

# ***DEVELOPMENTS IN MENTAL HEALTH LAW***

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## **Gun Prohibitions for People with Mental Illness – What Should the Policy Be?**

In the wake of recent incidents of mass violence culminating in the shooting at Sandy Hook Elementary School in Newtown, Connecticut, a clamor for reform of gun control laws has arisen. Many states and Congress are debating what actions to take both to protect an individual’s Second Amendment right to possess a firearm but also to protect the public from dangerous individuals. Many of these efforts focus on controlling access to guns for persons with mental illness.

Most people would agree that the most effective way to prevent violence by people with mental illness is to provide better screening and access to effective treatment for mental illness, especially for children and adolescents. Most people also agree that guns should be removed

from people with mental illness who are dangerous, but disagree on how that can be done without infringing on the rights of the vast majority of people with mental illness who have never been and never will be violent. The evidence reveals that the vast majority of individuals with psychiatric disorders do not commit violent acts. Ninety-six percent of firearm violence is committed by persons with no history of mental illness. And only certain serious psychiatric illnesses, such as bipolar disorder and schizophrenia, are associated with a risk of violence to others, and major depressive disorder with a risk of violence to self, or suicide.

Broad brush prohibitions focusing on the status of the individual instead of their risk adds to the already stigmatizing effects of a mental illness diagnosis. In addition, such actions may discourage those most at risk of committing violent acts from seeking the treatment they need. This article reviews current federal and state law on gun prohibitions for people with mental illness, the background check process and proposals for change in order to inform the public policy debate on the best methods to reduce violence.

## **Current Federal Law**

Congress enacted the Gun Control Act of 1968,<sup>1</sup> following the assassinations of Dr. Martin Luther King, Jr. and Robert F. Kennedy. For the first time, Congress prohibited certain classes of people, from purchasing firearms, including convicted felons, adjudicated persons with mental illness and drug abusers.<sup>2</sup> As it pertains to people with mental disabilities, the law specifically prohibits any person from selling or disposing of any firearm to any person he knows or has reason to believe “has been adjudicated as a mental defective or has been committed to any mental institution.”<sup>3</sup> The federal Bureau of Alcohol, Tobacco and Firearms has promulgated regulations clarifying the term “adjudicated as a mental defective” to mean a determination by a court, board, commission or other lawful authority that as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease, a person is a danger to himself or others or lacks the mental capacity to manage his own affairs. The term also includes a finding of insanity by a court in a criminal case and incompetency to stand trial.<sup>4</sup>

In addition, the Gun Control Act also prohibits the sale of firearms to any person who “is an unlawful user of or addicted to any controlled substance.”<sup>5</sup> The federal regulation defines “unlawful user of or addicted to any controlled substance” as “[a] person who uses a controlled substance and has lost the power of self-control with reference to the use of controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician.”<sup>6</sup> The regulation goes on to provide that an inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time. Examples include a conviction for use or possession of a controlled substance within the past year, multiple arrests

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<sup>1</sup> Public Law 90-618.

<sup>2</sup> 18 U.S.C. § 922(d). Other people prohibited from obtaining a firearm include indicted felons, fugitives, illegal aliens, people dishonorably discharged from the military, people who have renounced their US citizenship, people convicted of domestic violence misdemeanors, and people subject to certain domestic violence protective orders.

<sup>3</sup> 18 U.S.C. § 922(d)(4).

<sup>44</sup> 27 C.F.R. § 478.11 (2011).

<sup>5</sup> 18 U.S.C. § 922(d)(3).

<sup>6</sup> 27 C.F.R. § 478.11(2011).

for such offenses within the past five years if the most recent arrest occurred within the past year, or persons found through a drug test administered during the past year to have used a controlled substance unlawfully.<sup>7</sup>

In 1993, Congress passed the Brady Handgun Violence Prevention Act (“Brady Act”),<sup>8</sup> named for President Ronald Reagan’s press secretary who was seriously wounded in the assassination attempt on the President. The Brady Act established the National Instant Criminal Background System (“NICS”) requiring gun purchasers from federally licensed firearms dealers to pass a background check before purchasing a firearm.

Following the mass shooting at Virginia Tech, Congress discovered that a large number of records related to persons prohibited from possessing firearms, especially those with mental illness, had never been submitted to the NICS. In response, it passed the NICS Improvement Amendments Act of 2007.<sup>9</sup> This Act created the NICS Act Record Improvement Program to provide direct financial assistance to states to improve their infrastructure for collecting and submitting records to the NCIS. Under the Tenth Amendment to the United States Constitution, Congress cannot require states to submit records to the federal government, but instead it can provide fiscal incentives for them to do so. States sharing 90% of their records for persons prohibited from possessing a firearm receive a waiver of 10% of their state match requirements. As part of this incentive, states must establish a relief from disabilities program whereby people who are ineligible to purchase a firearm due to mental illness can have their rights restored.

## State Laws

Federal law establishes the baseline for the types of people ineligible to purchase firearms, and all states except Vermont also prohibit certain classes of individuals from purchasing and possessing firearms. Most states have incorporated at least some of the classes of federally-prohibited purchases into their laws and some states have applied broader standards than federal law or have established additional classes of prohibited persons. Thirty-five states and the District of Columbia have enacted laws prohibiting firearm access to persons with mental illness and several states have broadened the categories of persons with mental illness who are prohibited from purchasing a firearm beyond the scope of the federal prohibition.<sup>10</sup>

Some states have enacted laws that seek to prevent violence by removing guns from individuals with mental illness whom clinicians determine pose an elevated risk of violence or suicide. In Indiana, clinicians or the police can take steps with or without a warrant to have firearms removed from individuals who have been assessed as posing a danger to themselves or others.<sup>11</sup> If a law enforcement officer believes a person is a danger to himself or others now or in the future, he may obtain a warrant from a circuit or superior court to search for and seize the firearm. A law-enforcement officer may also seize a firearm without a warrant provided he files

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<sup>7</sup> *Id.*

<sup>8</sup> Public Law 103-159.

<sup>9</sup> Public Law 110-180.

<sup>10</sup> Law Center to Prevent Gun Violence, *Prohibited Purchasers Generally Policy Summary*, posted May 21, 2012, available at: <http://smartgunlaws.org/prohibited-purchasers-generally-policy-summary/>.

<sup>11</sup> IC 35-47-14 *et seq.* available at: <http://www.in.gov/legislative/ic/2010/title35/ar47/ch14.html>.

a written statement as to why he believes the person is dangerous, followed by a judicial probable cause review. In both situations, the seizure must be followed by a hearing within 14 days. The person may petition to have his firearm restored after 180 days.

In California, guns can be removed from individuals with mental illness who have communicated a serious threat of violence against an identifiable individual to a licensed psychotherapist during the last six months. Law enforcement may also confiscate firearms from individuals who are detained for dangerousness on a 72-hour hold under the state's civil commitment law. Law-enforcement must then petition the court for a hearing to retain possession of the firearm within 30 days of the person's release.<sup>12</sup>

New York passed the SAFE Act on January 15, 2013 requiring mental health professionals currently treating an individual to report the person if in their professional opinion the person is likely to engage in conduct resulting in serious harm to self or others. The report must be made to the director of community services who must then report the information to the division of Criminal Justice Services.<sup>13</sup> Any guns the person has may then be confiscated.

Although most state statutes tie firearm disqualification to the civil commitment process or formal judicial findings of incompetence, a few states have very broad statutes encompassing individuals who have received voluntary mental health treatment.<sup>14</sup> For example, Hawaii prohibits possession by any person who is or has been diagnosed as having a significant behavioral, emotional, or mental disorder.<sup>15</sup> Maryland prohibits possession of a firearm by any person who is suffering from a mental disorder and has a history of violent behavior against others or who has been confined in a mental health facility for more than 30 days unless he possesses a physician's certificate that certifies the person can possess a firearm without undue danger to self or others.<sup>16</sup> Illinois prohibits persons who have been patients in a mental health institution within the past five years and other persons whose mental condition poses a clear and present danger from possessing a firearm.<sup>17</sup> In addition to persons who have been involuntarily civilly committed to either inpatient or mandatory outpatient treatment, Virginia prohibits persons who have voluntarily admitted themselves to a mental health facility after being taken into custody under a temporary detention order from possessing a gun.<sup>18</sup>

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<sup>12</sup> California Welfare and Institutions Code § 8102 available at: [http://leginfo.legislature.ca.gov/faces/codes\\_displayexpandedbranch.xhtml](http://leginfo.legislature.ca.gov/faces/codes_displayexpandedbranch.xhtml).

<sup>13</sup> New York Mental Hygiene Law § 9.46 available at: [http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=\\$MHY9.46\\$\\$@TXMHY09.46+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=53298255+&TARGET=VIEW](http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$MHY9.46$$@TXMHY09.46+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=53298255+&TARGET=VIEW)

<sup>14</sup> Law Center to Prevent Gun Violence, Prohibited Purchasers Generally Policy Summary, posted May 21, 2012, last updated August 24, 2012 and available at: <http://smartgunlaws.org/prohibited-purchasers-generally-policy-summary/>.

<sup>15</sup> Haw.Rev.Stat. Ann. § 134-7 available at: [http://www.capitol.hawaii.gov/hrscurrent/vol03\\_ch0121-0200d/HRS0134/HRS\\_0134-0007.htm](http://www.capitol.hawaii.gov/hrscurrent/vol03_ch0121-0200d/HRS0134/HRS_0134-0007.htm).

<sup>16</sup> Md. Code Ann. Pub. Safety § 5-205 available at: [http://www.lawserver.com/law/state/maryland/md-laws/maryland\\_laws\\_public\\_safety\\_5-133](http://www.lawserver.com/law/state/maryland/md-laws/maryland_laws_public_safety_5-133).

<sup>17</sup> 405 Ill.Comp.Stat.103.3 available at: <http://www.ilga.gov/legislation/ilcs/ilcs4.asp?DocName=040500050HCh.+VI&ActID=1496&ChapterID=34&SeqStart=28200000&SeqEnd=-1>.

<sup>18</sup> Va. Code Ann. § 18.2-308.1:3 available at: <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+18.2-308.1C3>.

## The Background Check

A NICS background check consists of a search of three separate databases. One database is the National Criminal Information Center (NCIC), which is also accessible to law enforcement personnel and contains the National Sex Offender Registry and information about wanted individuals, individuals on supervised release, foreign fugitives, missing persons, persons subject to protective orders, and suspected terrorists, among others. The second database is the Interstate Identification Index (III) which contains criminal history records submitted by the states to the FBI. Third, the NICS Index contains information on individuals reported by state or federal agencies because they are prohibited from purchasing a gun under federal and state laws. Thirteen states, including Virginia, are point-of-contact (“POC”) states meaning the state maintains its own background check system. Federally licensed firearms dealers contact the state agency rather than the federal system directly, and the state agency accesses NICS and runs the background check. Most NICS background checks are conducted in minutes with more than 91% resolved instantaneously. No information is provided to the dealer other than to allow the sale, deny the sale, or wait three business days while a final determination is made. Forty percent of gun sales, however, are conducted by unlicensed private sellers.<sup>19</sup>

## Relevant Statistics

For legal and logistical reasons, records for persons with mental illness and substance abuse problems are difficult to capture in official records. Since the mass shooting at Virginia Tech, the number of records in the NICS Index related to persons with mental illness has grown by one million records but 23 states and the District of Columbia have submitted fewer than 100 mental health records. Most dramatically, 44 states have submitted fewer than 10 records to the controlled substance file. Many states have been unaware that they are required to submit records related to people with substance abuse disorders, and most do not have the infrastructure to compile substance abuse records unless they are already reported as part of criminal history records.<sup>20</sup>

According to the Bureau of Justice Statistics, United States Department of Justice, the number of firearms homicides in 2011 declined 39% from its all time high in 1993.<sup>21</sup> Although the number of firearms crimes has declined over time, the percentage of all violent crimes involving the use of a firearm has not changed substantially (declining from 9% in 1993 to 8% in 2011). By far the majority of firearms crimes were committed with a hand gun.<sup>22</sup>

Handguns were responsible for the majority of both homicide and nonfatal violence, with handguns used in about 83% of all firearms homicides in 1994 compared with 73% in 2011.

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<sup>19</sup> Mayors against Illegal Guns (November 2011) available at: [http://www.mayorsagainstillegalsguns.org/downloads/pdf/maig\\_mimeo\\_revb.pdf](http://www.mayorsagainstillegalsguns.org/downloads/pdf/maig_mimeo_revb.pdf).

<sup>20</sup> *Id.* at 22.

<sup>21</sup> Planty, Michael, and Truman, Jennifer L., Bureau Statisticians, *Firearm Violence, 1993-2011*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (May 2013) available at: <http://www.bjs.gov/index.cfm?iid=4616&ty=pbdetail>.

<sup>22</sup> *Id.* at 3.

Annually from 1994 to 2011, about 9 out of 10 non-fatal violent crimes were committed with a handgun. The remainder of the gun violence was committed using a shotgun or rifle.<sup>23</sup>

## The President's Plan

Immediately following the massacre at Sandy Hook Elementary School in Newtown, Connecticut, President Obama appointed a task force led by Vice President Joe Biden to identify strategies to prevent future gun violence. *Now is the Time, The President's plan to protect our children and our communities by reducing gun violence* was issued January 16, 2013.<sup>24</sup> The Plan focuses primarily on preventing those at risk of committing acts of violence and mass shootings from getting access to guns by extending the NICS to every gun buyer, and not just those who purchase firearms from a federally licensed firearms dealer, and ensuring that the background check system has complete information on people prohibited from having guns.

To that end, Senators Joe Manchin from West Virginia and Pat Toomey from Pennsylvania introduced S. 649<sup>25</sup> that would have expanded the existing background check system to cover commercial sales, including sales at gun shows and internet sales, and would have strengthened the existing instant check system by encouraging states to put all their available records into the NICS. The bill would have encouraged states to provide all of their available records to NICS by directing future grant money towards creating systems to send records to NICS and reducing federal funds to states that do not comply. S. 649 did not pass, but may be re-introduced.

In addition to universal background checks, the President's Plan calls for the Attorney General to review the laws governing who is prohibited from possessing guns and make legislative and executive recommendations to ensure dangerous people are not slipping through the cracks. After soliciting input from a variety of experts and stakeholders, the Attorney General should be making these recommendations in the near future.<sup>26</sup>

Other proposals related to mental health include clarifying concerns that the Health Insurance Portability and Accountability Act's Privacy Rule does not prevent states from providing mental health information to NICS. The Department of Health and Human Services ("DHHS") issued an Advance Notice of Proposed Rulemaking on April 23, 2013 announcing its intent to promulgate such a rule.<sup>27</sup> In addition, the Director of DHHS' Office of Civil Rights issued a message to all Health Care Providers on January 15, 2013 informing them that the HIPAA Privacy Rule, 45 C.F.R. § 164.512(j), does not prevent them from disclosing necessary information about a patient to law enforcement, family members or other persons when they believe the patient presents a serious danger to himself or others.<sup>28</sup>

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<sup>23</sup> *Id.* at 4.

<sup>24</sup> The Plan is available at: <http://www.whitehouse.gov/issues/preventing-gun-violence>.

<sup>25</sup> The full bill is available at: [http://www.manchin.senate.gov/public/index.cfm/files/serve?File\\_id=8134649f-6d23-4ef2-882f-6a4555ff4889&SK=BDEA0DD2B0F4D93F905B5BC8DF6F76B6](http://www.manchin.senate.gov/public/index.cfm/files/serve?File_id=8134649f-6d23-4ef2-882f-6a4555ff4889&SK=BDEA0DD2B0F4D93F905B5BC8DF6F76B6).

<sup>26</sup> Progress Report on the President's Executive Actions to Reduce Gun Violence, April 17, 2013 at 3, available at: [http://www.whitehouse.gov/sites/default/files/docs/exec\\_actions\\_progress\\_report\\_final.pdf](http://www.whitehouse.gov/sites/default/files/docs/exec_actions_progress_report_final.pdf).

<sup>27</sup> 78 Fed.Reg. 23872 (April 23, 2013).

<sup>28</sup> The Message is available at: <http://www.hhs.gov/ocr/office/lettertonationhcp.pdf>.

In addition to finalizing the requirements for private health insurance plans to cover mental health services under the Affordable Care Act and ensuring that Medicaid plans meet mental health parity requirements, most importantly for the mental health community, the President's Plan recommends making mental health care as easy as access to guns and ensuring that individuals get the treatment they need before dangerous situations develop. The Plan notes that less than half of children and adults with diagnosable mental health problems receive the treatment they need. The Plan makes a number of programmatic recommendations to accomplish this.<sup>29</sup>

## **The Emerging Debate Over Restoration**

The issue of criteria for restoration of firearm rights has emerged as a controversial issue in the Congress. Everyone seems to agree that fair process for restoration is needed. The 2007 NICS Improvements Act requires states that receive NICS improvement funds to provide an opportunity for the disqualified person to show that he or she is no longer a danger to public safety, but state statutes typically set no time limit on the loss of rights and prescribe vague criteria. A National Rifle Association-sponsored proposal introduced by Senators Chuck Grassley of Iowa and Ted Cruz of Texas would permit individuals with mental illness who have been disqualified from possessing a firearm based upon a civil commitment adjudication to regain their rights automatically when the commitment order expires. Any guns that were seized at the time of hospitalization would be returned. According to mental health experts, such a provision would make it easier for people with serious mental illness to buy firearms during a period of crisis. Attempts at suicide and other acts of violence are most likely to occur shortly after discharge. With very short periods of acute inpatient hospitalization, individuals are often released back to the community within a matter of days and are just beginning an often lengthy ongoing recovery from an acute episode of mental disorder.<sup>30</sup>

## **The Connecticut Study**

The federal prohibitions against certain people with mental illness possessing firearms based upon their legal status have not changed since the Gun Control Act was passed in 1968. These prohibitions may have been reasonable at that time but treatment for persons with mental illness and the location of that treatment has changed dramatically since then. In addition, voluminous research into the risk of violence among persons with mental illness has been done. However, there has been little research on the effectiveness of the background check system in relation to the disqualification of individuals with histories of mental illness.

A study was recently conducted in Connecticut measuring the impact of state reporting to NICS on the reduction of firearm violence among the seriously mentally ill.<sup>31</sup> The study

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<sup>29</sup> *The Time is Now, The President's plan to protect our children and our communities by reducing gun violence* at 13-15 available at: <http://www.whitehouse.gov/issues/preventing-gun-violence>.

<sup>30</sup> Appelbaum, Paul S., Bonnie, Richard J., Swanson, Jeffrey W., *Don't arm people in a mental health crisis*, The Hill's Congress Blog, June 13, 2013.

<sup>31</sup> Swanson, Jeffrey W., Robertson, Allison Gilbert, Frisman, Linda K., Norko, Michael A., Lin, Hsiu-Ju, Swartz, Marvin S., Cook, Philip J., *Preventing gun violence involving people with serious mental illness*, Chapter 3 in *Reducing Gun Violence in America: Informing Policy with Evidence and Analysis*, edited by Daniel W. Webster and Jon S. Vernick, Johns Hopkins University Press (2013).

combined the records of over 23,000 people with serious mental illness from Connecticut's public mental health and criminal justice systems between the years 2002 through 2009, spanning the time periods before and after the state began reporting mental health records to the NICS. Connecticut began reporting health records to the NICS in 2007, uploading 3,062 records during its first year and by 2013 nearly 14,000 records were contained in the database.<sup>32</sup> Theoretically, individuals whose records were added to the background check system should not be able to purchase guns and their risk of committing violent crime should therefore also be reduced.

Mental health records were assembled for 23,292 adults from January 2002 through December 2009 who had a diagnosis of schizophrenia, bipolar disorder, or major depressive disorder and were either voluntarily or involuntarily hospitalized in a state psychiatric hospital. Two cohorts were established for study comparison, one containing individuals with mental health adjudications of involuntary commitment, incompetency to stand trial, insanity acquittal, or conservatorship, and another with individuals with at least one voluntary psychiatric hospitalization, but no mental health adjudications. The base rate of violent crime in this study sample was much higher than estimates of crime among persons with mental illness in community settings because individuals treated in state psychiatric hospitals have more severe and disabling psychiatric conditions, higher rates of substance abuse co-morbidity, and a higher involvement with the criminal justice system.<sup>33</sup>

About 40% of the people in the study were disqualified from possessing a firearm at some time during the study period. Of this 40%, 34.9% were disqualified due to a criminal record and 7% were disqualified due to a mental health record. Of the 7% disqualified based upon a mental health diagnosis, 31.3% were disqualified upon both a mental health adjudication and a criminal record. The mean age of participants was 36 years and 62.5% were male. The racial composition was 62.7% non-Hispanic white, 18.4% African American, 16.6% Hispanic and 2.3% other racial or ethnic group. The diagnostic groups studied included 28.1% with schizophrenia, 30.6% with bipolar disorder and 41.2% with depression. Across these diagnostic groups, 85.9% had a co-occurring alcohol or illicit drug use problem.<sup>34</sup>

Thirty-nine percent of those in the study sample were convicted of a violent crime during the period of the study. The vast majority of persons in the study who were convicted of a gun-disqualifying crime were never involuntarily committed or otherwise disqualified during that time based upon a mental health record. Thus the study shows that, at least in one state, the mental health criteria for gun disqualification identify only a small fraction of persons with serious mental illness at risk of committing violent crime. Moreover, only a small proportion of persons with gun-disqualifying mental health adjudications engage in violent crime. In the sample overall, there was a small and statistically insignificant decline in the estimated rate of violent crime associated with NICS reporting among those with a mental health disqualification from 7.8% to 6.5%, or a proportional decline of 17%. However, among those with a mental

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<sup>32</sup> *Id.* at 6.

<sup>33</sup> *Id.* at 6-7.

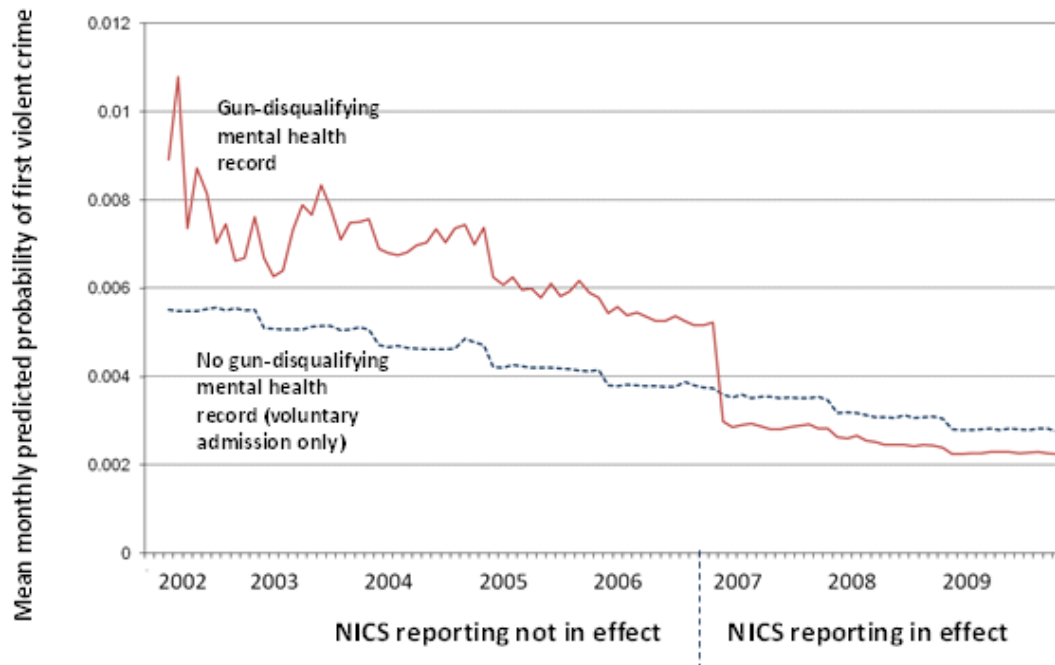
<sup>34</sup> *Id.* at 8-9.



health disqualification but no criminal disqualifications there was a greater decline from 6.7% before NICS reporting to 3.2% after NICS reporting, or a proportional decline of 54%.<sup>35</sup>

Figure 1 illustrates a key finding from the study, comparing trends in adjusted predicted probabilities of violent crime for person-month observations in which a gun-disqualifying mental health history was present and not present, before and after NICS reporting in Connecticut began. Those with disqualifying criminal records were removed from the analysis as displayed, in order to examine the unique effects of NICS reporting policy in those with mental health adjudications—about 7% of the sample of persons with serious mental illness who were receiving services in the state’s public behavioral health care system over the study period. The study investigators estimated that NICS reporting prevented approximately 14 violent crimes per year among the 1,118 people with a mental health disqualification. However, since only a small fraction of the study population was affected by the disqualifying policy, the overall impact on violent crime was very small – less than one half of 1% reduction in attributable risk—598 crimes instead of 612 expected crimes among 15,524 people with mental illness.<sup>36</sup>

Figure 1. Mean monthly predicted probabilities of first violent crime for SMI individuals with and without a gun-disqualifying mental health record, before and after NICS reporting began in Connecticut



Note: analysis excludes persons with disqualifying criminal records and only includes those susceptible uniquely to the effects of mental health gun disqualification.

<sup>35</sup> *Id.* at 10.

<sup>36</sup> Swanson, Jeffrey. “Do firearms restrictions prevent violence in people with mental illness? New research evidence,” American Public Health Association annual convention, San Francisco, Monday, October 29, 2012.

By contrast, the study revealed that having a gun-disqualifying criminal record did not reduce the likelihood of committing a future violent crime, but in fact, increased it. Among those who had committed a violent crime, the chances of committing another violent crime did not significantly decline after NICS reporting began. The study also showed that violent crime was associated with having a substance use disorder, being younger, male, African American or Hispanic, which also tend to be factors associated with crime in the broader population.<sup>37</sup> Having bipolar disorder was positively associated with violent crime as compared to depression, and schizophrenia was negatively associated with violent crime as compared with depression. Not surprisingly, there was no significant change in violent crime risk for those who were never disqualified.<sup>38</sup>

Some evidence from the study therefore supports disqualification based upon a mental health adjudication, especially in some subgroups.<sup>39</sup> Those having a gun-disqualifying criminal record are at significantly increased risk of committing a future violent crime. The fact that guns may have been involved in the commission of these crimes by people who could not legally buy a gun indicates that they did not need to purchase them from a federally licensed gun dealer and undergo a background check. They found other ways to obtain firearms.<sup>40</sup> Among those with serious mental illness who do not have criminal records, however, the data suggests that background checks can have some effect on preventing them from purchasing firearms.

Even though the NICS program seems to work for a small number of persons with mental illness, the base rate of mental health adjudication in Connecticut is very low. Only about 7% of the sample population had any disqualifying mental health adjudication and an even smaller proportion or 5% were disqualified solely on the basis of a mental health history without also being disqualified on the basis of criminal history. In the non-criminally-disqualified subsample, those with a mental health disqualifier accounted for 3% of the sample and 3.4% of the violent crime. In the post-NICS period, they accounted for 6.2% of the sample and 5% of the violent crime.<sup>41</sup>

This study only focused on those with mental illness who attempted to purchase a firearm and did not impact those who already have guns. Ninety-six percent of crimes were committed by individuals who did not have a mental health disqualifier in effect.<sup>42</sup> Background checks to enforce federal mental health prohibitions will have very little effect on overall violent crime in persons with mental illness, with most of those at risk unaffected by the law. Changes to the prohibition should therefore focus on individual dangerousness. Suicides account for 61% of all firearm fatalities in the United States and are the third leading cause of death in Americans aged 15 to 24.<sup>43</sup> Laws that focus on removing guns already in the possession of persons assessed to be dangerous would better serve to reduce violence. Efforts should instead be directed toward reducing risk factors for engaging in criminal behavior, improving community-based treatment outcomes, and reducing criminal recidivism in offenders with mental illness.

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<sup>37</sup> *Id.* at 11.

<sup>38</sup> *Id.* at 13.

<sup>39</sup> *Id.* at 14.

<sup>40</sup> *Id.* at 15-16.

<sup>41</sup> *Id.* at 18.

<sup>42</sup> *Id.* at 17.

<sup>43</sup> *Id.* at 19.

## **The Search for Evidence-Based Policies**

In March 2013, a Consortium of Experts for Risk-Based Firearm Policies met at Johns Hopkins Bloomberg School of Public Health to discuss the evidence related to mental illness and gun violence. Included in the group were mental health and gun violence prevention researchers, practitioners and advocates. The goal of the meeting was to formulate evidence-based recommendations about policies concerning access to firearms by individuals with serious mental illness. The group believes that any such policies should balance a commitment to public safety with respect for persons with serious mental illness that will not further stigmatize individuals or discourage them from seeking mental health treatment. It notes that the research reveals the vast majority of people with mental illness do not engage in violence against others. Unfortunately, psychiatric disorders such as depression are strongly implicated in suicide. As a result, the group has made the following recommendations:

1. Any long term restrictions on the right to purchase or possess firearms due to serious mental illness should be based upon the legal protections available through the civil commitment process. These restrictions should be extended by 1) establishing temporary firearms prohibitions, including removing guns from persons undergoing emergency psychiatric hospitalization who are assessed as posing a threat of harm to themselves or others, and 2) developing a meaningful, feasible and consistent judicial process for restoring rights that is supported by expert clinical opinion.
2. New prohibitions should be enacted based on an individual's risk of dangerousness. These new prohibitions should apply to individuals with mental illness who are convicted of violent misdemeanors, abuse alcohol or drugs, are respondents under domestic violence restraining orders, or have engaged in other specific conduct demonstrating an increased risk of violent behavior in the near future. Focusing on risk factors rather than relying primarily upon status-based mental health criteria will be a more effective strategy than targeting all those who have been civilly committed. Some of these prohibitions could be time-limited rather than life-long.
3. Similar to the short-term firearm prohibitions as part of domestic violence restraining orders, law enforcement and family members should be able to petition a court to authorize seizure of firearms and issue a temporary prohibition on firearm possession based on a specific, substantiated threat of physical harm to oneself or others. This model is similar to current Indiana law that authorizes law enforcement to temporarily remove firearms without a warrant from people whom they assess to be a danger to themselves or others with a judicial hearing following in 14 days.

The Consortium of Experts plans to release its final evidence-based recommendations by the end of 2013.

## **Conclusion**

As state legislatures grapple with the issue of gun violence and the United States Attorney General reviews the laws to recommend what categories of individuals should be prohibited from possessing and purchasing firearms, they should remember that the vast number of individuals with mental illness have never engaged in violent acts. Ninety-six percent of all

violent crime is committed by individuals with no mental health diagnosis whatsoever. Unfortunately, most of the high profile mass shootings have been perpetrated by violent young men, suffering from a mental disorder.

As state and federal policy makers seek to restrict access to firearms for people with mental illness, they should focus on individual risk factors, such as the individual's past involvement with the criminal justice system, the individual's use and abuse of alcohol and controlled substances, and the individual's current acute risk of violence to self and others. Decisions to confiscate guns and prohibit individuals with mental illness from possessing them, and any decision to restore guns or the right to possess them should be based upon sound clinical judgment with oversight provided through the court system.

- Jane D. Hickey, Editor, DMHL

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## **Virginia Supreme Court Holds Commitment Criteria Must Be Met at Time of Appeal; Case Not Moot Due to Loss of Firearms Right**

The Virginia Supreme Court ruled on June 6, 2013, that Virginia Code § 37.2-821 requires a circuit court to determine whether an individual who is appealing the commitment decision of a general district court judge or special justice meets the commitment criteria on the date the circuit court conducts the *de novo* hearing.<sup>44</sup> For the first time, the Supreme Court also held that, because the circuit court allowed the initial commitment order to remain intact, the individual was still subject to the collateral consequences of the order and the case was therefore not moot. *Paugh v. Commonwealth*, 286 Va. 85, 743 S.E.3d. 277 (2013).<sup>45</sup>

In most prior cases appealed to the Supreme Court, the Court has dismissed the appeal as moot because the commitment order appealed from, which lasts only 30 days in the case of an initial commitment and 180 days for continued commitments, has long since expired before it considers the case.<sup>46</sup> Although the majority opinion did not so explicitly state, the collateral consequence argued by Paugh and alluded to in Justice William Mims concurring opinion and Justice Elizabeth McClanahan's opinion concurring in part and dissenting in part, is an individual's Second Amendment right to possess a firearm. In their separate opinions, Justice Mims and Justice McClanahan wrote that the proper procedure to challenge the validity of the underlying commitment decision is through a petition filed under Virginia Code § 37.2-846(A), a post-discharge process available to a person who has been committed but is no longer in

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<sup>44</sup> In an unreported order entered issued the same day, the Court reversed and dismissed *Wood v. Commonwealth*, (No. 121602, June 6, 2013) based upon the Opinion in this case.

<sup>45</sup> The opinion is available on the Supreme Court's website at: <http://www.courts.state.va.us/opinions/opnscvwp/1121562.pdf>.

<sup>46</sup> There is very little case law in Virginia interpreting the civil commitment process because appellate courts have previously deemed the appeals moot. That may change following this decision.

custody,<sup>47</sup> and not Code § 37.2-821, the statute that authorizes an appeal. Justice Mims then invited the General Assembly to clarify the process.

## **Facts and Procedural History**

On March 19, 2012, a Henrico County Magistrate issued a temporary detention order (“TDO”) for Michael Paugh. The next day, March 20, 2012, a special justice involuntarily committed Paugh for a period of up to 30 days. The day after he was discharged, but within the 10-day time frame specified in the statute, Paugh appealed his commitment to the Henrico County Circuit Court under Virginia Code § 37.2-821. Although the statute requires that an appeal be given priority over all other pending matters, including criminal cases, the circuit court did not hear the case until May 18, 2012.

Over his objection, the circuit court admitted Paugh’s pre-admission screening report into evidence. The report contained information provided by Henrico police that they had obtained from a friend of Paugh’s indicating her belief that Paugh was suicidal and possessed guns.<sup>48</sup> Paugh also argued that the circuit court should make a *de novo* determination as to whether he met the commitment criteria as of the date of the circuit court hearing, not as of the date of his admission under the TDO. The Commonwealth advised the court that because Paugh had been discharged, he no longer met the commitment criteria and it was not seeking his further hospitalization or commitment. The court ruled, however, that “common sense” required the court to conduct a *de novo* appeal of whether Paugh should have been admitted on the date the TDO was executed. After hearing the evidence, the circuit court determined that Paugh met the commitment criteria on the date of his temporary detention and denied his appeal.

On appeal, the Virginia Supreme Court reviewed whether the circuit court should evaluate the evidence as of the 1) date of admission, 2) the date of the hearing conducted by the general district court or special justice, or 3) the date of the *de novo* hearing in the circuit court. The Court relied on the principle of statutory construction that if the words of a statute are clear and unambiguous it need not look further than the plain meaning of the statute itself. It held therefore that “the day that the *de novo* hearing is conducted is the proper date on which to consider whether the individual should be committed.” Section 37.2-821(B) provides:

The appeal shall be heard *de novo* in accordance with the provisions set forth in §§ 37.2-802, 37.2-804, 37.2-804.1, 37.2-804.2, and 37.2-805, and (i) § 37.2-806 or (ii) 37.2-814 through 37.2-819, except that the court in its discretion may rely upon the evaluation report in the commitment hearing from which the appeal is taken instead of requiring a new evaluation pursuant to § 37.2-815. Any order of the circuit court shall not extend the period of involuntary admission or mandatory outpatient treatment set forth in the order appealed from. *An order*

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<sup>47</sup> This process has seldom, if ever, been used.

<sup>48</sup> Paugh objected to admission of the narrative statement in the pre-admission screening report because it was not a fact as contemplated by Virginia Code § 37.2-816. Section 37.2-816 requires the report to “be admitted into evidence of the facts stated therein.” Although presented as an assignment of error before the Virginia Supreme Court, the Court did not decide this issue because the case was reversed on other grounds.

*continuing the involuntary admission shall be entered only if the criteria in § 37.2-817 are met at the time the appeal is heard. (Emphasis added.)*

The Court stated that this interpretation is further supported by the provision permitting the circuit court to order a new evaluation report rather than relying upon the previous one prepared at the time of the original commitment hearing.

As to the proper relief to be granted, the Court's majority then found that a *de novo* hearing constitutes a statutory grant of a new trial and annuls the judgment of the district court as completely as if there had been no previous trial. The Court then determined that the case was before the circuit court on the petition for involuntary commitment. Because the Commonwealth conceded that Paugh had been discharged from his commitment and no longer met the criteria, the proper outcome therefore was to dismiss the petition for involuntary commitment. As a result, the original commitment order became a nullity.

The Supreme Court's decision would have been straightforward had not Justice Mims filed a concurring opinion, and Justice McClanahan filed an opinion concurring in part and dissenting in part.

### **Justice Mims' Opinion**

Justice Mims reluctantly concurred in the result of this case, but only because he believed the circuit court, and hence the majority of the Supreme Court, incorrectly applied § 37.2-821 to this case, but the Commonwealth failed to object in the circuit court or to assign cross error. Justice Mims strongly agreed with the majority of the Court that this case was not moot because collateral consequences of constitutional magnitude were at stake for Paugh. In particular, he referenced in his footnote 2 that the particular consequence aggrieving Paugh was the effect of the initial commitment order which denied him the right to possess a firearm under Virginia Code § 18.2-308.1:3(A).

However, because his commitment order had expired and he no longer met the commitment criteria at the time of the circuit court *de novo* hearing, Justice Mims wrote that § 37.2-821 was not the proper process for Paugh to challenge his commitment in the general district court and the loss of his firearms rights. Section 37.2-821 should therefore be available only when the person remains involuntarily committed or, if no longer committed, remains subject to an involuntary commitment order.

Instead, Justice Mims wrote that an individual in Paugh's situation can only challenge the collateral consequences resulting from his original commitment order by filing a separate action under § 37.2-846(A).<sup>49</sup> That section provides that in cases in which an individual is not confined in a facility or institution, "the person may file his petition in the circuit court of the county or city in which he resides or in which he was found to have a mental illness or in which an order was entered authorizing his continued

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<sup>49</sup> Neither Justice Mims' opinion nor Justice McClanahan's opinion references the procedure in Virginia Code § 18.2-308.1:3(B) providing the procedure available to a person to have his right to possess a firearm restored.

involuntary inpatient treatment pursuant to Article 5 (§ 37.2-814 et seq.) of Chapter 8 of this title.” Had Paugh followed this process, Justice Mims then determined that the proper inquiry before the circuit court and this Court should have been whether Paugh’s commitment was according to the law on the day the order was entered rather than on the day of the hearing as contemplated by Code § 37.2-821. He then invited the legislature to take action to clarify the law: “To the extent this predicament resulted from the statutory scheme’s failure to anticipate that a Code § 37.2-821 hearing could occur long after a commitment had ended and the concomitant commitment order had expired, the General Assembly may wish to consider clarifying the interrelationship between Code §§ 37.2-821 and 37.2-846(A).”

### **Justice McClanahan’s Opinion**

Justice McClanahan, in her opinion concurring in part and dissenting in part, agreed with Justice Mims that Paugh erroneously filed an appeal under § 37.2-821 rather than utilizing the post-release procedure available under § 37.2-846(A) to challenge the validity of his underlying commitment. She agreed with the majority’s decision and Justice Mims that § 37.2-821 requires a determination as to whether the individual meets the commitment criteria at the time of the *de novo* circuit court decision, but disagreed with the remedy that the petition for involuntary commitment must be dismissed. Justice McClanahan wrote that the expedited appeal is established for the limited purpose of providing an opportunity to the individual to obtain his release if the evidence does not demonstrate he met the criteria for commitment at the time of the appeal. Because § 37.2-821(B) specifically states that the circuit court may enter “[a]n order continuing the involuntary admission only if the commitment criteria are met at the time the appeal is heard,” she concluded that such a finding does not mean that the initial commitment order was invalid. The remedy is therefore not dismissal of the petition for involuntary commitment.

Justice McClanahan recognized the practical effect of the majority’s opinion that every individual who has been involuntarily committed and appeals that commitment under § 37.2-821 but has already been discharged before the *de novo* hearing is held, or otherwise no longer meets the commitment criteria, will have his prohibition from purchasing, possessing or transporting a firearm negated. From arguments presented by Paugh in this appeal, avoidance of the firearms prohibition was his primary objective. Justice McClanahan wrote that “[a] more reasonable construction and application of this statutory scheme is that a successful 821 appeal terminates the effectiveness of the petition for involuntary commitment and accompanying commitment order, but does not result in its outright dismissal. Code § 37.2-846 would then provide the procedural avenue for challenging the validity of the underlying petition and commitment order.”

Unlike the majority and Justice Mims, Justice McClanahan would also have found the case pending before the circuit court moot based on her reasoning above because Paugh had already been released when he filed the appeal under § 37.2-821 and the circuit court could not have granted the relief he requested under that statute.

## Conclusion

In spite of the well-reasoned concurring and dissenting opinions, the majority opinion controls. Individuals who have been involuntarily committed, but have been discharged, otherwise no longer meet commitment criteria, or whose 30-day commitment order has simply expired, may negate the collateral effects of the commitment order, such as their right to possess a firearm, simply by filing an appeal of their commitment order under § 37.2-821 within the 10-day time period. The Commonwealth will not be able to present evidence denying them relief.

Since the tragedy at Virginia Tech and the General Assembly's mandate enacted in 2008 under Virginia Code § 37.2-819, general district court clerks have diligently provided certification of an individual's commitment to the CCRE. Although circuit court clerk's are also required to provide such information to the CCRE, there is no similar mandate that the circuit court clerk report that an individual's commitment order has been negated. As a practical matter, it is therefore not clear whether clerks of court will automatically notify the state police to remove the individual's name from the Central Criminal Records Exchange ("CCRE"), the state's firearms registry, and that it will then be removed from the National Instant Criminal Background Check System ("NICS"), when an individual's appeal succeeds in the circuit court. As Justice McClanahan pointed out, it is also not clear that the General Assembly intended such a result. The General Assembly may want to clarify the interrelationship between §§ 37.2-821 and 37.2-846 and their effect on an individual's right to possess a firearm at the next or in future sessions, as Justice Mims has invited.

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## Other Recently Decided Cases

### US Supreme Court Denies Habeas Relief in Michigan's Denial of Diminished Capacity Defense

The United States Supreme Court has denied a Michigan prisoner's petition for Writ of Habeas Corpus arguing that Michigan had erroneously prevented him from presenting evidence of his diminished capacity to a charge of first degree murder. At the time this case first came to trial in 1993, the Michigan Court of Appeals had long recognized the defense of diminished capacity to negate the *mens rea* or specific intent element required to support a first degree murder conviction. Two years after the first trial, the Michigan Supreme Court held that the diminished capacity defense had been abolished following Michigan's 1975 comprehensive enactment of its statutes related to the admissibility of evidence of mental illness and intellectual disability. Upon his retrial in 2005 and on direct appeal, the Michigan courts refused to allow the defendant to present evidence of diminished capacity rejecting his argument that retroactive application of the state's Supreme Court decision did not violate his due process rights. The Sixth Circuit granted the petitioner habeas relief. The United States Supreme Court reversed finding that the state court decisions did not result in an unreasonable application of clearly established federal law as embodied in Supreme Court decisions. *Metrish v. Lancaster*, \_\_ U.S. \_\_,



133 S.Ct. 1781, 2013 WL 2149793 (No. 12-547, May 20, 2013). The Opinion is available on the Court's website at: [http://www.supremecourt.gov/opinions/12pdf/12-547\\_Opm1.pdf](http://www.supremecourt.gov/opinions/12pdf/12-547_Opm1.pdf).

In April 1993, Burt Lancaster, a former police officer with a long history of mental illness, shot and killed his girlfriend in a shopping center parking lot. Lancaster was charged with first degree murder and possession of a firearm to commit a felony. At his jury trial in 1994, Lancaster raised the insanity and diminished capacity defenses. At that time, the Michigan Court of Appeals in a line of cases had permitted legally sane defendants to present evidence of mental abnormality to negate the specific intent or *mens rea* required to commit a crime. Even though he was allowed to present this evidence, the jury convicted him of both charges. Lancaster later obtained federal habeas corpus relief on different grounds because the prosecutor at his first trial had erroneously exercised a race-based preemptory challenge to a potential juror and was awarded a new trial.

Prior to his new trial, however, the Michigan Supreme Court determined that the Michigan legislature had enacted a comprehensive legislative scheme in 1975 establishing the requirements for introducing evidence related to a defense based upon mental illness or intellectual disability. *People v. Carpenter*, 627 N.W.2d 276 (Mich. 2001). That scheme essentially adopted the M'Naughten rule for asserting an insanity defense. It also required a 30-day notice of intent to use the defense and a court-ordered psychiatric examination. In addition, the legislature created a verdict of "guilty but mentally ill" for defendants who suffered from mental illness but did not satisfy the legal definition of insanity. Such defendants would be provided with treatment but would not be exempt from the sentencing provisions applicable to other criminal defendants. Although the legislation did not specifically address the diminished capacity defense, the Michigan Supreme Court found that by creating such a comprehensive statutory scheme, the diminished capacity defense was superseded by that scheme.

Upon retrial in 2005, the trial court refused to allow Lancaster to assert the diminished capacity defense based upon the decision in *Carpenter* and he was again found guilty of first degree murder and sentenced to life in prison. The Michigan appellate courts upheld the conviction and the United States District Court denied him habeas relief. On appeal, the Sixth Circuit Court of Appeals reversed holding that the Michigan Supreme Court's decision in *Carpenter* was unforeseeable because of 1) the Michigan Court of Appeals' consistent application of the diminished capacity defense, 2) the Michigan Supreme Court's repeated references in dicta to the defense, and 3) the Michigan State Bar's use of the defense in pattern jury instructions.

After granting the petition for Writ of *Certiorari*, the United States Supreme Court reversed the Sixth Circuit. Writing for a unanimous Court, Justice Ginsburg recognized that a state prisoner has a very high standard to meet to obtain habeas corpus relief from a federal court. To obtain such relief, the challenged court ruling must have unreasonably applied federal law clearly established in United States Supreme Court decisions. The Court declined to apply *Bouie v. City of Columbia*, 378 U.S. 347 (1964), as urged by Lancaster, a case in which the Court had preciously held that due process required state criminal statutes must give fair warning of the conduct they prohibit. In *Bouie*, African-American petitioners had been convicted of trespass under South Carolina law after they refused to comply with orders to leave a drug store's

restaurant, which was reserved for white customers. Unlike this case, the South Carolina Supreme Court had unexpectedly expanded narrow and precise statutory language that did not cover the defendants' conduct.

Instead the Court relied upon *Rogers v. Tennessee*, 532 U.S. 451 (2001), a case that upheld the Tennessee Supreme Court's retroactive abolishment of the year and a day rule, a common law rule that barred a murder conviction unless the victim died within a year and a day of the act. In *Rogers*, the Court held that the retroactive application of the decision did not violate due process. The Court recognized that the diminished capacity defense is not an outdated relic of the common law as is the year and a day rule. To the contrary, the Court observed that the Model Penal Code sets out a version of the defense whenever evidence may establish a defendant does not have the state of mind that is necessary to establish an element of the offense.

In addition, the American Bar Association approved criminal justice guidelines in 1993 that favor the admissibility of mental health evidence to negate *mens rea*, and a majority of States, including Virginia, allow such evidence in certain circumstances. Nevertheless, the Court held that it has never found a due process violation where a state supreme court "squarely addressing a particular issue for the first time, rejected a consistent line of lower court decisions based on the supreme court's reasonable interpretation of the language of a controlling statute." The Supreme Court therefore reversed the Sixth Circuit decision and denied Lancaster habeas relief.

### **Ninth Circuit Finds Constitutional Right to Testify at Competency Hearing; Right Can Only Be Waived by Defendant, Not Counsel**

The Ninth Circuit Court of Appeals held on June 17, 2013 that a defendant has a constitutional and statutory right to testify at his pretrial competency hearing and only the defendant, not his counsel, can waive that right. The Court also held that the district court must first warn the defendant that his disruptive conduct may result in his removal from the courtroom and thus the loss of his right to testify. The Court further found that denial of the defendant's right to testify in this case was not harmless error, resulting in reversal of the district court's decision and remanding the case for a new pre-trial competency hearing. *United States v. Gillenwater*, 717 F.3d 1070 (9<sup>th</sup> Cir. 2013).

The defendant Charles Lee Gillenwater, II, was charged in August 2011 in the Eastern District of Washington with two counts of transmission of threatening communications and a third count of transmission of threatening communications by United States mail. Gillenwater had previously worked on a construction project at Caesar's Palace in Las Vegas, observed what he believed to be asbestos, and began taking increasingly drastic steps to report the situation to the Occupational Safety and Health Administration ("OSHA"). Following his indictment, the district court appointed the federal defender to represent Gillenwater. After the federal defender moved to withdraw as counsel, the court appointed a private attorney to represent him. Then after receiving several letters from Gillenwater concerning the public defender and hearing from the private attorney and Gillenwater in court, the court appointed additional counsel to meet with

the defendant and report whether there was a need for a competency hearing. Upon receipt of this report, the court ordered a psychological evaluation and competency hearing.

Gillenwater was transferred to a federal detention center for evaluation but was uncooperative in the evaluation process. Although unable to fully interview Gillenwater or perform psychiatric tests, the examining psychologist submitted a report based upon her clinical interviews, observations of his behavior, and a review of his legal and medical records. The psychologist diagnosed Gillenwater as suffering from a delusional disorder, persecutory type that could substantially impair his ability to assist counsel in his defense. The psychologist reported and testified at the hearing that Gillenwater described his case as a government conspiracy to silence him from reporting OSHA violations and that he believed he was the victim of “tens of thousands” of computer attacks, that he was under constant surveillance, that people from OSHA and the casino were after him, and that newspapers had been bought off from reporting his allegations. Gillenwater had also accused his attorneys of committing crimes. According to law enforcement records, Gillenwater had contacted numerous State and federal officials including a US Senator from Washington state, saying powerful people were trying to kill his staff and frame him, and that the FBI would not protect him. Gillenwater also asked his attorney to subpoena 50-plus witnesses, including Obama Administration cabinet members, so that he could take his conspiracy theory to trial.

At the competency hearing held on January 12, 2012, the government only submitted the psychologist’s report and called her as a witness. It then recommended that Gillenwater receive competency-based restoration treatment. After the government finished introducing its evidence, Gillenwater’s attorney informed the court that Gillenwater wanted to testify but that he had advised him against it, and then stated the defendant had no further evidence. During this process, Gillenwater was whispering loudly to his attorney and then interrupted his counsel calling him a criminal. When admonished by the court for interrupting the proceedings, Gillenwater continued his expletive-filled remarks, and asked to be taken out of the courtroom, stating the evidence would clear him of the diagnosis, that the judge would not be a judge much longer, and that he would wait for the Republicans to be back in charge again. The court ordered him removed from the courtroom. It then found Gillenwater did not appear to understand the charges or the court process or to be able to assist counsel in his defense and ordered him remanded to the custody of the Attorney General for 60 days.

On appeal, the Ninth Circuit reviewed Gillenwater’s contention that he had been denied his right to testify at his pre-trial competency hearing and had not waived that right as a result of his disruptive behavior. The Ninth Circuit first determined that under federal law, 18 U.S.C. § 4247(d), a defendant has the right to testify at a pretrial competency hearing. The Ninth Circuit further found that the right to testify is contained in the Fourteenth Amendment due process guarantee of the right to be heard and to offer testimony. Moreover, the Ninth Circuit found that the right to testify is also embodied in the Compulsory Process Clause of the Sixth Amendment which grants a defendant the right to call witnesses in his favor. Logically included in that right, the Court noted, is the right to testify on one’s own behalf. This right is further found in the corollary to the Fifth Amendment right against self-incrimination. If a defendant cannot be compelled to testify against himself, he must also have the right to testify. Reviewing prior Supreme Court decisions holding that an individual has the right to testify in extrajudicial

proceedings, such as probation revocation hearings and hearings involving termination of welfare benefits, the Ninth Circuit went on to hold that a defendant must have an equivalent right to testify in his pre-trial competency hearing.

The Ninth Circuit then held that because a defendant's right to testify is a personal right, it can be relinquished only by the defendant himself, and the waiver must be knowing and intentional. The Court recognized that obtaining a knowing and intentional waiver may be difficult when the defendant's competency is in question, but it noted that defense counsel plays an important role in ensuring that the defendant understands his right to testify, that it can be waived, and the consequences of either decision. Here, the Court found that Gillenwater clearly demonstrated that he wanted to testify despite his counsel's advice to the contrary.

The Ninth Circuit also determined that a court has no affirmative duty to inform a defendant of his right to testify, but stated it does have a duty to warn the defendant of the consequences of his disruptive behavior before it removes him from the courtroom. In this case, the court never advised Gillenwater that his behavior could lead to the loss of his right to testify. Although Gillenwater asked to be removed from the courtroom, he never expressed any desire to waive his right to testify. The court did not expressly warn Gillenwater that his removal would result in the loss of his ability to testify and therefore he never effectively waived that right.

The Ninth Circuit went on to find that where a defendant is denied a constitutional right, the court on appeal must determine whether the denial was harmless error beyond a reasonable doubt. Here, the Court found that the district court only considered a single, incomplete psychological report and Gillenwater's conduct in the courtroom. The Ninth Circuit found other ample evidence in the psychological report that Gillenwater was very intelligent, had no criminal history, and although he was hesitant to be interviewed, was pleasant, polite, cooperative, and articulate. Based on its review of the record, the Ninth Circuit found that the denial of the right to testify was harmless error and remanded the case for a new competency hearing. The Ninth Circuit then stated that if another competency hearing is held at which Gillenwater testifies, the district court must enter an order barring the use of his testimony at his trial. Such testimony may only be used to impeach Gillenwater if he testifies at trial, but not to prove his guilt.

### **Sixth Circuit Finds Special Circumstances Preclude Involuntary Medication of Incompetent Defendant Charged with Bank Robbery**

The Sixth Circuit Court of Appeals held on April 11, 2013 that special circumstances exist that outweigh the government's interest in prosecuting for bank robbery a pre-trial detainee to restore him to competency. Unlike the Eighth Circuit evaluating similar special circumstances in *United States v. Mackey*, 717 F.3d 569 (8<sup>th</sup> Cir. 2013), reviewed below, a majority three-judge panel concluded that the potential availability of lengthy civil commitment together with the likelihood that, even if the defendant is restored to competency, he will be found not guilty by reason of insanity, greatly diminishes the government's interest in prosecution. *United States v. Grigsby*, 712 F.3d 964 (6<sup>th</sup> Cir. 2013).

Dennis Grigsby was charged with three counts of unarmed bank robbery in Columbus, Ohio, between January and March 2010. Grigsby's attorney requested the court to order mental evaluations to determine Grigsby's competence to stand trial and his sanity at the time of the offenses. The district court granted the motion and he was transferred to the Metropolitan Correctional Center in New York where two psychologists conducted the examinations. They both diagnosed Grigsby with paranoid schizophrenia and determined him incompetent to stand trial, but one postulated that he was sane at the time of his offense and the other that he was not. Both psychologists reported that Grigsby's mental disease did not significantly interfere with his appreciation of the wrongfulness of his acts, but there was insufficient information about whether mental illness impaired his ability to appreciate the wrongfulness of his conduct. Neither the government nor the defendant objected to the reports' findings and the district court committed Grigsby to the custody of the Attorney General in November 2010 for a period not to exceed four months for a determination whether he could be restored to competency.

Grigsby was then transferred to the Federal Medical Center in Butner, North Carolina and was evaluated by a psychiatrist and psychologist at the facility. They found that Grigsby had a normal upbringing, education and employment until he stopped working due to "job burnout." He was convicted of grand theft auto, disorderly conduct, and resisting arrest in 2006; for criminal trespassing in 2007; and for resisting arrest in 2010. He served short jail sentences for these crimes. He was also charged with voyeurism and menacing by stalking, which were not prosecuted. Grigsby was in good physical health, never received mental health treatment and was not taking antipsychotic medication for his illness. He followed all of the rules of the facility, got along well with peers and staff, was not gravely disabled and did not present a danger to self or others, or to the safe operation of the facility. Although his dress and grooming were appropriate and he was oriented to person, place, time and circumstances, and denied hallucinations and delusions, they reported, however, that Gillenwater's conversation was not linear and he displayed substantial evidence of thought disorder, including an extensive, but poorly organized, paranoid religious delusional system extending into all major functional areas of his life.

The evaluators determined that Grigsby was incompetent to stand trial. Because he was refusing all antipsychotic medications, they also requested an order under *Sell v. United States*, 539 U.S. 166 (2003), allowing them to medicate him involuntarily to restore his competence to stand trial. The evaluators both determined that antipsychotic medication was substantially likely to render Grigsby competent to stand trial and substantially unlikely to produce side-effects that would interfere with his ability to assist his attorney in conducting a defense and that less intrusive therapies, such as psychotherapy would not able work. They reported that antipsychotic medication was medically appropriate and would take at least four months to be effective.

In determining whether to uphold the district court's order authorizing involuntary medication to restore Grigsby to competence, the Sixth Circuit applied the *Sell* test requiring the government to prove by clear and convincing evidence that 1) an important government interest in prosecution exists; 2) involuntary medication will significantly further the governmental interest, which requires proof both that administration of the medication is substantially likely to render the defendant competent to stand trial and substantially unlikely to cause side effects that

will interfere significantly with the defendant's ability to assist counsel in conducting the trial defense; 3) involuntary medication is necessary to further the governmental interest; and 4) administration of drugs is medically appropriate for the defendant. *Id* at 180-81.

At the district court hearing, Grigsby conceded that the government had an important interest in bringing him to trial for the serious crime of bank robbery. Grigsby argued, however, that special circumstances existed in his case to diminish that interest. He first argued that the potential availability of lengthy civil commitment together with the likelihood that he would be found not guilty by reason of insanity addressed the government's interest in his continued confinement.

The Sixth Circuit reviewed the Butner psychiatrist's testimony that if Grigsby is not forcibly medicated he would remain psychotic and medical staff at FMC-Butner would request his civil commitment. In order to be civilly committed, federal law requires the district court to determine by clear and convincing evidence whether Grigsby is suffering from a mental disease or defect and poses a substantial risk of bodily injury or serious damage to property. The evidence revealed that although Grigsby was not a present danger to himself or others in the structured environment at Butner, the government psychiatrist testified that he was not necessarily fit for release into society. The district court found that the evidence was inconclusive on that issue, but the Sixth Circuit determined that the district court should have inquired further. The Sixth Circuit found evidence in the record that supported the possibility that Grigsby might meet the insanity standard at trial, if restored to competence. Both the government's psychiatrist and Grigsby's expert agreed that Grigsby would need to be restored to competence before a definitive determination could be made, but Grigsby's expert testified that he suffered from a severe and chronic mental illness and likely suffered from it at the time of the bank robberies. He also surmised that Grigsby may have experienced previous psychotic episodes.

The Court further determined that the length of Grigsby's confinement while the government attempts to restore him to competency and prosecute him may approximate the length of any prison sentence he might receive if convicted. If convicted, the government indicates Grigsby might receive a sentence of 57 to 71 months based on sentencing guidelines. Unlike the Eighth Circuit, the Sixth Circuit found the government's analysis under the guidelines instructive because the government often uses this range, rather than the maximum possible sentence, as a basis for negotiating plea agreements. The Court therefore found this range more useful when, as here, the government advances the length of sentence as a core reason why it wants to prosecute. The Court found that Grigsby had already been held since July 2010, or 33 months. It would take at least four months to restore him to competency, plus additional time to bring him to trial, and potentially additional time to re-restore him if he loses competency during the pendency of the trial. The Court also noted that often defendants plead guilty after they are restored to competency which reduces further their period of imprisonment under the guidelines. All of these factors indicated to the Court that Grigsby may remain in custody for a period roughly equivalent to the length of any prison sentence he might serve, thus lessening the government's interest in prosecuting him.

The Court went on to find that antipsychotic medication can burden a defendant's fair trial rights by affecting his ability to comprehend and react to trial events. Grigsby argued that he had trial-related concerns that tardive dyskinesia and akathisia, which causes constant movement and an inability to remain still, might impair his ability to make a dignified appearance before a jury and assist his counsel in his defense. Although the Court noted that the record indicates antipsychotic medication is generally effective in restoring competency especially in patient's with Grigsby's positive symptoms, it also found that the government's psychiatrist testified that 30% of patients do not respond to haloperidol and another 30% show only a partial response. He also testified that 30% of individuals treated with haloperidol develop pseudoparkinsonism, 20-30% develop akathisia, 2-10% develop acute systonic reactions, and 18-40% develop irreversible tardive dyskinesia. Although Grigsby had never previously been treated with antipsychotic medication, and the government psychiatrist testified that other medications would be prescribed to counter the side-effects and that the medication would be changed or discontinued if the side effects continued or irreversible side-effects developed, the Court nonetheless found that the record lacked clear and convincing evidence that medication is substantially unlikely to cause side effects that will interfere with Grigsby's ability to assist in his defense.

Based upon all the facts above, the majority of the Sixth Circuit three-judge panel hearing the appeal found that the findings of the district court supporting an order authorizing involuntary medication were clearly erroneous. The Court reversed the district court order and remanded the case for further proceedings, specifying its expectation that the district court would determine whether civil commitment is appropriate for Grigsby. A dissent was filed in this case stating that the Court majority's analysis of the special circumstances was highly speculative as to the likelihood of Grigsby's civil commitment, his being found not guilty by reason of insanity, his pretrial confinement exceeding any sentence he might receive, and any side-effects impairing his pre-trial rights. Compare this decision with the decision in *United States v. Mackey* below.

## **Eight Circuit Upholds Administration of Antipsychotic Medication to Restore Competency of Defendant Accused of Failing to Register as Sex Offender**

The Eighth Circuit Court of Appeals upheld on June 10, 2013, the decision of the district court authorizing the government to involuntarily medicate a defendant accused of failing to register as a sex offender to restore him to competency to stand trial. Applying the standard in *Sell v. United States*, 539 U.S. 166 (2003), the Court found that the government has an important interest in bringing the defendant to trial for the non-violent status offense of failure to register as a sex offender. Unlike the Sixth Circuit in *United States v. Grigsby*, 712 F.3d 964 (6<sup>th</sup> Cir. 2013, reviewed above, the likelihood that the defendant might be sentenced to a term less than his pretrial confinement did not minimize that interest given the requirement for a minimum of five years, and the potential for a life time, of post-release supervision. Nor did the fact that the defendant might be found not guilty by reason of insanity, resulting in a lengthy period of civil commitment satisfy the government's interest in his confinement, because there was no guarantee in spite of his delusional disorder that he would meet civil commitment criteria. *United States v. Mackey*, 717 F.3d 569 (8<sup>th</sup> Cir. 2013).

Shawn Mackey was indicted in June 2010 for failure to register as a sex offender in violation of the federal Sex Offender Registration and Notification Act. Mackey was detained pending trial and requested the district court to order a mental evaluation. He refused, however, to participate in the evaluation conducted at the Federal Detention Center in Seattle, Washington, but based upon the stipulation of both the government and Mackey, the district court found him to be suffering from a mental disease rendering him incompetent to stand trial. The court then ordered him to be committed to the custody of the Attorney General for evaluation and treatment, and a determination of whether he could be restored to competency.

In March 2012, the government moved the court to conduct a *Sell* hearing to determine whether Mackey could be medicated involuntarily. Two doctors at the United States Medical Center for Federal Prisoners in Springfield, Missouri, testified that Mackey was delusional and suffered from a “psychotic disorder not otherwise specified.” One psychologist tried to interview Mackey on seven occasions but he refused to talk with her in almost all of those instances. He did make some remarks reflecting a mental illness, including once that he owned Alaska, and on another occasion that his mother owned Alaska. A psychiatrist and Director of the Medical Center testified that Mackey was delusional and his thinking was disorganized. The psychiatrist testified that administration of antipsychotic medication would be necessary to restore Mackey to competency and there was a substantial probability that it would be successful, although Mackey had stated he absolutely did not want any medication. He also testified that medication would have a positive impact on other aspects of his life, including his personal hygiene and his ability to interact with his peers.

Both the district court and the Court of Appeals applied the *Sell* test finding 1) that an important governmental interest is at stake; 2) that involuntary medication will significantly further that governmental interest; 3) that involuntary medication is necessary to further that interest; and 4) that administration of the drugs is medically appropriate. The Eighth Circuit first reviewed *de novo* the district court’s legal determination that important government interests are at stake.

Mackey first contended that the nonviolent “status” offense of failure to register as a sex offender was not “serious” for the purposes of *Sell*. The Court rejected this argument finding that sex offenders who are not properly registered present a serious risk to the safety of the community. The legislative scheme was enacted to address deficiencies in prior law that had enabled sex offenders to fall through the cracks. Even though this offense does not itself harm others directly, the Court found that society has a strong interest in prosecuting the violation and imposing punishment.

Mackey also argued that there were special circumstances in his case. Specifically he argued that the maximum time that he was likely to receive if convicted would be 24-30 months under the sentencing guidelines approximating or exceeding the time he would already be held pre-trial. The government’s interest in his confinement would thus be achieved. The Court first found that the maximum sentence for the crime charged is ten years imprisonment, but it was impossible to know what sentence might be imposed when no conviction had yet been obtained or pre-sentence report received. In addition, a criminal sentence in this case also included mandatory post-release supervision of at least five years to life.



Mackey further argued that even if medication restored him to competency, he would most likely be found not guilty by reason of insanity and civilly committed. The Court next noted that even if Mackey could successfully raise an insanity defense, there was no guarantee that he would be found to meet the long term federal civil commitment criteria that he posed a substantial risk of bodily injury to another person or serious damage to the property of another. The Court then held that these circumstances did not outweigh the government's interest in bringing Mackey to trial.

Turning to the other *Sell* factors, the Eighth Circuit held that the district court did not commit clear error in finding that the administration of antipsychotic medication would be substantially likely to restore Mackey's competence to stand trial and would be substantially unlikely to have significant side effects. Mackey challenged the testimony of the two experts based upon testimony presented in other cases that treatment with medication for persons with grandiose delusional disorders, such as his, was not effective. The Eighth Circuit upheld the district court finding that the experts in this case had testified to the contrary and that medication was substantially likely to restore his competency, distinguishing their testimony from the testimony of experts in other cases.

Finally the Court held that the district court did not commit clear error in finding that medication was medically appropriate in this case based upon the testimony of the psychiatrist that the medication would not only restore Mackey's competence to stand trial but would provide him with a better quality of life. Based upon these findings, the Eighth Circuit upheld the district court's order authorizing the government to involuntarily treat Mackey with antipsychotic medication to restore his competency to stand trial.

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