

## The Federal Background Check System

The federal prohibition on individuals with serious mental health histories possessing firearms has been in place since 1968. 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.

Only 32 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.

### The Federal NICS Database.

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.

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.	<b>Local Law Enforcement</b>	<b>Local Law Enforcement</b>
Handgun with concealed pistol license.	<b>Local Law Enforcement</b>	<b>Dealer</b>
Handgun without concealed pistol license.	<b>Local Law Enforcement</b>	<b>Local Law Enforcement</b>
Long-gun (rifles, shotguns).	<b>N/A</b>	<b>Dealer</b>

## DSHS Began Submitting Mental Health Records in 2004

DSHS submitted an initial batch of 47,000 records to NICS in 2004. Today, Washington is one of the only states that has submitted any mental health records to NICS, and it is one of only four states to submit records regularly.

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. However, an exception to the strict rule of confidentiality in RCW 71.05 does enable release of limited information to law enforcement.

## Courts 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
- Community inpatient psychiatric inpatient billing records.

### 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. 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.”



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# Restricting Access to Firearms by Persons With Mental Health Commitments



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).

Like Virginia, Washington is also a leader among the 32 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 submits records to NICS. Nonetheless, gaps exist in Washington’s reporting. 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.

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 disaster. 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. 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 tucked into his waistband, along with a clip with 22 rounds of 7.62 mm armor piercing ammunition.

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.

## background

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.

## Workgroup studies state and federal laws

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. McKenna charged the workgroup with identifying laws that prohibit gun possession for reasons other than mental health. He asked the workgroup to describe how current state and federal laws and regulations are being administered. Finally, he charged the workgroup 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.

### The report:

- 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 regarding gaps and obstacles to fulfilling the purposes of those laws; and
- e. Provides options for both client state agencies and the Attorney General regarding administrative improvements and legislative changes that may help advance public safety.

Table 1: Types of Mental Health Interventions 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	

## 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;**

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.

## Who handles the background checks?

In Washington, the responsibility to conduct state background checks lies with 291 local law enforcement agencies. 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.

### Problems:

- Washington's background check system is not centralized and therefore lacks accuracy and consistency.
- 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 dispersed to hundreds of local law enforcement agencies.

## 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 regarding 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. There is no such ambiguity under federal law.

Table 2: Comparison between the major features of State and Federal Law

Mental health intervention, commitment or finding	State law firearms disqualification	Federal law firearms disqualification
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*
Restoration of firearm rights.	YES	NO

\*if court order finds a mental illness

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, this is an area where Congress may change federal law to require state restoration and federal recognition of state restorations.

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.

## Needed improvements within the courts

- Following a civil commitment or other disqualifying court order, court clerks do not routinely send Notices of Ineligibility to Possess a Firearm to the state DOL for inclusion in DOL's database.
- 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.

## 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 to enforce the state law restrictions on firearms. (RCW 71.05.390(17) and 71.34.340(16)). At the request of the workgroup, DSHS has placed a term in its new state mental health contract, effective Oct. 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.

### Key Issues:

- Information systems designed to give officers on the street greater access to an individual's mental health history.
- A better understanding of mental health history may allow the officer to tailor his or her approach accordingly and could diminish the possibility of violence.
- 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.