeframe should be established in statute for sending the ineligibility notice from committing courts to DOL.*

### **B. One Pattern Form for Firearms Ineligibility Should Apply to all Mental Health Cases.**

There is no pattern court form for ineligibility to possess a firearm that applies to all applicable mental health proceedings. A pattern form for “Notice of Ineligibility to Possess Firearm” was developed in 2005 for not guilty by reason of insanity cases.<sup>23</sup> It states: “Because you have been found not guilty by reason of insanity, effective immediately you may not own, use or possess any firearm unless your right to do so is restored by a court of record. You are further notified that you must immediately surrender any concealed pistol license.” The form is to be read to the defendant who signs and receives a copy. The form does not, however, contain elements required by RCW 9.41.047 that provides identifying information for DOL. Another pattern form exists for domestic violence cases advising the defendant that he or she is ineligible to possess a firearm and must surrender any firearm immediately.<sup>24</sup> This domestic violence form is detailed in its identifying information and would serve as the best template for a mental health ineligibility form. No such pattern forms have been developed for civil commitment cases or cases in which the defendant has been found incompetent to stand trial. The Pierce County Superior Court at Western State Hospital uses its own firearm form for civil commitments, which contains fields for name, aliases, date of birth, height, weight, eye color, race and sex.

Related to the lack of pattern forms, the Superior Court Mental Proceedings Rules (MPRs) fail to reference the firearms prohibition. Although the MPRs set forth the required format of numerous pleadings, the MPRs do not require a use of a firearms ineligibility form.

### **Recommendations:**

- *The Administrative Office of the Courts should develop one standardized Notice of Ineligibility to Possess Firearm form that can be used for all mental health cases. The pattern form should be modeled on the domestic violence form and have detailed fields that will assist DOL to enter identifying information. Necessary changes to court rules should also be made to require the use of the form by court clerks.*

- *Education and training should be provided to court clerks on using a pattern form and timely forwarding it to the DOL for inclusion in its Firearms Database.*

### **C. The Background Check System for Pistol Transfers and Concealed Pistol Licenses is Fragmented.**

Background checks for purchase of a pistol or application for a concealed pistol license begin with local law enforcement. Applications are received by law enforcement in person, by fax, or by mail, and law enforcement generally has five business days to perform the required background checks. The time may be extended to 30 days for an applicant whose record lacks certain dispositions, or up to 60 days for an applicant who is a new resident of Washington or lacks required identification. As noted above, law enforcement may check against many different databases. It is the dealer's responsibility to check NICS. RCW 9.41.090(2)(b). To initiate the NICS check, the purchaser must complete a Firearms Transaction Record (ATF form 4473) and the dealer will verify the purchaser's identity. The 4473 form asks the purchaser if they have ever been committed to a mental institution or been adjudicated as a mental defective. The Virginia Tech shooter answered "no" to these questions, although the Virginia panel noted that it is impossible to know whether he understood that the correct answer was "yes".<sup>25</sup>

In Washington, the responsibility to conduct state background checks lies with 291 local law enforcement agencies. Some jurisdictions may perform certain background checks while others may not. In addition, the process is time consuming and labor-intensive for law enforcement. Local law enforcement checks the applicant against multiple state and federal databases, including the Local Records Management System, WACIC/WASIS, Department of Social and Health Services, DOL, and the federal Automated Alien Query (AAQ) process for non-U.S. citizens. The firearms dealer is required to check NICS.

This process is not completely automated. For example, RCW 9.41.090(2)(b) requires a sheriff or police chief to "check the department of social and health services' electronic data base and with other agencies or resources as appropriate, to determine whether applicants are ineligible under RCW 9.41.040 to possess a firearm." Law enforcement has no access to a DSHS "electronic data base." Rather, law enforcement faxes an application to DSHS and DSHS staff manually checks against an electronic file that shows prior civil commitments. While DSHS records are considered accurate, the process is slow and labor intensive. According to DSHS, it performs about 5,000 firearm background checks annually and has no dedicated FTE for this function. Some requests even come from Oregon.

The time-consuming nature of these background checks has created concern that the system causes "default approvals." Under the statute, a dealer forwards a pistol transfer application to law enforcement for a background check. Law enforcement has five business days (or in some cases, longer) to process that application. RCW 9.41.090(1)(c). After five days elapses, however, law enforcement is only technically required to notify the dealer if approval has been denied. RCW 9.41.090(5). Therefore, it is possible that silence by law enforcement may be construed by the dealer as "approval" and the transfer will proceed even though no

background check has been performed. DOL encourages law enforcement to notify dealers of both approvals and denials, but not all law enforcement agencies may follow this practice. DOL believes dealers would support such a requirement because any law enforcement approval would come with a federal ATF tracking number that will serve as documentation during ATF audits of dealers.

Reliance on 291 sheriffs and police departments to conduct firearm purchase background checks is another concern. Washington's background check system is not centralized and therefore lacks accuracy and consistency. Based on data accumulated by NICS, Washington is one of eight states that act as a "partial point of contact" state for firearm purchases.<sup>26</sup> A "partial point of contact" means that state or local law enforcement conduct checks for handguns or handgun permits, while the FBI has responsibility for conducting (at dealer request) checks for long-guns. The responsibility is further decentralized in Washington, however, because even handgun checks are not conducted by a single state agency. In 10 states (including Washington) the responsibility is given to hundreds of local law enforcement agencies.<sup>27</sup>

By contrast, some states require that dealers contact one state agency for state and federal background checks. For example, the Oregon State Police acts as the single contact in Oregon for dealers checking a purchaser's background against both state and federal NICS records. Oregon State Police receives information from various sources, including civil commitment records from the State Department of Mental Health. Checks are performed by telephone only and take three minutes.<sup>28</sup> Washington's local law enforcement agencies must check multiple databases, and the checks may be performed differently depending on jurisdiction.

#### **Recommendations:**

- *Washington's firearm statute should be amended to require law enforcement to notify dealers when pistol transfers are approved. This change in law would support best practice and relieve ambiguity in cases of silent or "default approvals."*
- *In the long-term, policy makers should consider a centralized firearms background check system where firearms dealers contact one state agency which has access to all necessary records to perform a state background check. Dealers could remain responsible for conducting a federal NICS check, or that could become a state responsibility. This change would lead to greater efficiency, but would require significant statutory changes and fiscal appropriation to improve information systems.*

#### **D. Law Enforcement Needs Better Access to Mental Health Records.**

A recurring theme by individuals representing law enforcement and prosecutors is the need for greater access to mental health records by law enforcement officers on the street. This issue centers on officer safety and public safety. In the 2005 legislative session, confidentiality provisions in the civil commitment statutes were amended to grant law enforcement an express right of access to mental health information for purposes of enforcing the state law restrictions

on firearms. See RCW 71.05.390(17) and 71.34.340(16). Law enforcement is concerned that some mental health providers and the Regional Support Networks are not forthcoming in response to inquiries about a person's mental health history. This problem can be remedied by better education and contract language. At the request of the workgroup, DSHS has placed a term in its new state mental health contract, effective October 1, 2007, requiring Regional Support Networks and provider subcontractors to comply in a full and timely manner with law enforcement requests for information regarding firearms possession.

Law enforcement and prosecutor representatives also requested that information systems be designed to give officers on the street greater access to an individual's mental health history. If a mental health history is known to the officer, the officer's approach may be tailored accordingly and could diminish the possibility of violence. In addition, if the officer knows that a person in possession of a firearm is prohibited from possessing that firearm, probable cause for an arrest is likely to be established.

At the present time, an officer can retrieve records from the DOL firearms database through the State Patrol ACCESS system. The amount of information available from DOL is limited, however, by the antiquated nature of the ACCESS computer. Therefore, a positive response from the DOL database will only show that the person is "ineligible to possess" and will not show the reason why. The officer may then have to contact local mental health agencies or Regional Support Networks to determine if civil commitments have been entered in the past. A number of solutions to this problem have been proposed, including the development a new web-based application available to law enforcement. Another solution is moving the DOL firearms database to the DOL Driver and Plate database, which is a web-based application that could accessed by law enforcement dispatchers. State Patrol representatives have discussed loading civil commitment and other mental health court records into ACCESS, however, the workload involved in that option may outweigh its utility.

### **Recommendations:**

- *To promote public safety, law enforcement, the Department of Licensing, and the Administrative Office of the Courts (if necessary) should work together to achieve better electronic access by law enforcement to records of civil commitment and other disqualifying mental health interventions.*
- *The DSHS Mental Health Division should distribute guidance to public mental health entities to educate them about permissible disclosures to law enforcement when contacted for firearms background checks.*

### **E. Washington Should Develop An Effective Surrender And Forfeiture Program For Mental Health Cases.**

As discussed above, state law has provisions for surrender and forfeiture of firearms upon court order. RCW 9.41.098 and 9.41.800. DOL will contact local law enforcement if DOL receives a notice of ineligibility that suggests that a person in the DOL database is disqualified under state law due to a mental health prohibition. But there appears to be no other efforts in this area. The effectiveness of DOL's efforts are limited by the fact that it only has records of

handgun transfers and concealed pistol licenses. Long-gun transfers will not appear in the DOL Firearms Database. At the present time, there appear to be no efforts by courts, law enforcement or mental health officials to remove firearms from the homes of individuals who are disqualified.

This issue has been developed in the area of domestic violence. For example, the Gender and Justice Commission of the state courts has a “Firearms and Domestic Violence” program. Thurston County Superior Court Judge Chris Wickham has developed protocols for Thurston County. King County has a surrender and forfeiture program developed in 2003 after a report identified a lack of enforcement and procedures in the wake of fatality reviews conducted in 2000 and 2002.<sup>29</sup> The development of these types of removal and seizure programs for high-risk individuals is one of the recommendations of a recent report on gun violence by the International Association of Chiefs of Police.<sup>30</sup>

**Recommendation:**

- *Courts, law enforcement and mental health officials should develop a firearm surrender and forfeiture program for mental health cases that involves court scrutiny of less restrictive placements, home visits, and database checks.*

**F. Instant Background Checks Should be Available for Gun Shows in Washington.**

Additional protections to keep guns out of the hands of individuals with mental health histories may be of marginal utility if those individuals can purchase firearms at gun shows that do not conduct background checks. The International Association of Chiefs of Police has noted that private “secondary market sales” (private sales, Internet sales and gun shows) account for 40 percent of all firearms transfers.<sup>31</sup> The Virginia Tech Review Panel recommended state background checks for all gun sales, including sales at gun shows.<sup>32</sup> Gun shows are typically open to the public for a fee and are sponsored by commercial promoters or organizations of firearms enthusiasts. Gun shows are a venue where federal firearms licensees, who are licensed by the Bureau of Alcohol Tobacco and Firearms, may transfer firearms along side private sellers or hobbyists. Licensees are subject to all federal laws regarding firearms sales, including background checks. Private sellers are generally not subject to the firearms restrictions that apply to licensed dealers.<sup>33</sup>

Under Washington law, the definition of firearms “dealer” excepts a person who “makes only occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or sells all or part of his or her personal collection of firearms.” RCW 9.41.010(10). Therefore, not all sellers at gun shows are obligated to perform state background checks. Under federal law, only licensed dealers “engaged in the business” of dealing firearms are subject to the background check requirements of the Brady Act. 18 U.S.C. § 922(t). It is nonetheless unlawful for anyone to knowingly transfer a firearm to a person who is prohibited from possessing a firearm. 18 U.S.C. § 922(d).

Legislative efforts to address this issue at the state and federal level have not succeeded.<sup>34</sup> From the perspective of gun show operators, a uniform requirement that all sellers perform background checks could result in delayed transfers due to the time needed to complete the checks (five days under Washington law, and three days under federal law). Delays in transfers could adversely impact collectors and hobbyists who participate in shows that occur one weekend a month. Washington Arms Collectors, the leading gun show operator in Washington, addresses the issue of background checks through the following rule:

Any member who is required to conduct a NICS background check on a sale of a firearm to a member at a gathering of members and who receives a denial, must IMMEDIATELY report said denial and the identity of the prospective purchaser to the Show Manager or his designee. Failure to report such information may be cause for disciplinary action.<sup>35</sup>

The rule does not address which members are required to conduct a NICS background check on the sale of a firearm. Presumably, the rule applies only to federally-licensed firearms dealers. Another rule provides that any “member” whose purchase is denied by a federal background check is suspended from the organization.<sup>36</sup>

**Recommendation:**

- *Policy makers and state agencies should consider the development of an instant background check service that can be used at gun shows.*

**G. Existing Background Check Requirements Should be Enforced at Pawn Shops.**

Unlike private sellers at gun shows, pawn shops that receive and transfer firearms are subject to state and federal laws requiring background checks. In addition, pawn shops have the option of performing federal background checks on individuals prior to accepting the firearm in pawn.<sup>37</sup> Policy makers may wish to consider an education and outreach campaign to encourage compliance with existing state and federal firearms laws that apply to pawn shops. In addition, state law requires pawnbrokers to record certain information about pawned firearms. RCW 19.60.020(1)(e).

**Recommendation:**

- *Local law enforcement should consider increased education and enforcement of requirements that pawn shops request background checks on applicants who attempt to purchase firearms.*

#### **IV. THE FEDERAL BACKGROUND CHECK SYSTEM**

The federal prohibition on individuals with serious mental health histories possessing firearms has been in place since 1968. Only recently, however, has a practical system been developed to prevent the sale of firearms to those individuals. In late 1998, the NICS began operation. State participation in this system is critical because the states hold the majority of

mental health records that demonstrate whether a person is federally disqualified from possessing a firearm.

Following the Virginia Tech tragedy, a report to the president was submitted by the secretaries of Health and Human Services, Education and the U.S. Attorney General.<sup>38</sup> Although it was not a detailed investigation of the Virginia Tech tragedy, the report reviewed issues facing the nation regarding the balance between privacy and security, access to mental health services, school campus safety and the need for “accurate and complete” data reporting “to keep guns out of the wrong hands.” The report noted:

Only 23 states currently provide any information to the NICS on persons disqualified from possessing firearms under federal law for reasons related to mental health, and many of those that do provide information provide very few records. For the NICS to be maximally effective in keeping firearms out of the hands of persons prohibited by federal law, including those prohibited by virtue of reportable and qualifying mental health history, all states need to understand the full scope of the existing federal laws and submit, or make accessible, appropriate information to the NICS.<sup>39</sup>

The report went on to recommend that states address legal and financial barriers to submitting all disqualifying records to NICS. The report also recommended that the FBI and ATF continue to encourage states to submit records to NICS. The Virginia Tech Review Panel made the same recommendation.<sup>40</sup>

#### **A. The Federal NICS Database.**

Following the attempted assassination of President Reagan and the injuries sustained by press secretary James Brady in 1981, Congress debated the issue of firearms legislation for years. In 1993, Congress passed the Brady Handgun Violence Prevention Act (the “Brady Act”). The Brady Act amended the Gun Control Act and provided a method for blocking transfers to prohibited persons. From 1994 to 1998, the “interim” provisions of the Act were put in place which required dealers to request background checks of prospective purchasers conducted by the chief law enforcement officer of the jurisdiction where the licensee sold firearms. *See* 18 U.S.C. § 992(s). Part of the interim provisions were struck down by the U.S. Supreme Court in 1997 under federalism principles. *U.S. v. Printz*, 521 U.S. 898 (1997). The court ruled that under the Tenth Amendment, the federal government could not require state officials to perform federal duties. The “permanent” provisions of the Brady Act took effect in 1998 with the establishment of NICS. *See* 18 U.S.C. § 922(t). NICS began to operate on November 30, 1998.<sup>41</sup> The Brady Act provides immunity in an action for damages, to federal, state and local officials responsible for providing information to NICS for failure to prevent the sale or transfer of a firearm to a person who may not lawfully possess a firearm, and immunity for preventing the transfer or sale of a firearm to a person who may lawfully possess a firearm. 18 U.S.C. § 922(t)(6).

NICS allows firearms dealers to contact a federal database, either by phone or electronically (internet access to dealers is known as “e-check”), to determine on an instant basis whether a prospective purchaser is prohibited from possessing a firearm. NICS allows checks on

both purchases of handguns and long-guns, and also allows dealers the option of requesting a check on a person who attempts to pawn a firearm. Although firearms dealers are licensed by the Bureau of Alcohol Tobacco and Firearms (ATF), NICS is operated by the Federal Bureau of Investigation (FBI). NICS receives records of ineligible persons from various federal and state sources.

NICS checks are initiated either by the dealer who contacts NICS directly or by a state “point of contact” (POC) agency designated by the state, or both. The Washington State Patrol is the POC for this state. Washington is, however, considered a “partial POC” state because sheriffs and police departments request NICS background checks for handguns, but dealers perform the NICS background checks for long-guns.<sup>42</sup> The NICS check involves three major federal databases: the National Crime Information Center (NCIC), the Interstate Identification Index (III) and the NICS Index. If the transferee is not a U.S. citizen, a check may also be performed on Immigration and Customs Enforcement (ICE) records. NCIC is the nation’s most extensive criminal justice information system with records on wanted persons and persons subject to protection or restraining orders. III is a pointer system for interstate exchange of criminal history records, including records of felony and misdemeanor convictions. The NICS Index was created specifically for NICS and includes records of individuals subject to the disqualifying categories of the Gun Control Act, including illegal aliens, dishonorable discharges, those who have renounced their citizenship and the mental health prohibitions. All the firearm disqualifying categories can be checked in a single computerized search. Before NICS, records in the NCIC, III and the new NICS Index were not centralized.

For purchases made in Washington State, the method of federal background checks differs according to the type of firearm to be purchased and whether the purchaser already has a concealed pistol license. Table 3 shows responsibility for background checks.

Table 3: Type of Firearm Determines Which Entity Performs a Background Check.

Type of firearm.	Who checks state databases?	Who checks the federal NICS database?
Concealed pistol license.	Local law enforcement.	Local law enforcement.
Handgun with concealed pistol license.	Local law enforcement.	Dealer.
Handgun <i>without</i> concealed pistol license.	Local law enforcement.	Local law enforcement.
Long-gun (rifles, shotguns).		Dealer.

After the name and identifying information of the purchaser are submitted to NICS, the dealer is notified instantaneously that the transfer may proceed, may not proceed, or is delayed pending further review of the applicant’s history. If a transfer is delayed for further review, but the dealer does not receive a response from NICS within three business days, the transfer may proceed at the dealer’s discretion. These are known as “default proceeds.” If FBI/NICS

determines that a firearm has been transferred that should have been denied, the case is referred to ATF and ATF is responsible for retrieval of the firearm.<sup>43</sup>

NICS regulations provide several avenues for an individual to challenge the denial of firearm transfer or seek the correction of erroneous information entered into NICS. A person may seek correction from the “denying agency,” which may be state or federal law enforcement. 28 C.F.R. § 25.10(c). In turn, the “denying agency” shall take steps to verify the information from the “originating agency,” and if the record is erroneous, “take all necessary steps to correct the record in NICS.” 28 C.F.R. § 25.10(c). Alternatively, the individual may contact the FBI directly, which will contact the data source to verify the accuracy of the information that caused a denial of federal firearm rights. 28 C.F.R. § 25.10(d). Individuals may also contest the accuracy of a disqualifying record by bringing an action in court against the federal, state or other political subdivision responsible for providing the contested information. 28 C.F.R. § 25.10(f). Of 67,000 denials issued by FBI/NICS in 2005, 12 percent were appealed. About 21 percent of those appeals resulted in the denial being overturned.<sup>44</sup>

The Brady Act does not require states to submit information on prohibited persons to NICS. In addition, the federalism principles enunciated in *U.S. v. Printz* may constrain mandatory participation, at least under Commerce Clause legislation. Following the Virginia Tech Incident, one federal official acknowledged that states are not required to submit mental health records to NICS. “It’s a voluntary process. There’s no requirement.”<sup>45</sup> The Report to the U.S. President on Virginia Tech also acknowledged that state submissions are voluntary.<sup>46</sup>

One year after implementation, the NICS Index contained just over one million records of individuals barred from possessing a firearm. Ninety percent of those records were Immigration and Naturalization Service records of illegal aliens. In 2000, the General Accounting Office noted that states faced barriers to submitting records due to other fiscal priorities, a refusal by state law enforcement to take responsibility for performing checks on long-gun purchases (potentially an issue for Washington State), states’ rights, and a lack of resources or expertise.<sup>47</sup> As of January 2006, the number of records in the NICS Index had increased to almost four million records, although the total number of records accessed for NICS checks (including III and NCIC) has increased to 63 million.<sup>48</sup>

## **B. DSHS Began Submitting Mental Health Records to NICS in 2004.**

DSHS submitted an initial batch of 47,000 records to NICS in 2004.<sup>49</sup> Today, Washington is one of 23 states that have submitted any mental health records to NICS, and it is one of only four states to submit records regularly. In 2002, FBI/NICS contacted WSP and initiated a series of policy and technical meetings over the next year to discuss voluntary submission of state mental health records to NICS. WSP, in turn, contacted DSHS and requested DSHS’ participation.<sup>50</sup> DSHS subsequently received direction from the Governor’s Office to voluntarily submit mental health records. To implement the reporting, funds were obtained from the National Criminal History Improvement Program (NCHIP), administered by the Bureau of Justice Statistics. Ultimately, the funds were not needed. Throughout this process, DSHS sought legal advice from the Attorney General’s Office in regards to federal and state law, and permissible uses of data transferred to NICS.

One paramount issue raised by the submission of state mental health records to FBI/NICS is whether state law allows such disclosures to federal authorities. In general, all information about involuntary mental health admissions is confidential.<sup>51</sup> However, an exception to the strict rule of confidentiality in Ch. 71.05 RCW does enable release of limited information to law enforcement. In pertinent part, the statute provides:

Information and records may be disclosed only: . . . To law enforcement officers . . . which information or records are necessary to carry out the responsibilities of their office. [T]he extent of information that may be released is limited as follows:

- (i) Only the fact, place, and date of involuntary commitment, the fact and date of discharge or release, and the last known address shall be disclosed upon request;
- ...
- (v) Disclosure under this subsection is mandatory for the purposes of the health insurance portability and accountability act.

RCW 71.05.390(7)(b).<sup>52</sup>

While general statutory authority for the disclosure of this information exists, it may be preferable to have specific statutory authority for such releases. For example, an exception to confidentiality was adopted in 2005 to enable law enforcement access to mental health information for purposes of enforcing state law gun restrictions. See RCW 71.05.390(17) and RCW 71.34.340(16).

**Recommendation:**

- *Policy makers should consider a technical correction that provides specific legislative authority for Washington State submissions to NICS.*

**C. Courts, Not DSHS, Should Submit Disqualifying Records to NICS.**

DSHS' participation in this effort is a major contribution to public safety. There are, however, significant shortcomings to the data submitted to NICS. The primary shortcoming is DSHS does not receive its information from the courts. Every commitment or mental health finding that makes a person ineligible to possess a firearm occurs because of a court order. DSHS supplies NICS with records gleaned from three basic sources: State hospitals admission data, Regional Support Networks (county-based mental health authorities) service data, and community inpatient psychiatric inpatient billing records. None of these data sources were originally designed to be used in this manner. First, DSHS' primary source of information is data received by headquarters on a daily basis about state hospital admissions and whether the patients are being held on an involuntary basis. This data captures commitments for mental illness of 14 days or greater, commitments for criminal insanity, and several other categories.<sup>53</sup> This data is considered reasonably reliable because it originates with DSHS. Nonetheless, the source of the information is state hospital admission codes, not court records. Second, data

received from Regional Support Networks captures local detentions (principally 14-day commitments or 90-day commitments) that occur in six evaluation and treatment facilities across the state. Under DSHS' contracts with the Regional Support Networks, this data must be submitted to DSHS within 60 days of the close of each calendar month in which the patient "encounter" occurred. If the service was provided by a subcontractor to the Regional Support Network, the data need only be reported within 60 days of collection or receipt of the data from the subcontracted providers.<sup>54</sup> Most data from the evaluation and treatment facilities is posted to DSHS' computers 57 days after the treatment occurs, however, the average post is 75 days due to some cases that are posted with greater delay.<sup>55</sup> Due to this latency, DSHS excludes Regional Support Network records that are older than six months from the records submitted to NICS. Lastly, DSHS receives Medicaid billing data from community hospitals that provide inpatient psychiatric care. An example of this type of provider would be the psychiatric unit at Harborview Medical Center in Seattle. This record may yield some information about length of stay and whether the patient is voluntary or involuntary, but the record can change many times before the claim is finally settled between the hospital and DSHS. A further limitation is that for the Regional Support Network data and the hospital billing data, persons not covered by Medicaid (i.e., persons who are private pay or with private insurance) are unlikely to be captured in the data submitted to DSHS. Thus, it is unlikely that mental health commitment records relating to anyone not covered by Medicaid are being submitted to NICS.

Once this data is compiled at DSHS headquarters, it is cross-checked and compiled into a monthly submission to NICS. The actual submission of data to NICS occurs when DSHS sends, on a monthly basis, an encrypted floppy disk by regular mail. An average of 160 to 180 records is submitted to NICS each month. NICS loads the data and a NICS analyst sends an error list back to DSHS for further review. DSHS should explore the possibility of more frequent electronic submissions to FBI/NICS, perhaps through a secure website such as [www.leo.gov](http://www.leo.gov).

In summary, records submitted by DSHS to NICS are subject to the following limitations:

- DSHS receives data daily from its state hospitals but makes monthly submissions to NICS.
- Regional Support Networks take about 60 days to report local detention data to DSHS.
- Records based on community hospital billing data are limited to Medicaid-eligible individuals.
- Findings by criminal courts of incompetency to stand trial are not reported to DSHS. These persons may or may not be sent to a state hospital for restoration, and may or may not be subsequently civilly committed, either in a community facility or a state hospital.
- Findings by criminal courts of not guilty by reason of insanity are not reported to DSHS. Again, those individuals may or may not receive subsequent care in a state hospital.

Because every mental health commitment is the result of a court order, the courts are the most reliable source of information about whether an individual has been committed to a mental institution. At this time, however, the courts do not have the technology and administrative coordination to make NICS submissions. A 2005 Bureau of Justice report, based on state survey results, identified Washington as one of three states that does not have the technology to reliably submit denial information based on mental health records to FBI/NICS.<sup>56</sup> Washington was also one of three states where state officials cited the “current fragmented nature of conducting firearms purchases and issuing firearms permits [as preventing] State officials from providing denial information from mental health records to FBI/NICS.”<sup>57</sup> Washington State is currently reporting DSHS records to FBI/NICS, however, these records are less reliable than those held by the courts.

As discussed below, reporting by the courts may be required under new federal legislation. In addition, reporting by courts would relieve any privacy concerns related to DSHS’ reporting of mental health data to NICS. The Health Insurance Privacy and Accountability Act (HIPAA) places privacy restrictions on “covered entities” such as DSHS, which may disclose health information without patient authorization only under limited circumstances. One of those exceptions is a release to law enforcement agencies to lessen a serious and imminent threat to public safety. 45 C.F.R. § 164.512(j)(1)(i). After Virginia Tech, it may be easier to justify DSHS disclosures to NICS as such a release. The boundaries of various HIPAA exceptions have not been tested in litigation. The Virginia Tech panel noted that this HIPAA exception “has been construed to be limited to circumstances involving imminent, specific threats to health or safety.”<sup>58</sup> If so, the exception might not justify mass disclosures by DSHS. Another HIPAA exception applies to responses to law enforcement administrative requests, which might include FBI/NICS’ request for Washington State’s mental health records. 45 C.F.R. § 164.512(f)(1)(ii)(C). Regardless, transmittals by the courts to NICS would involve no HIPAA constraints because courts are not considered “covered entities.”

As other reports have noted, state submission of records to NICS is a critical step in protecting public safety. A NICS record will always be checked if a person attempts to purchase a firearm from a registered dealer. Further, unlike a state background check, a person cannot avoid NICS checks by attempting to purchase a firearm in another state. Finally, NICS is the *only* database that is checked when Washington residents attempt to purchase a long-gun.

Funding to improve the NICS submission process will be a critical issue. H.R. 2640, discussed below, is intended to fund such improvements but it may not pass this year. An alternative source of funding is the federally-funded National Criminal History Improvement Program. In Washington State, grant applications are administered by the Department of Information Services, in coordination with the Justice Information Network. The next funding cycle for these grants is expected in November 2007, with state proposals to be evaluated by the Justice Information Network on January 15, 2008.<sup>59</sup>

### **Recommendations:**

- *In the near-term, DSHS should submit current data to NICS on a more frequent basis than once a month. If possible, these submissions should be made through electronic file transfer. This practice will enhance public safety by making sure that a record of involuntary psychiatric hospitalization is entered into NICS promptly and prevent the person from purchasing a firearm immediately upon release.*
- *In the near-term, DSHS should consider a contract amendment to require Regional Support Networks to report data on local detentions more timely than 60 days from the date of service.*
- *In the long-term, Washington State Courts should develop the capability to submit records directly to NICS. Court records are the most accurate reflection of whether a person has been civilly committed, found incompetent to stand trial, or found not guilty by reason of insanity. Automated transmittal by courts to NICS will ensure that all records of prohibited persons are sent in a timely manner. If courts believe state legislative authority is needed, statutory changes should be pursued.*

**D. New Federal Legislation Would Require States to Automate Transmittals to NICS.**

This year Congress has considered a bill to require States to submit records to NICS and to help fund the significant system changes needed to accomplish that goal. In June 2007, the House of Representatives passed H.R. 2640, the “NICS Improvement Amendment Act of 2007.” The bill has been referred to the Senate Judiciary Committee, where its passage to the Senate floor has been blocked by the opposition of one senator.<sup>60</sup> If signed into law, the bill will be the first federal gun legislation since the 1994 assault weapons ban (which has since expired) and the 1996 addition of domestic violence to the list of federal firearm prohibitions. The legislation is supported by both the Brady Campaign and the National Rifle Association.<sup>61</sup>

H.R. 2640 recognizes that states need funding and assistance in providing data to NICS and takes a “carrot and stick” approach to the issue. The bill will provide funding to states to develop the capability to make data transmittals to NICS but conditions that assistance on providing consistent data. First, states must provide the U.S. Department of Justice with a “reasonable estimate” of the number of individuals who are federally prohibited from possessing firearms (due to felony convictions, outstanding warrants, addicted to controlled substances, adjudicated mentally defective or committed to a mental institution, and subject to domestic violence restraining order or convicted of domestic violence). States must “look back” 30 years in reviewing data for submission to NICS. In fact, a recent survey sent to Washington State by the U.S. Bureau of Justice Statistics asked the state to estimate the percentage of federally-disqualifying records that were sent to NICS.<sup>62</sup>

States and Tribes that participate are eligible for grants to develop capability to electronically submit records to NICS and perform NICS background checks. Congress has provided \$250 million per year for FFY 2008 to FFY 2010 for this purpose. Grants to state and tribal court systems are also available to automate and transmit arrest and conviction records,

court orders, mental health adjudications and commitments to Federal and State repositories. Congress has provided \$125 million for FFY 2008 to FFY 2010.

States that provide less than 60 percent of estimated data in the first five years will face three percent reductions in law enforcement funding under the Omnibus Crime Control and Safe Streets Act program. After five years, states that provide less than 90 percent of estimated data are subject to five percent reductions.

States must have a “relief from disabilities” program under State law for individuals adjudicated as a mental defective or committed to a mental institution. If relief (or “restoration”) is granted, the adjudication or commitment is deemed not to have occurred for purposes of the federal law prohibition. (Washington already has a restoration provision. This is a significant change; federal agencies currently do not recognize state law restorations.) There is some concern, however, that the bill may require the removal of a person’s record from NICS but would not effectively change their status as prohibited under the Gun Control Act.<sup>63</sup>

If H.R. 2640 passes in its present form, states must transmit records to NICS electronically. Congress’ expectation is those records should be transmitted by state courts. The bill makes grants to states “for use by the state court system to improve the automation and transmittal of criminal history dispositions, [convictions for] domestic violence . . . and mental health adjudications or commitments, to Federal and State records repositories...” H.R. 2640, Sec. 301.

## **V. CONCLUSION AND SUMMARY OF RECOMMENDATIONS**

Washington’s firearm background check system has several strengths. First, the state background check system provides redundancy to the federal system. Second, unlike many other states, Washington has been willing to cooperate with federal authorities by participating in the NICS background check system and contributing records.

Nonetheless, Washington can improve its practices in a number of key areas, including more complete reporting of ineligibility records to the state firearms database, alignment of state ineligibility standards with the federal law, centralization of data collection, and developing the capability to transmit accurate and complete court records to NICS.

## **Appendix A: RECOMMENDATIONS**

### **Administrative Changes**

1. Administrative Office of the Courts (AOC) and the Department of Licensing (DOL) should work together to verify the completeness of the DOL Firearms Database and fill any gaps in records held by DOL. DOL should consider additional cross-checks of records held by the Department of Social and Health Services (DSHS) under disclosures allowed for program evaluation.
2. The Administrative Office of the Courts should develop one standardized Notice of Ineligibility to Possess Firearm form that can be used for all mental health cases. The pattern form should be modeled on the domestic violence form and have detailed fields that will assist DOL to enter identifying information. Necessary changes to court rules should also be made to require the use of the form by court clerks.
3. Education and training should be provided to court clerks on using a pattern form and timely forwarding it to the DOL for inclusion in its Firearms Database.
4. To promote public safety, law enforcement, the Department of Licensing, and the Administrative Office of the Courts (if necessary) should work together to achieve better electronic access by law enforcement to records of civil commitment and other disqualifying mental health interventions.
5. The DSHS Mental Health Division should distribute guidance to public mental health entities to educate them about permissible disclosures to law enforcement when contacted for firearms background checks.
6. Courts, law enforcement and mental health officials should develop a firearm surrender and forfeiture program for mental health cases that involves court scrutiny of less restrictive placements, home visits, and database checks.
7. In the near-term, DSHS should submit current data to NICS on a more frequent basis than once a month. If possible, these submissions should be made through electronic file transfer. This practice will enhance public safety by making sure that a record of involuntary psychiatric hospitalization is entered into NICS promptly and prevent the person from purchasing a firearm immediately upon release.
8. In the near-term, DSHS should consider a contract amendment to require Regional Support Networks to report data on local detentions more timely than 60 days from the date of service.

9. Policy makers and state agencies should consider the development of an instant background check service that can be used at gun shows.
10. Local law enforcement should consider increased education and enforcement of requirements that pawn shops request background checks on applicants who attempt to purchase firearms.

### **Legislative Changes**

1. Washington's firearm statute should be amended to prohibit individuals who have been involuntarily committed for 14 days from possessing a firearm. This would align Washington law with federal law.
2. Washington's firearm statute should be amended to prohibit individuals who participate in mental health court proceedings from possessing a firearm. While such a prohibition may discourage some persons from participating, those persons should not be considered candidates for participation if they are unwilling to forego their firearm rights.
3. A timeframe should be established in statute for sending the ineligibility notice from committing courts to DOL.
4. Washington's firearm statute should be amended to require law enforcement to notify dealers when pistol transfers are approved. This change in law would support best practice and relieve ambiguity in cases of silent or "default approvals."
5. In the long-term, policy makers should consider a centralized firearms background check system where firearms dealers contact one state agency which has access to all necessary records to perform a state background check. Dealers could remain responsible for conducting a federal NICS check, or that could become a state responsibility. This change would lead to greater efficiency, but would require significant statutory changes and fiscal appropriation to improve information systems.
6. Policy makers should consider a technical correction that provides specific legislative authority for Washington State submissions to NICS.

7. In the long-term, Washington State Courts should develop the capability to submit records directly to NICS. Court records are the most accurate reflection of whether a person has been civilly committed, found incompetent to stand trial, or found not guilty by reason of insanity. Automated transmittal by courts to NICS will ensure that all records of prohibited persons are sent in a timely manner. If courts believe state legislative authority is needed, statutory changes should be pursued.

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## END NOTES

<sup>1</sup> Virginia had submitted 80,000 records to the NICS database since 2003. Tim Craig, “Ban on Sale of Guns to Mentally Ill is Expanded,” Washington Post, May 1, 2007, page B01.

<sup>2</sup> John K. Wiley, “Idaho courthouse shooting reveals difficulty of locking up mentally ill.” AP, May 22, 2007. [www.findlaw.com](http://www.findlaw.com)

<sup>3</sup> Amy Cannata and Benjamin Shors, “Moscow shooter identified,” Spokane Spokesman Review, May 21, 2007.

<sup>4</sup> Robert Jamieson, Jr., “Praise police for preventing a bloodbath,” Seattle Post-Intelligencer, April 26, 2007.

<sup>5</sup> Telephone and interview notes, with Jessie Phillips, Gun Crime Program Analyst, Seattle Police Department.

<sup>6</sup> Memo from Deputy AG Rob Costello to AG Rob McKenna, May 3, 2007 outlining workgroup purpose and scope.

<sup>7</sup> The Seattle mental health courts are recipients of grants from the U.S. Justice Department. Evaluations of the Seattle courts as well as one operated by Clark County are available from the Bureau of Justice Administration: [http://www.ojp.usdoj.gov/BJA/evaluation/psi\\_courts/mh6.htm](http://www.ojp.usdoj.gov/BJA/evaluation/psi_courts/mh6.htm)

<sup>8</sup> Paul Shukovsky, “Law Offered No Way to Take Suspects Weapons,” Seattle Post-Intelligencer, August 10, 2000.

<sup>9</sup> An example of a diversion case is J.S., described in the introduction to this paper, who displayed a rifle in a threatening manner in Seattle two days before the Virginia Tech incident. J.S. was charged in King County Superior Court with unlawful display and unlawful possession of a firearm. His case was then referred to King County District Mental Health Court, where he pled guilty to one charge in return for a suspended sentence and agreement to participate in treatment. J.S. was given credit for time served in jail and his remaining sentence was suspended.

<sup>10</sup> Improving Access to and Integrity of Criminal History Records, Bureau of Justice Statistics, 2005, p. 27.

<sup>11</sup> The complete list of prohibited persons are persons who:

- (1) has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
- (2) is a fugitive from justice;
- (3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act ([21 U.S.C. § 802](#)));
- (4) has been adjudicated as a mental defective or who has been committed to a mental institution;
- (5) is an illegal alien;
- (6) has been dishonorably discharged from the Armed Forces;
- (7) has renounced U.S. citizenship;
- (8) is subject to a court order restraining him or her from harassing, stalking, or threatening an intimate partner or child of an intimate partner; and
- (9) has been convicted in any court of a misdemeanor crime of domestic violence.

18 U.S.C. § 922(g).

<sup>12</sup> What follows is a brief summary of case law regarding the term “committed to a mental institution”:

- “Committed to a mental institution” means formal commitment, not hospitalized for observation and examination. *U.S. v. Hansel*, 474 F.2d 1120 (8<sup>th</sup> Cir., 1973), *accord U.S. v. Giardina*, 861 F.2d 1334 (5<sup>th</sup> Cir., 1988) (formal judicial commitment required).
- Involuntary admission for psychiatric treatment without judicial review constitutes “commitment” under New York state law. Defendant “committed” for purpose of Gun Control Act. *U.S. v. Waters*, 23 F.3d 29 (2<sup>nd</sup> Cir. 1994).

- 90-day order by Texas state judge for involuntary treatment was “committed.” *U.S. v. Whiton*, 48 F.3d 356 (8<sup>th</sup> Cir., 1995).
- Involuntary admission under Maine’s five-day emergency admission statute was “committed” under Gun Control Act. *U.S. v. Chamberlain*, 159 F.3d 656 (1<sup>st</sup> Cir., 1998).
- Finding of incompetency to stand trial and subsequent involuntary commitment to mental institution was “committed” under Gun Control Act. *U.S. v. Midgett*, 198 F.3d 143 (4<sup>th</sup> Cir., 1999).
- Involuntary admission with five days in psychiatric hospital, followed by judicial order of 90 days of less restrictive alternative treatment, meant defendant was “committed.” “It does not appear that Congress intended to require all commitments to arise from official judicial orders.” *U.S. v. Vertz*, 2002 WL 1359368 (6<sup>th</sup> Cir., Mich.) (not reported).
- Finding of mental illness by South Dakota county board and order to state mental facility for up to 90 days meant defendant was “committed.” *U.S. v. Dorsch*, 363 F.3d 784 (8<sup>th</sup> Cir., 2004).
- Initial detention order, based on physician’s certificate, satisfies “committed” element. “The term ‘committed’ in the statute refers to a judicial (or possibly an administrative) order of commitment and does not depend on the ultimate outcome of the commitment.” *U.S. v. Holt*, 464 F.3d 101, 105 (1<sup>st</sup> Cir., 2006).

<sup>13</sup> Report of the Virginia Tech Review Panel, August 2007, p. 73.

<sup>14</sup> *Id.*, p. 71. The definition of “adjudicated as a mental defective includes a finding that a person is “a danger to himself or to others.” 27 C.F.R. § 478.11.

<sup>15</sup> *Id.*, p. 73.

<sup>16</sup> WAC 388-865-0585 applies to civil commitments. WAC 388-875-0080 applies to NGRIs and other RCW 10.77 cases.

<sup>17</sup> FBI-NICS 03-27-03 (caps and emphases in original).

<sup>18</sup> Michael J. Sullivan, Acting ATF Director to Washington State Attorney General Rob McKenna, May 9, 2007.

<sup>19</sup> As discussed below in more detail, state law does provide for surrender and forfeiture of firearms. RCW 9.41.098 and RCW 9.41.800. One problem with this process is that DOL has no information on long-gun transfers and therefore cannot notify law enforcement if a long-gun owner has a disqualifying commitment.

<sup>20</sup> “DOL’s Procedures for Processing Ineligible to Possess Firearms Notices (ITPF) from the Courts, Mental Prohibitors.” Department of Licensing, undated.

<sup>21</sup> Report of the Virginia Tech Review Panel, August 2007, p. 72 (*see* Appendix J, Form SP 237 – Notice of Adjudication of Involuntary Commitment or Incapacitation.)

<sup>22</sup> Current statute does not allow DSHS to release its records to DOL for purposes of populating DOL’s Firearms Database. Rather, DSHS must respond to law enforcement inquiries made for firearm purchase background checks, RCW 9.41.090(2)(a), and DSHS must respond to law enforcement inquiries for purposes of enforcing state firearm restrictions. *See* RCW 71.05.390(17). But DSHS could release records to DOL for purposes of program evaluation under RCW 71.05.390(5) and RCW 71.05.630.

<sup>23</sup> Available on the courts.wa.gov website as CR 04\_0900 (6/2005).

<sup>24</sup> Available on the courts.wa.gov website as M07\_0800 (12/2000).

<sup>25</sup> Report of the Virginia Tech Review Panel, August 2007, p. 73.

<sup>26</sup> NICS Operations Report, 2005, p. 5.

<sup>27</sup> Survey of State Procedures Related to Firearm Sales, 2005. Bureau of Justice Statistics, November 2006, p. 91 (Appendix D – Agencies conducting firearm background checks, December 31, 2005).

<sup>28</sup> Telephone conversation with Marie Severson, director of Oregon State Police background check unit. June 1, 2007.

<sup>29</sup> King County Sheriff’s Office Firearms and Surrender and Forfeiture Program. *See also* Kennedy Condor, *Removing Firearms from Domestic Violence Perpetrators*, Seattle, City of Seattle Human Services Department, Domestic and Sexual Violence Prevention Office, December 2003.

<sup>30</sup> Taking a Stand: Reducing Gun Violence in Our Communities, International Assoc. of Chiefs of Police, 2007. *See* Recommendation 17, p. 17.

<sup>31</sup> *Id.* Recommendation 9, p. 14.

<sup>32</sup> Report of the Virginia Tech Review Panel, August 2007, p. 76 (Recommendation VI-2 “Virginia should require background checks for all firearms sales, including those at gun shows.”)

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<sup>33</sup> “The Bureau of Alcohol Tobacco and Firearms and Explosives’ Investigative Operation at Gun Shows,” U.S. Department of Justice, Office of the Inspector General, June 2007, pp. 4-6. This report concluded that ATF has no specific enforcement program directed at gun shows.

<sup>34</sup> See SB 5197 (“Regulating the sale of firearms at gun shows and events”), 2007. Similarly, federal legislation has been introduced, but has not passed. See H.R. 96 (Gun Show Loophole Closing Act of 2007, introduced January 4, 2007).

<sup>35</sup> <http://www.washingtonarmscollectors.org/shows.asp>. This rule is Number 17.

<sup>36</sup> *Id.* This rule is Number 18.

<sup>37</sup> Federal Firearms Regulations Guide, Bureau of Alcohol, Tobacco and Firearms, 2005, p. 192.

<sup>38</sup> Report to the President on Issues Raised by the Virginia Tech Tragedy, June 13, 2007.

<sup>39</sup> Report to the President, p. 10.

<sup>40</sup> Report of the Virginia Tech Review Panel, August 2007, p. 76 (Recommendation VI-1 “All states should report information necessary to conduct federal background checks on gun purchases.”)

<sup>41</sup> “Gun Control: Improving the National Instant Criminal Background Check System,” General Accounting Office, GAO/T-GGD-00-163, June 21, 2000.

<sup>42</sup> *Survey of State Procedures Related to Firearms Sales, 2005*, Bureau of Justice Statistics, U.S. Department of Justice, p. 64.

<sup>43</sup> Background Checks for Firearm Transfers, Bureau of Justice Statistics Bulletin, November 2006, p. 7.

<sup>44</sup> *Id.*, p. 6.

<sup>45</sup> Tom Breen, “FBI gun-check database lacks help of states,” Associated Press, Seattle Post-Intelligencer, April 26, 2007. The individual quoted is Jerome Pender, the deputy assistant director of the FBI’s Criminal Justice Information Services Division that administers NICS.

<sup>46</sup> Report to the President on Issues Raised by the Virginia Tech Tragedy, June 13, 2007, fn.7.

<sup>47</sup> General Accounting Office, GAO/T-GGD-00-163, June 21, 2000, pp. 9-10.

<sup>48</sup> Improving Criminal History Records for Background Checks, 2005 (National Criminal History Improvement Program), Bureau of Justice Statistics Program Report, July 2006, p. 3.

<sup>49</sup> “State gives FBI names of those on gun-ban list,” Seattle Post-Intelligencer, July 29, 2004.

<sup>50</sup> Letter from Capt. Paul Beckley, Washington State Patrol, to Jack Morris, Assistant Director of the DSHS Mental Health Division, October 28, 2002.

<sup>51</sup> “[T]he fact of admission and all information and records compiled, obtained, or maintained in the course of providing services to either voluntary or involuntary recipients of services at public or private agencies shall be confidential.” RCW 71.05.390.

<sup>52</sup> The same exception exists in the minor mental health statute. See RCW 71.34.340(8).

<sup>53</sup> E-mail from Greg Kline, August 23, 2006, to other DSHS staff outlining DSHS’s criteria for submissions of data to NICS.

<sup>54</sup> 2006-2007, State Mental Health Contract, Section 10.1 Data Submission and Error Correction. This contract began on August 1, 2006 and has been extended to September 30, 2007.

<sup>55</sup> Data report on by DSHS Division of Systems and Monitoring, November 2, 2007.

<sup>56</sup> Improving Access to and Integrity of Criminal History Records, Bureau of Justice Statistics, 2005.

<sup>57</sup> *Id.*

<sup>58</sup> Report of the Virginia Tech Review Panel, August 2007, p. 67.

<sup>59</sup> Scott Blonien and Martin Kravik from the AGO sit on the JIN Board.

<sup>60</sup> “As the Shock of Virginia Tech Fades,” New York Times editorial page, October 17, 2007. On October 19, 2007, Senator John Warner of Virginia issued a letter to the Senate majority and minority leaders urging passage of the bill. Senator Warner noted, “The terrible crime perpetrated at Virginia Tech brought to national attention the fact that we need to strengthen this system by addressing the under reporting of mental health records. Passage of H.R. 2640 would be a step in the right direction towards preventing tragedies similar to that which occurred in Blacksburg.”

<sup>61</sup> Jacqueline Palank and Ian Urbina, “House Votes to Bolster Database on Gun Buyers,” New York Times, June 14, 2007.

<sup>62</sup> Survey from the Bureau of Justice Statistics, Regional Justice Information Service, to Washington State Patrol. Forwarded to DSHS on August 3, 2007.

<sup>63</sup> One expert in the field of firearms law has noted a concern that the legislation would allow state-restored persons to be removed from NICS, but does not necessarily change their status under 18 U.S.C. § 922(g)(4) as committed to a mental institution or adjudicated as a mental defective.