

DEVELOPMENTS IN MENTAL HEALTH LAW

The Institute of Law, Psychiatry & Public Policy — The University of Virginia

Volume 36, Issue 2

Summer 2017

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I. Article

The Gun Violence Restraining Order: An Opportunity for Common Ground in the Gun Violence Debate

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Introduction

In March of 2013, shortly after the massacre at Sandy Hook Elementary School, experts in the areas of mental health, public health, law enforcement, law and gun violence prevention met for a two-day conference to discuss research and identify areas of

consensus regarding the intersection of gun violence, public health and mental health. This meeting resulted in the formation of the Consortium for Risk-Based Firearm Policy and the publication of two reports outlining research and recommending evidence-based gun violence prevention policies at the State and Federal level.¹

The Consortium determined that law enforcement and family members needed a tool to keep firearms out of the hands of individuals who may be a danger to themselves or others, but who have committed no crime, and do not meet the clinical criteria for involuntary psychiatric hospitalization. To address this compelling public safety need, the Consortium reviewed innovative state statutes from Connecticut and Indiana and developed a proposal for a Gun Violence Restraining Order (GVRO). A GVRO would “authorize law enforcement to remove guns from any individual who poses an immediate threat of harm to self or others,” and “create a new civil restraining order process to allow private citizens to petition the court to request that guns be temporarily removed from a family member or intimate partner who poses an immediate risk of harm to self or others.”² An important component of this recommendation was a restoration process that provided respondents the opportunity to participate in a hearing to seek the return of removed firearms and a suggested duration for the order of 1 year.³ This article outlines the history of GVRO-style policies in Connecticut, Indiana, Massachusetts, Illinois, and California, and summarizes similar proposals that were considered in Virginia during the 2015, 2016, and 2017 legislative sessions.

The purposes of this article are to update the original article, which appeared in the Institute of Law, Psychiatry, & Public Policy “Developments in Mental Health Law” October 2015 issue, by incorporating amendments to the California GVRO, summarize similar laws in Massachusetts, and Illinois that were previously not discussed, and summarize a California-style GVRO law that was enacted in Washington State by ballot initiative in November 2016.⁴

Connecticut

The 1998 Connecticut Lottery shooting, in which a disgruntled Connecticut Lottery accountant stabbed and shot one of his bosses and shot three other top executives before turning the gun on himself, prompted the Connecticut legislature to pass, and the

¹ The Consortium for Risk-Based Firearm Policy. (2013). *Guns, Public Health, and Mental Illness: An Evidence-Based Approach for State Policy*. Retrieved July 20, 2015, from <http://www.efsgv.org/wp-content/uploads/2014/10/Final-State-Report.pdf>; see also The Consortium for Risk-Based Firearm Policy. (2013). *Guns, Public Health, and Mental Illness: An Evidence-Based Approach for Federal Policy*. Retrieved July 20, 2015, from <http://www.efsgv.org/wp-content/uploads/2014/10/Final-Federal-Report.pdf>

² The Consortium for Risk-Based Firearm Policy. (2013). *Guns, Public Health, and Mental Illness: An Evidence Based Approach for State Policy*. Retrieved July 20, 2015, from <http://www.efsgv.org/wp-content/uploads/2014/10/Final-State-Report.pdf>

³ *Id.*

⁴ Kelly Ward, The Gun Violence Restraining Order: An Opportunity for Common Ground in the Gun Violence Debate, 34 Dev. Mental Health L. 1 (2015)

governor to sign, legislation that established a process to remove firearms from individuals who pose “a risk of imminent injury to self or others.”⁵

Under the Connecticut statute, a state’s attorney, assistant state’s attorney, or two law enforcement officers, may submit a complaint under oath to a judge of the Superior Court asserting probable cause to believe that “(1) a person poses a risk of imminent personal injury to himself or herself or to other individuals, (2) such person possesses one or more firearms, and (3) such firearm or firearms are within or upon any place, thing or person.”⁶ Law enforcement, state’s attorneys and assistant state’s attorneys are directed to make such a complaint only after they “have conducted an independent investigation and have determined that such probable cause exists and that there is no reasonable alternative available to prevent such person from causing imminent personal injury to himself or herself or to others with such firearm.”⁷

A judge may issue a warrant only on a complaint outlined above that establishes the grounds for issuing a warrant. In determining whether grounds for the warrant exist, a judge shall consider the following: “(1) Recent threats or acts of violence by such person directed toward other persons; (2) recent threats or acts of violence by such person directed toward himself or herself; and (3) recent acts of cruelty to animals ... by such person.”⁸ A judge may also consider other factors including, but not limited to, the following: “(A) the reckless use, display or brandishing of a firearm by such person, (B) a history of the use, attempted use or threatened use of physical force by such person against other persons, (C) prior involuntary confinement of such person in a hospital for persons with psychiatric disabilities, and (D) the illegal use of controlled substances or abuse of alcohol by such person.”⁹

If a judge issues a warrant, Connecticut law mandates that a hearing be held within 14 days to consider whether the guns should be removed for up to 1 year or returned to the owner.¹⁰ At this hearing the state must prove by clear and convincing evidence that the owner remains “a risk of imminent injury to self or others” for the order to be extended.¹¹

Indiana

In 2004, the shooting of five Indiana police officers, in which one officer was killed and four others were injured, prompted the passage of similar legislation that allows law enforcement to remove firearms from individuals they deem dangerous. An individual is

⁵ Rabinovitz, Jonathan. "Connecticut Lottery Worker Kills 4 Bosses, Then Himself." *The New York Times*. The New York Times, 06 Mar. 1998. Web. 20 July 2015.

<http://www.nytimes.com/1998/03/07/nyregion/rampage-connecticut-overview-connecticut-lottery-worker-kills-4-bosses-then.html>; Conn. Gen. Stat. Ann. § 29-38c (West).

⁶ Conn. Gen. Stat. Ann. § 29-38c(a) (West).

⁷ *Id.*

⁸ Conn. Gen. Stat. Ann. § 29-38c(b) (West).

⁹ *Id.*

¹⁰ Conn. Gen. Stat. Ann. § 29-38c(d) (West).

¹¹ *Id.*

defined as “dangerous” if: “(1) the individual presents an imminent risk of personal injury to the individual or to another individual; or (2) the individual may present a risk of personal injury to the individual or to another individual in the future and the individual: (A) has a mental illness (as defined in IC 12-7-2-130) that may be controlled by medication, and has not demonstrated a pattern of voluntarily and consistently taking the individual’s medication while not under supervision; or (B) is the subject of documented evidence that would give rise to a reasonable belief that the individual has a propensity for violent or emotionally unstable conduct.”¹² The Indiana law provides two mechanisms for the removal of firearms from individuals whom law enforcement deem to be dangerous: a warrant-based removal process, similar to Connecticut’s, and a warrantless removal process.

Under the Indiana law, a circuit court or superior court judge may issue a warrant for the seizure of firearms if:

- (1) The law enforcement officer provides the court a sworn affidavit that:
 - (A) states why the law enforcement officer believes that the individual is dangerous and in possession of a firearm; and
 - (B) describes the law enforcement officer's interactions and conversations with:
 - (i) the individual who is alleged to be dangerous; or
 - (ii) another individual, if the law enforcement officer believes that information obtained from this individual is credible and reliable;that have led the law enforcement officer to believe that the individual is dangerous and in possession of a firearm;
- (2) the affidavit specifically describes the location of the firearm; and
- (3) the circuit or superior court determines that probable cause exists to believe that the individual is: (A) dangerous; and (B) in possession of a firearm.¹³

If the court issues a warrant for the seizure of firearms, the law enforcement officer executing the warrant shall file, within 48 hours of the execution of the warrant, a return with the court that states that the warrant was served and informs the court of the time and date that the warrant was served, the name and address of the individual named in the warrant; and the quantity and identity of any firearms seized by the law enforcement officer.¹⁴

¹² Ind. Code Ann. § 35-47-14-1 (West).

¹³ Ind. Code Ann. § 35-47-14-2 (West).

¹⁴ Ind. Code Ann. § 35-47-14-4 (West).

If a law enforcement officer, without obtaining a warrant, seizes a firearm from an individual whom the officer believes to be dangerous, the officer is required to submit to the circuit or superior court having jurisdiction over the individual believed to be dangerous a written statement under oath or affirmation describing the basis for the officer's belief that the individual is dangerous.¹⁵ If the court finds there is probable cause to believe the individual is indeed dangerous, the court shall order the law enforcement agency that has custody over the seized firearms to retain them.¹⁶

Not later than 14 days from the date a return is filed for a warrant-based seizure, or the date on which a written submission is made for a warrantless seizure, the court shall conduct a hearing to determine whether the seized firearm should be returned to the individual or retained by law enforcement.¹⁷ The court shall inform the prosecuting attorney and the individual from whom firearms were seized of the date, time, and location of the hearing.¹⁸ The burden at this hearing is on the state to prove by clear and convincing evidence that the respondent is dangerous.¹⁹ If the state meets the standard, any firearms seized may be held, until the court orders the firearms to be returned or otherwise disposed of, by the state.²⁰ The respondent also has the option of selling the firearms.²¹

One hundred eighty days after the date on which a court orders a law enforcement agency to retain an individual's firearm, a respondent may petition the court for return of the firearm. The court shall schedule a hearing and inform the prosecuting attorney, who shall represent the state, of the date, time, and location of the hearing. At the hearing, the respondent shall bear the burden of proving by a preponderance of the evidence that he or she is not dangerous. If the respondent meets this burden, the court shall order the law enforcement agency having custody of the firearm to return the firearm to the individual. If the respondent fails to meet this burden, the individual may not file a subsequent petition until at least 180 days after the date on which the court denied the petition.²²

Massachusetts

Massachusetts requires individuals to obtain a Firearm Identification Card (“FID card”) in order to purchase or possess rifles and shotguns that are not considered “large capacity” weapons, and feeding devices for long guns that are not “large capacity” weapons.²³ Massachusetts requires individuals to obtain a FID card and a “permit to

¹⁵ Ind. Code Ann. § 35-47-14-3 (West).

¹⁶ *Id.*

¹⁷ Ind. Code Ann. § 35-47-14-5(a) (West).

¹⁸ Ind. Code Ann. § 35-47-14-5(b) (West).

¹⁹ Ind. Code Ann. § 35-47-14-6 (West).

²⁰ *Id.*

²¹ Ind. Code Ann. § 35-47-14-10 (West).

²² Ind. Code Ann. § 35-47-14-8 (West).

²³ Mass. Gen. Laws Ann. ch. 140, §§ 131E(a), 129B(6) (West).

purchase, rent or lease” in order to purchase a handgun, handgun feeding device, or short-barreled shotgun or rifle.²⁴

A law enforcement agency may file a petition in the district court of jurisdiction requesting that an applicant for an FID card be denied the issuance or renewal of an FID card, or to suspend or revoke such a card.²⁵ The petition shall be accompanied by written notice to the applicant describing the specific evidence in the petition.²⁶

Within 90 days of the filing of a petition to deny the issuance or renewal of a FID card, the court shall hold a hearing to determine if the applicant is unsuitable.²⁷

Within 15 days of the filing of a petition to suspend or revoke a FID card, the court shall determine whether there is sufficient evidence to support a finding that an applicant is unsuitable.²⁸ If a court determines that the evidence is insufficient to support a finding of unsuitability, the law enforcement agency may not file another petition for the same applicant within 75 days of the previous petition for that applicant.²⁹ If a court determines that there is sufficient evidence to support a finding of unsuitability, within 75 days, the court shall hold a hearing to determine if the applicant is unsuitable.³⁰

The court may enter a judgment that the applicant is unsuitable if by a preponderance of the evidence there exists: “(i) reliable, articulable, and credible information that the applicant has exhibited or engaged in behavior to suggest the applicant could potentially create a risk to public safety; or (ii) existing factors that suggest the applicant could potentially create a risk to public safety.”³¹

Upon revocation, suspension or denial of an application for an FID, the person whose application was revoked, suspended or denied must deliver or surrender all firearms, rifles, shotguns, machine guns, and ammunition which the person possesses to the licensing authority “without delay.”³² After taking possession, the licensing authority may transfer possession of any firearms, rifles, shotguns, machine guns, and ammunition to a licensed firearms dealer for storage purposes.³³ The licensed firearms dealer shall issue a receipt to the person who surrendered the firearms, rifles, shotguns, machine guns and ammunition, and such individual shall be liable to the licensed firearms dealer for reasonable storage charges.³⁴

²⁴ Mass. Gen. Laws Ann. ch. 140, § 131E(b) (West).

²⁵ Mass. Gen. Laws Ann. ch. 140, § 129B(1 ½)(a) (West).

²⁶ *Id.*

²⁷ Mass. Gen. Laws Ann. ch. 140, § 129B(1 ½)(b) (West).

²⁸ Mass. Gen. Laws Ann. ch. 140, § 129B(1 ½)(c) (West).

²⁹ *Id.*

³⁰ *Id.*

³¹ Mass. Gen. Laws Ann. ch. 140, § 129B(1 ½)(d) (West).

³² Mass. Gen. Laws Ann. ch. 140, § 129D (West)

³³ *Id.*

³⁴ *Id.*

At any time up to 1 year after surrender, the person who surrendered or the person's legal representative shall have the right to transfer the firearms, rifles, shotguns, machine guns, and ammunition to a licensed dealer or any other person legally permitted to take possession of the aforementioned objects.³⁵ Upon notification in writing by the purchaser and the former owner, the licensing authority shall within 10 days deliver the firearms, rifles, shotguns, machine guns, and ammunition to the transferee or purchaser.³⁶

Illinois

Illinois law requires individuals to have a Firearm Owner's Identification Card ("FOID card") to acquire or possess a firearm.³⁷ The Department of State Police may deny an application for or revoke and seize a FOID card only if the Department finds that the applicant or the person to whom a FOID card was issued is or was at the time of issuance "[a] person whose mental condition is of such nature that it poses a clear and present danger to the applicant, any other person or persons or the community[.]"³⁸ A law enforcement officer may determine that a person poses a clear and present danger to himself, herself, or to others, and must notify the Department of State Police of such a determination within 24 hours.³⁹ "Clear and present danger" as it applies here means "a person who ... demonstrates threatening physical or verbal behavior, such as violent, suicidal, or assaultive threats, actions, or other behavior..."⁴⁰ The Department of State Police shall provide written notice to a person whose application for a FOID card is denied and to the holder of a FOID card whose card is revoked or seized stating specifically the grounds for such action.⁴¹ Within 48 hours of receiving notice of the denial of an application for a FOID card or revocation of a FOID card, the person who receives notice shall surrender his or her FOID card to the local law enforcement agency where he or she resides.⁴² The law enforcement agency accepting surrender shall provide the person a receipt and transmit the FOID card to the Department of State Police.⁴³ The person who receives notice shall also complete a Firearm Disposition Record in which the person shall disclose "(1) the make, model, and serial number of each firearm owned by or under the custody and control of the revoked person; (2) the location where each firearm will be maintained during the prohibited term; and (3) if any firearm will be transferred to the custody of another person, the name, address, and [FOID] card number of the transfer."⁴⁴ The person who receives notice shall place his or her firearms in the location or with the person reported in the Firearm Disposition Record. The local law

³⁵ *Id.*

³⁶ *Id.*

³⁷ 430 Ill. Comp. Stat. Ann. 65/2(a)(1).

³⁸ 430 Ill. Comp. Stat. Ann. 65/8(f).

³⁹ 430 Ill. Comp. Stat. Ann. 65/8.1(d)(2).

⁴⁰ 430 Ill. Comp. Stat. Ann. 65/1.1.

⁴¹ 430 Ill. Comp. Stat. Ann. 65/9.

⁴² 430 Ill. Comp. Stat. Ann. 65/9.5(a)(1).

⁴³ *Id.*

⁴⁴ 430 Ill. Comp. Stat. Ann. 65/9.5(a)(2).

enforcement agency shall provide a copy of the Firearm Disposition Record to the person whose FOID card has been revoked and to the Department of State Police.⁴⁵

If the person whose FOID card has been revoked fails to surrender his or her FOID card or complete a Firearm Disposition Record and surrender his or her firearms to the location or person indicated in the Firearm Disposition Record, “the sheriff or law enforcement agency where the person resides may petition the circuit court for a search warrant to search for and seize the [FOID] card and firearms in the possession or under the custody or control of the person whose [FOID] card has been revoked.”⁴⁶

Failure of a person who has received notice of revocation of a FOID card to surrender his or her FOID card, complete a Firearm Disposition Record, and surrender his or her firearms is a Class A misdemeanor.⁴⁷

A person whose application for a FOID card is denied or whenever a FOID card is revoked or seized, the person may appeal to the Director of State Police for a hearing on the denial, revocation or seizure.⁴⁸

California Gun Violence Restraining Order

On May 23, 2014, Elliot Rodger killed six people and injured fourteen others in Isla Vista, California near the University of California, Santa Barbara. He first stabbed three men in his apartment. Afterward, he drove to a sorority house and shot three women, killing two. Rodger then drove to a nearby deli and shot a male student to death. He drove around Isla Vista shooting and wounding several pedestrians. Rodger finally shot and killed himself.

A month prior to the rampage, Rodger’s mother, alarmed at some “bizarre” videos Rodger had posted on YouTube, contacted Rodger’s therapist. The therapist called a mental health crisis service and they referred the matter to police. On April 30, 2014, police officers arrived at Elliot Rodger’s residence to conduct a welfare check but felt they did not have a legal basis to intervene.⁴⁹

Shortly after the shooting in Isla Vista, Assemblywomen Nancy Skinner (D- Berkeley) and Das Williams (D- Santa Barbara) introduced Assembly Bill No. 1014. The law, passed by the legislature and signed by the governor, allows law enforcement and immediate family members to petition the court for a Gun Violence Restraining Order (GVRO). There are three types of GVROs established by Assembly Bill No. 1014: a

⁴⁵ 430 Ill. Comp. Stat. Ann. 65/9.5(b).

⁴⁶ 430 Ill. Comp. Stat. Ann. 65/9.5(c).

⁴⁷ 430 Ill. Comp. Stat. Ann. 65/9.5(d).

⁴⁸ 430 Ill. Comp. Stat. Ann. 65/10.

⁴⁹ Mather, Kate, Richard Winton, and Adolfo Flores. "Deputies Didn't View Elliot Rodger's Videos in Welfare Check." *Los Angeles Times*. Los Angeles Times, 29 May 2014. Web. 20 July 2015. <http://www.latimes.com/local/la-me-rodger-welfare-20140530-story.html>

temporary emergency GVRO, an ex parte GVRO, and a GVRO issued after notice and hearing.

Temporary Emergency GVRO

A temporary emergency GVRO may be sought only by a law enforcement officer based on a petition or oral request to a judicial officer any time of day or night.⁵⁰ A temporary emergency GVRO may be issued on an ex parte basis if a law enforcement officer asserts, and a judicial officer finds, there is reasonable cause to believe that a person poses an immediate and present danger of injury to self or others by having a firearm in his or her possession and that less restrictive alternatives have been ineffective, inadequate, or inappropriate.⁵¹ The temporary emergency GVRO shall prohibit the subject of the petition from having in his or her custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm or ammunition, and shall expire 21 days from the date the order is issued.⁵²

Ex Parte GVRO

An ex parte GVRO may be sought by a law enforcement officer or immediate family member who submits a petition to a judicial officer during normal court hours.⁵³ An immediate family member is defined as:

- any spouse (whether by marriage or not),
- domestic partner,
- parent,
- child,
- any person related by consanguinity or affinity within the second degree, or
- any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household.⁵⁴

A court may issue an ex parte GVRO if the petition shows that there is a substantial likelihood that “(A)the subject of the petition poses a significant danger, in the near future, of personal injury to himself, herself, or another by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm ...” and “an ex parte gun violence restraining order is necessary to prevent personal injury to the subject of the petition or another because less restrictive alternatives either have been tried and found to be ineffective, or are inadequate or inappropriate for the circumstances of the subject of

⁵⁰ Cal. Penal Code § 18125 (West).

⁵¹ Cal. Penal Code § 18125(a)(1),(2) (West).

⁵² Cal. Penal Code § 18125(b) (West).

⁵³ Cal. Penal Code § 18150(a)(1) (West).

⁵⁴ Cal. Penal Code §§ 18150(2), 422.4(b)(3) (West).

the petition.”⁵⁵ The court must consider the following types of evidence to determine whether to issue an ex parte GVRO:

- (1) A recent threat of violence or act of violence by the subject of the petition directed toward another.
- (2) A recent threat of violence or act of violence by the subject of the petition directed toward himself or herself.
- (3) A recent violation of a protective order of any kind.
- (4) A conviction of a violent offense.
- (5) A pattern of violent acts or violent threats within the past 12 months, including, but not limited to, threats of violence or acts of violence by the subject of the petition directed toward himself, herself, or another.⁵⁶

The court may also consider any other evidence of an increased risk for violence, including, but not limited to, evidence of any of the following:

- (1) The unlawful and reckless use, display, or brandishing of a firearm by the subject of the petition.
- (2) The history of use, attempted use, or threatened use of physical force by the subject of the petition against another person.
- (3) Any prior arrest of the subject of the petition for a felony offense.
- (4) Any violation of a protective order of any kind.
- (5) Documentary evidence, including, but not limited to, police reports and records of convictions, of either recent criminal offenses by the subject of the petition that involve controlled substances or alcohol or ongoing abuse of controlled substances or alcohol by the subject of the petition.
- (6) Evidence of recent acquisition of firearms, ammunition, or other deadly weapons.⁵⁷

The ex parte GVRO shall prohibit the subject of the petition from having in his or her custody or control, owning, purchasing, possessing, or receiving, or attempting to

⁵⁵ Cal. Penal Code § 18150(b)(1),(2) (West).

⁵⁶ Cal. Penal Code §§ 18150(b)(1); 18155(b)(1)(West).

⁵⁷ Cal. Penal Code §§ 18150(b)(1); 18155(b)(2)(West).

purchase or receive, a firearm or ammunition, and shall either be dissolved or extended at a hearing to be held within 21 days of the issuance of an ex parte GVRO.⁵⁸

GVRO Issued After Notice and Hearing

Not later than 21 days after the issuance of an ex parte GVRO, the court shall provide a hearing for the respondent to determine if a more permanent gun violence restraining order should be issued.⁵⁹ At the hearing, the petitioner shall have the burden of proving, by clear and convincing evidence, that “[t]he subject of the petition, or a person subject to an ex parte gun violence restraining order, as applicable, poses a significant danger of personal injury to himself, herself, or another by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm or ammunition” and “[a] gun violence restraining order is necessary to prevent personal injury to the subject of the petition, or the person subject to an ex parte gun violence restraining order, as applicable, or another because less restrictive alternatives either have been tried and found to be ineffective, or are inadequate or inappropriate for the circumstances of the subject of the petition, or the person subject to an ex parte gun violence restraining order, as applicable.”⁶⁰ If the court finds that there is clear and convincing evidence to issue a GVRO, the court shall issue a GVRO that prohibits the subject of the petition from having in his or her custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm or ammunition for up to 1 year, subject to termination or renewal.⁶¹

Termination and Renewal

A respondent may petition for the termination of a GVRO issue after notice and hearing one time while the order is in effect.⁶² If the court finds after the hearing that there is *no longer* clear and convincing evidence to believe that 1) the subject of a GVRO poses a significant danger of personal injury to himself, herself, or another by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm or ammunition, and 2) a GVRO is necessary to prevent personal injury to the subject of the GVRO or another because less restrictive alternatives either have been tried and found to be ineffective, or are inadequate or inappropriate for the circumstances of the subject of the GVRO, the court shall terminate the order.⁶³

A law enforcement officer or immediate family member of the respondent may request a renewal of a GVRO at any time within the three months before the expiration of a

⁵⁸ Cal. Penal Code § 18165 (West).

⁵⁹ *Id.*

⁶⁰ Cal. Penal Code § 18175(b)(1),(2) (West).

⁶¹ Cal. Penal Code § 18175(c)(1),(d) (West).

⁶² Cal. Penal Code § 18185(a) (West).

⁶³ Cal. Penal Code § 18185(b) (West).

GVRO.⁶⁴ The evidentiary requirements and standard of review are the same as those of an initial GVRO issued after notice and hearing.⁶⁵

Surrender of Firearms

Upon issuance of a GVRO, the court shall order the restrained person to surrender to the local law enforcement agency all firearms and ammunition in the restrained person's custody or control, or which the restrained person possesses or owns.⁶⁶ Surrender shall occur by immediately surrendering all firearms and ammunition in a safe manner, upon request of any law enforcement officer, to the control of the officer, after being served with the restraining order.⁶⁷ A law enforcement officer serving a gun violence restraining order that indicates that the restrained person possesses any firearms or ammunition shall request that all firearms and ammunition be immediately surrendered.⁶⁸ Alternatively, if no request is made by a law enforcement officer, the surrender shall occur within 24 hours of being served with the order, by either surrendering all firearms and ammunition in a safe manner to the control of the local law enforcement agency, by selling all firearms and ammunition to a licensed gun dealer, or transferring all firearms and ammunition to a licensed firearms dealer in accordance with state law.⁶⁹ The law enforcement officer or licensed gun dealer taking possession of any firearms or ammunition shall issue a receipt to the person surrendering the firearm or firearms or ammunition or both at the time of surrender.⁷⁰ A person ordered to surrender all firearms and ammunition shall file the original receipt with the court that issued the GVRO and a copy of the receipt with the law enforcement agency that served the gun violence restraining order within 48 hours of service of the order.⁷¹

Penalties

It is a misdemeanor crime for a person to own or possess a firearm or ammunition knowing that he or she is prohibited from doing so by a temporary emergency GVRO, ex parte GVRO, or GVRO issued after notice and hearing.⁷² Such individual shall also be prohibited from having in his or her custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm or ammunition for a period of 5 years from the expiration of any GVRO.⁷³

⁶⁴ Cal. Penal Code § 18190 (West).

⁶⁵ *Id.*

⁶⁶ Cal. Penal Code § 18120(b)(1) (West).

⁶⁷ Cal. Penal Code § 18120(b)(2) (West).

⁶⁸ *Id.*

⁶⁹ *Id.* See also Cal. Penal Code § 29830 (West).

⁷⁰ *Id.*

⁷¹ Cal. Penal Code § 18120(b)(2)(A),(B) (West).

⁷² Cal. Penal Code § 18205 (West).

⁷³ *Id.*

It is a misdemeanor crime for a person to file a petition for an ex parte GVRO or GVRO issued after notice and a hearing knowing the information in the petition to be false or with the intent to harass.⁷⁴

Washington Extreme Risk Protection Order

Washington's Extreme Risk Protection Order ("ERPO"), which was passed in November 2016 by ballot initiative, creates two types of ERPOs: ex parte temporary ERPO and a final ERPO.

A law enforcement officer, law enforcement agency, or family or household member of the respondent may petition for an ex parte temporary ERPO or ERPO issued after notice and hearing. A family or household member means, with respect to the respondent, any:

- Person related by blood, marriage, or adoption,
- Dating partners,
- Person who has a child in common (regardless of whether such person has been married to the respondent or has lived together with the respondent at any time),
- Person who resides or has resided with the respondent within the past year,
- Domestic partners,
- Person who has a biological or legal parent-child relationship with the respondent, including:
 - Stepparents and stepchildren, and
 - Grandparents and grandchildren, and
- Person who is acting or has acted as the respondent's legal guardian.⁷⁵

The petition must "(a) [a]llege that the respondent poses a significant danger of causing personal injury to self or others by having in his or her custody or control, purchasing, possessing, or receiving a firearm, and be accompanied by an affidavit under oath stating the specific statements, actions, or facts that give rise to a reasonable fear of future dangerous acts by the respondent; (b) [i]dentify the number, types, and locations of any firearms the petitioner believes to be in the respondent's current ownership, possession, custody, or control ..."⁷⁶

Ex Parte ERPO

A petitioner may request that an ex parte ERPO be issued before a hearing for an ERPO, without notice to the respondent, by including detailed allegations based on personal knowledge that the respondent poses a significant danger of causing personal injury to

⁷⁴ Cal. Penal Code § 18200 (West).

⁷⁵ Wash. Rev. Code Ann. § 7.94.020(2) (West).

⁷⁶ Wash. Rev. Code Ann. § 7.94.030(3) (West).

self or others in the near future by having in his or her custody or control, purchasing, possessing, or receiving a firearm.⁷⁷

The day the petition is filed, or the judicial day immediately following the day the petition is filed, the court shall hold an ex parte ERPO hearing in person or by telephone.⁷⁸

A court shall issue an ex parte ERPO if the court finds there is a reasonable cause to believe that the respondent poses a significant danger of causing personal injury to self or others in the near future by having in his or her custody or control, purchasing, possessing, or receiving a firearm.⁷⁹ In determining whether to issue an ex parte ERPO, the court may consider any relevant evidence including, but not limited to, the following:

1. A recent act or threat of violence by the respondent against self or others (whether or not the violence or threat of violence involved a firearm);
2. A pattern of acts or threats of violence by the respondent within the past 12 months;
3. Any “dangerous mental health issues of the respondent;”
4. A violation by the respondent of a protection order or no-contact order;
5. A previous or existing ERPO issued against the respondent;
6. A violation of a previous or existing ERPO issued against the respondent;
7. A conviction of the respondent for a crime of domestic violence;
8. The respondent’s ownership, access to, or intent to possess firearms;
9. The unlawful or reckless use, display, or brandishing of a firearm by the respondent;
10. The history of use, attempted use, or threatened use of physical force by the respondent against another person;
11. The respondent’s history of stalking another person;
12. Any prior arrest of the respondent for a felony offense or violent crime;
13. Corroborated evidence of the abuse of controlled substances or alcohol by the respondent; and
14. Evidence of the recent acquisition of firearms by the respondent.⁸⁰

The ex parte ERPO shall prohibit the respondent from having in his or her custody or control, purchasing, possessing, receiving, or attempting to purchase or receive, a firearm while the order is in effect and order the respondent to relinquish firearms already in his or her possession as well as any concealed pistol license (“CPL”) issued to the

⁷⁷ Wash. Rev. Code Ann. § 7.94.050(1) (West).

⁷⁸ Wash. Rev. Code Ann. § 7.94.050(4) (West).

⁷⁹ Wash. Rev. Code Ann. § 7.94.050(3) (West).

⁸⁰ Wash. Rev. Code Ann. §§ 7.94.050, 7.94.040(3) (West).

respondent.⁸¹ The ex parte ERPO shall either be dissolved or extended at a hearing to be held within 14 days of the issuance of an ex parte ERPO.⁸²

ERPO Issued After Notice and Hearing

A law enforcement officer, law enforcement agency, or family or household member may petition for an ERPO. Upon receipt of a petition for an ERPO, the court shall order a hearing to be held not later than 14 days from the date of the order and issue a notice of the hearing to the respondent. If an ex parte ERPO was issued, a hearing shall be held no later than 14 days from the date of issuance of the ex parte ERPO.⁸³

The court shall issue an ERPO if, after the hearing, the court finds by a preponderance of the evidence that the respondent poses a significant danger of causing personal injury to self or others by having in his or her custody or control, purchasing, possessing, or receiving a firearm.⁸⁴ In determining whether to issue an ERPO, the court may consider any relevant evidence listed under ex parte ERPO, above.⁸⁵

The ERPO shall prohibit the respondent from having in his or her custody or control, purchasing, possessing, receiving, or attempting to purchase or receive, a firearm while the order is in effect and order the respondent to relinquish firearms already in his or her possession as well as any CPL issued to the respondent.⁸⁶

Termination and Renewal

The respondent is entitled to submit one written request for a hearing to terminate an ERPO every 12-month period that the order is in effect.⁸⁷ Upon receipt of such a request, the court shall set a date for a hearing. Notice of the hearing must be served on the petitioner. The hearing shall occur no sooner than 14 days and no later than 30 days from the date of service of the request upon the petitioner.⁸⁸ The court shall terminate the order if the respondent has met his or her burden of proving by a preponderance of the evidence that the respondent does not pose a significant danger of causing personal injury to self or others by having in his or her custody or control, purchasing, possessing, or receiving a firearm. The court may consider any relevant evidence, including, but not limited to, the factors discussed above.⁸⁹

A family or household member of the respondent or a law enforcement officer or agency may make a motion for renewal of an ERPO at any time within 105 calendar days before

⁸¹ Wash. Rev. Code Ann. § 7.94.050(6)(g) (West).

⁸² Wash. Rev. Code Ann. § 7.94.050(6) (West).

⁸³ Wash. Rev. Code Ann. § 7.94.040(1) (West).

⁸⁴ Wash. Rev. Code Ann. § 7.94.040(2) (West).

⁸⁵ Wash. Rev. Code Ann. § 7.94.040(3) (West).

⁸⁶ Wash. Rev. Code Ann. § 7.94.040(7)(g) (West).

⁸⁷ Wash. Rev. Code Ann. § 7.94.080(1) (West).

⁸⁸ Wash. Rev. Code Ann. § 7.94.080(1)(a) (West).

⁸⁹ Wash. Rev. Code Ann. § 7.94.080(1)(b),(c) (West).

the expiration of the order.⁹⁰ Upon receipt of such a motion, the court shall order that a hearing be held not later than 14 days from the date the order issues.⁹¹ The court shall follow the same procedure outlined in the previous section on “ERPO Issued After Notice and Hearing.”⁹² The renewal of the ERPO shall last 1 year, subject to termination or further renewal.⁹³

Surrender of Firearms

Upon issuance of an ex parte ERPO or ERPO, the court shall order the respondent to surrender to the local law enforcement agency all firearms in the respondent’s custody, control, or possession and any CPL issued to the respondent.⁹⁴ A law enforcement officer serving an ex parte ERPO or ERPO shall request that the respondent immediately surrender all firearms in his or her custody, control, or possession and any concealed pistol license issued to the respondent.⁹⁵ The law enforcement officer shall take possession of all respondent’s firearms that are surrendered, in plain sight, or discovered pursuant to a lawful search.⁹⁶ If personal service by a law enforcement officer is not possible, or not necessary because the respondent was present at the ERPO hearing, the respondent shall surrender the firearms in a safe manner to the control of the local law enforcement agency within 48 hours of being served with the order by alternate service or within 48 hours of the hearing at which the respondent was present.⁹⁷ At the time of surrender, a law enforcement officer taking possession of a firearm or CPL shall issue a receipt and provide a copy of the receipt to the respondent.⁹⁸ Within 72 hours of service of the order, the officer serving the order shall file the original receipt with the court and ensure that his or her law enforcement agency retains a copy.⁹⁹

Upon the sworn statement or testimony of the petitioner or of any law enforcement officer alleging that the respondent has failed to surrender firearms as required by an ex parte ERPO or ERPO, the court shall determine whether probable cause exists to believe that such failure to surrender has occurred.¹⁰⁰ If probable cause exists, the court shall issue a warrant authorizing a search of the locations firearms are reasonably believed to be and the seizure of firearms discovered pursuant to such a search.¹⁰¹

⁹⁰ Wash. Rev. Code Ann. § 7.94.080(3) (West).

⁹¹ Wash. Rev. Code Ann. § 7.94.080(3)(a) (West).

⁹² Wash. Rev. Code Ann. § 7.94.080(3)(b) (West).

⁹³ Wash. Rev. Code Ann. § 7.94.080(3)(d) (West).

⁹⁴ Wash. Rev. Code Ann. § 7.94.090(1) (West).

⁹⁵ Wash. Rev. Code Ann. § 7.94.090(2) (West).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Wash. Rev. Code Ann. § 7.94.090(3) (West).

⁹⁹ *Id.*

¹⁰⁰ Wash. Rev. Code Ann. § 7.94.090(4) (West).

¹⁰¹ *Id.*

Penalties

It is a gross misdemeanor crime for a person to have in his or her custody or control, to purchase, possess, or receive a firearm knowing that he or she is prohibited from doing so by an ex parte ERPO or ERPO.¹⁰² Such person is further prohibited from having in his or her custody or control, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm for a period of 5 years from the date the existing ex parte ERPO or ERPO expires.¹⁰³

It is a gross misdemeanor crime for a person to file a petition for an ex parte ERPO or ERPO knowing the information in such petition to be materially false, or with the intent to harass.¹⁰⁴

Experience Under Temporary Firearm Removal Statutes

Connecticut

In the first 14 years that the Connecticut statute was in effect (1999-2013), 762 risk-warrants were issued to temporarily remove firearms from individuals who were deemed to pose an imminent risk of violence, with significant increases in the frequency of use following the 2007 shooting at Virginia Tech University and the 2013 shooting at Sandy Hook Elementary in Newtown, Connecticut.^{105,106} At least one firearm was removed in 99% of cases, with an average of seven firearms removed per risk-warrant subject.¹⁰⁷

Threats to self, including suicidality or self-injury, were listed as the type or object of alleged risk in at least 61% of risk-warrant cases where such information was available.¹⁰⁸ Only 1% of individuals served with warrants were in active psychiatric treatment at the time of service and just 12% had been in treatment in the past year for a mental health or substance use disorder in the Connecticut public behavioral health system; the majority of individuals served had no history of treatment.^{109,110} However, in

¹⁰² Wash. Rev. Code Ann. § 7.94.120(1) (West).

¹⁰³ *Id.*

¹⁰⁴ Wash. Rev. Code Ann. § 7.94.120(2) (West).

¹⁰⁵ Norko, MA. & Baranoski, M. *Gun Control Legislation in Connecticut: Effects on Persons with Mental Illness*, 46 Conn. L. Rev. 1609, 1624-1630 (2014).

¹⁰⁶ Swanson, JW. Norko, M, Lin, HJ, Alanis-Hirsch, K, Frisman, L, Baranoski, M. Easter, M, Robertson, AG. Swartz, M, and Bonnie, RJ. *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does it Prevent Suicides?* 80 Law and Contemporary Problems 179-208 (2017). Available at: <http://scholarship.law.duke.edu/lcp/vol80/iss2/8>

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Norko, MA. & Baranoski, M. *Gun Control Legislation in Connecticut: Effects on Persons with Mental Illness*, 46 Conn. L. Rev. 1609, 1624-1630 (2014).

¹¹⁰ Swanson, JW. Norko, M, Lin, HJ, Alanis-Hirsch, K, Frisman, L, Baranoski, M. Easter, M, Robertson, AG. Swartz, M, and Bonnie, RJ. *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does it Prevent Suicides?* 80 Law and Contemporary Problems 179-208 (2017). Available at: <http://scholarship.law.duke.edu/lcp/vol80/iss2/8>

the year *following* firearm removal, nearly one-third (29%¹¹¹) of risk-warrant subjects received treatment services in the state system for a mental health and/or substance use disorder.¹¹² These data highlight that the law's grounds for the issuance of a warrant, based on risk of dangerousness rather than mental illness, allows for intervention to not only occur before treatment begins, but to serve as a portal to treatment in itself.

An analysis of Connecticut's risk-warrant law adds to the growing body of evidence for temporary risk-based firearms removal laws by demonstrating that such policies hold promise as effective tools in suicide prevention. Matching risk-warrant cases to state death records showed that 21 individuals who had been served risk-warrants went on to die by suicide, a rate approximately 40 times higher than the average annualized suicide rate in the adult population in Connecticut during the same time period. Of those 21 suicides, 6 were carried out with firearms. Using known case fatality rates of the suicide methods used, the researchers estimated that the 21 deaths likely represent 142 suicide attempts, primarily using means that are less lethal than a firearm.¹¹³

Had firearms been available and used in more of those attempts, more risk-warrant subjects would have died by suicide. To reach this conclusion, the researchers used national data to estimate the likelihood that people in a demographically matched population of gun owners would have chosen a gun in attempting suicide. This likelihood was applied in developing a model for calculating how many more of those estimated 142 suicide attempts would have been fatal had the subjects still been in possession of firearms in the absence of the risk-warrant. Since attempted suicide with a firearm has such a high case fatality rate (85%), reducing the percentage of suicide attempts with a firearm saves lives.¹¹⁴ The resulting model considers various levels of risk, finding that for every 10 to 20 risk-warrants issued, 1 suicide is averted.¹¹⁵ Given that 762 risk-warrants were issued through 2013, an estimated 38 to 76 more people are alive today as a result of risk-warrants in Connecticut.¹¹⁶

¹¹¹ 29% is a conservative estimate; it is likely that additional risk-warrant subjects sought private mental health and substance use treatment services that are not included in this figure.

¹¹² Swanson, JW, Norko, M, Lin, HJ, Alanis-Hirsch, K, Frisman, L, Baranoski, M, Easter, M, Robertson, AG, Swartz, M, and Bonnie, RJ. *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does it Prevent Suicides?* 80 Law and Contemporary Problems 179-208 (2017). Available at: <http://scholarship.law.duke.edu/lcp/vol80/iss2/8>

¹¹³ *Id.*

¹¹⁴ Miller, M., Azrael, D., & Barber, C. (2012). Suicide mortality in the United States: the importance of attending to method in understanding population-level disparities in the burden of suicide. *Annual review of public health*, 33, 393-408.

¹¹⁵ Swanson, JW, Norko, M, Lin, HJ, Alanis-Hirsch, K, Frisman, L, Baranoski, M, Easter, M, Robertson, AG, Swartz, M, and Bonnie, RJ. *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does it Prevent Suicides?* 80 Law and Contemporary Problems 179-208 (2017). Available at: <http://scholarship.law.duke.edu/lcp/vol80/iss2/8>

¹¹⁶ Educational Fund to Stop Gun Violence. (2016). [Extreme Risk Protection Orders: An Opportunity to Save Lives in Washington](http://efsgv.org/wp-content/uploads/2016/09/FINAL-ERPO-complete-091916-1.pdf). Available at <http://efsgv.org/wp-content/uploads/2016/09/FINAL-ERPO-complete-091916-1.pdf>.

Indiana

During 2006 and 2007, the first 2 years the Indiana law was in effect, one county court in Indianapolis heard 133 cases involving firearms removed under the new statute.¹¹⁷ In only 6% of cases the judge ordered the firearms returned to the owner; in 53% of the cases, the court retained the weapons and in 42% of cases the gun owners voluntarily gave up their weapons.¹¹⁸ In 2007, the pattern of hearing outcomes changed dramatically.¹¹⁹ Retention of firearms by decision of the court dropped to only 8% of cases, and in only 14% of cases did gun owners voluntarily surrender their weapons.¹²⁰

More recent data from 2006-2013 (the first 8 years of the law being in effect) from Marion County (Indianapolis) show the court heard 404 cases regarding firearm removal by police.¹²¹ Over the study period, risk of suicide was the most common reason for firearm removal by police (68% of cases overall, peaking at 88.9% in 2009). Risk of actual or threatened violence was a reason cited in 21% of cases, and psychosis was a reason cited in 16% of cases.¹²² More than a quarter of the cases noted intoxication by drugs or alcohol.¹²³

During the initial hearing, the court retained firearms in 63% of cases (primarily associated with the individual failing to appear in court) and dismissed 29% of cases. From February 2008 through 2013 the court ordered retention of firearms only in cases where the defendant failed to appear for the scheduled hearing.¹²⁴

The law has rarely been used outside Marion County, according to the study author. On the whole, most of the individuals whose firearms were removed under the Indiana law did not request return of their firearms.¹²⁵

¹¹⁷ Parker, G. (2010). Application of a firearm seizure law aimed at dangerous persons: outcomes from the first two years. *Psychiatric Services*, 61(5), 478-482.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Parker, G. (2015). Circumstances and Outcomes of a Firearm Seizure Law: Marion County, Indiana, 2006–2013. *Behavioral Sciences & the Law*, 33(2-3), 308-322. doi:10.1002/bsl.2175

¹²² Parker, G. (2015). Circumstances and Outcomes of a Firearm Seizure Law: Marion County, Indiana, 2006–2013. *Behavioral Sciences & the Law*, 33(2-3), 308-322. doi:10.1002/bsl.2175

¹²³ Parker, G. (2015). Circumstances and Outcomes of a Firearm Seizure Law: Marion County, Indiana, 2006–2013. *Behavioral Sciences & the Law*, 33(2-3), 308-322. doi:10.1002/bsl.2175

¹²⁴ Parker, G. (2015). Circumstances and Outcomes of a Firearm Seizure Law: Marion County, Indiana, 2006–2013. *Behavioral Sciences & the Law*, 33(2-3), 308-322. doi:10.1002/bsl.2175

¹²⁵ Parker, G. (2015). Circumstances and Outcomes of a Firearm Seizure Law: Marion County, Indiana, 2006–2013. *Behavioral Sciences & the Law*, 33(2-3), 308-322. doi:10.1002/bsl.2175

California and Washington

The California GVRO went into effect January 1, 2016 and the Washington ERPO went into effect December 1, 2016; data on the implementation of either law are not yet publicly available.

Proposed Gun Violence Restraining Order in Virginia

During the 2015 General Assembly Session, Virginia State Senator George Barker introduced Senate Bill No. 1429 which would have, among other things, established a warrant-based firearm removal process modeled closely on Connecticut's law.¹²⁶ The bill was referred to the Courts of Justice Committee and failed to report by a vote of 4-10.¹²⁷

During the 2016 General Assembly Session, Virginia State Senator George Barker re-introduced the warrant-based removal bill.¹²⁸ The bill was referred to the Courts of Justice Committee and was passed by indefinitely by a vote of 9-5.¹²⁹

During the 2017 General Assembly Session, Virginia State Senator George Barker re-introduced the warrant-based removal bill.¹³⁰ Virginia State Delegate Richard "Rip" Sullivan introduced House Bill No. 1758, a companion bill to Barker's.¹³¹ The Senate bill was referred to the Courts of Justice Committee and failed to report by a vote of 5-10.¹³² The House bill was referred to the Militia, Police and Public Safety Committee, assigned to subcommittee 1, and was laid on the table by a voice vote.¹³³

The aforementioned bills would have authorized a circuit court judge to issue a warrant for the removal of firearms "[u]pon complaint under oath by any attorney for the Commonwealth or by any law-enforcement officer ... that such attorney for the Commonwealth or law-enforcement officer has probable cause to believe that (i) a person poses a substantial risk of personal injury to himself or to other individuals in the near future, (ii) such person possesses one or more firearms, and (iii) such firearms are within or upon any place, thing, or person."¹³⁴

¹²⁶ Senate Bill 1429, 2015 Reg. Sess. (Va.2015). <http://lis.virginia.gov/cgi-bin/legp604.exe?151+ful+SB1429>

¹²⁷ <http://lis.virginia.gov/cgi-bin/legp604.exe?151+sum+SB1429>

¹²⁸ Senate Bill 411, 2016 Reg. Sess. (VA.2016) <http://lis.virginia.gov/cgi-bin/legp604.exe?161+ful+SB411>

¹²⁹ <http://lis.virginia.gov/cgi-bin/legp604.exe?161+sum+SB411>

¹³⁰ Senate Bill 1443, 2017 Reg. Sess. (Va.2017) <http://lis.virginia.gov/cgi-bin/legp604.exe?171+ful+SB1443>

¹³¹ House Bill 1758, 2017 Reg. Sess. (Va.2017) <http://lis.virginia.gov/cgi-bin/legp604.exe?171+ful+HB1758>

¹³² <http://lis.virginia.gov/cgi-bin/legp604.exe?171+sum+SB1443>

¹³³ <http://lis.virginia.gov/cgi-bin/legp604.exe?171+sum+HB1758>

¹³⁴ Senate Bill 1429, 2015 Reg. Sess. (Va.2015). <http://lis.virginia.gov/cgi-bin/legp604.exe?151+ful+SB1429>; Senate Bill 411, 2016 Reg. Sess. (VA.2016) <http://lis.virginia.gov/cgi-bin/legp604.exe?161+ful+SB411>; Senate Bill 1443, 2017 Reg. Sess. (Va.2017) <http://lis.virginia.gov/cgi-bin/legp604.exe?171+ful+SB1443>

In determining whether probable cause to issue a warrant exists, a circuit court judge would have been required to consider evidence of the following:

- (1) recent threats or acts of violence by such person directed toward other persons;
- (2) recent threats or acts of violence by such person directed toward himself;
- (3) recent issuance of a protective order;
- (4) recent violation of an unexpired protective order; and
- (5) recent acts of cruelty to animals.¹³⁵

In determining whether probable cause to issue a warrant exists, a circuit court judge would have been allowed to consider other factors, including the following:

- (1) the reckless use, display, or brandishing of a firearm by such person;
- (2) a history of the use, attempted use, or threatened use of physical force by such person against other persons;
- (3) prior involuntary confinement of such person in a hospital for persons with psychiatric disabilities;
- (4) any prior arrest of such person for a violent felony offense;
- (5) any history of a violation of a protective order;
- (6) the illegal use of controlled substances or abuse of alcohol by such person; and
- (7) evidence of recent acquisition of firearms or other deadly weapons by such person.¹³⁶

The bills further provided that not later than 14 days after the execution of a warrant the circuit court for the jurisdiction where the person named in the warrant resides shall hold a hearing to determine whether any firearm taken should be returned to the person named in the warrant or should continue to be held by the agency that took the firearms.¹³⁷ The attorney for the Commonwealth, who would represent the Commonwealth, would bear the burden of proving by clear and convincing evidence that the person poses a substantial risk of personal injury to himself or to other individuals in the near future.¹³⁸ If the attorney for the Commonwealth met this burden, the court would order that any firearm taken pursuant to the warrant issued under this section continue to be held by the

[bin/legp604.exe?171+ful+SB1443](#); House Bill 1758, 2017 Reg. Sess. (Va.2017) <http://lis.virginia.gov/cgi-bin/legp604.exe?171+ful+HB1758>

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

agency that took the firearm for a period not to exceed 180 days.¹³⁹ A person who would have been the subject of an order would have been allowed to petition the court one time during the 180 days for the return of his firearms after 30 days from the date the order was issued.¹⁴⁰

Conclusion

The GVRO is an evidence-based policy that seeks to provide law enforcement and families with a tool to temporarily remove firearms from an individual during times of crisis regardless of whether that person has been diagnosed with a mental illness. GVRO-style laws have been enacted in Connecticut, Indiana, Massachusetts, Illinois, California, and most recently, Washington.¹⁴¹ Research indicates that the GVRO is an effective tool in particular for suicide prevention. While bills to enact a statute similar to Connecticut's law have been introduced and have failed in the last three Virginia General Assembly sessions, the demonstrated efficacy of the GVRO in saving lives makes GVRO-style laws worthy of serious consideration in Virginia.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ The judicial procedures used in these GVRO statutes, which parallel those used in connection with domestic violence restraining orders, satisfy constitutional requirements under both the due process clause and the Second Amendment. *See* Law Center to Prevent Gun Violence. (2014). *Memo: California's New Gun Violence Restraining Order Law*. Retrieved October 21, 2015, from <http://smartgunlaws.org/californias-new-gun-violence-restraining-order-law/>

II. Summary Tables of Preemptive Firearm Removal Statutes

Tables 1-4: Preemptive Firearm Removal from Persons at Risk of Violence Towards Self or Others

Table 1.	Connecticut	Indiana	
Type of process	Warrant	Warrant	Warrant-less
Who initiates the process?	<ul style="list-style-type: none"> • Two law enforcement officers, or • A state’s attorney, or • An assistant state’s attorney. 	Law enforcement officer.	Law enforcement officer.
What must be proven?	The entity seeking the warrant must show probable cause to believe that a person poses a risk of imminent injury to himself, herself, or another, such person possesses one or more firearms, and such firearm(s) are within or upon any place, thing or person.	The law enforcement officer must show probable cause exists to believe that the individual is dangerous and in possession of a firearm.	
Factors considered in deciding whether the burden has been met	<p>To issue a warrant, judges shall consider:</p> <ul style="list-style-type: none"> • Recent threats or acts of violence directed toward himself, herself or another, and • Recent acts of cruelty to animals. <p>Judges may also consider, but are not limited to:</p> <ul style="list-style-type: none"> • The reckless use, display, or brandishing of a firearm, • A history of the use, attempted use, or threatened use of physical force by such person against another, • Prior involuntary confinement of such person in a hospital for persons with psychiatric disabilities, and • The illegal use of controlled substances or abuse of alcohol. 	No factors are specified.	No factors are specified.
Court Review/Approval	Court approval is required prior to the removal of firearms.	Court approval is required prior to the removal of firearms.	Court approval is not required prior to the removal of firearms.
Length of prohibition on purchase/possession of firearms and removal of firearms	Removal of firearms pursuant to the warrant lasts up to 14 days until a hearing can be held.	The removal of firearms lasts up to 14 days from the return of an executed warrant.	The removal of firearms lasts up to 14 days after written submission to the court justifying the warrant-less seizure.
How are firearms removed?	Law enforcement shall execute the warrant to search for and seize firearms.	Law enforcement shall execute the warrant to search for and seize firearms.	Law enforcement shall seize the firearms.

Table 1. (cont'd)	Connecticut	Indiana	
	Warrant	Warrant	Warrant-less
Is a hearing automatically scheduled to provide an opportunity to challenge it, and if so, when is it held?	Yes, a hearing shall be held within 14 days of the issuance of a warrant.	Yes, a hearing shall be held within 14 days of the return of an executed warrant.	Yes, a hearing shall be held within 14 days of a written submission. ¹
What must be proven at the hearing?	The state must prove by clear and convincing evidence that the owner remains “a risk of imminent injury to self or others.”	The state must prove by clear and convincing evidence that the respondent is dangerous.	
Length of prohibition on purchase/possession of firearms and removal of firearms	Up to one year after the hearing.	180 days after the hearing, at which point the respondent may petition for return.	
Statute(s)	Conn. Gen. Stat. Ann. § 29-38c.	Ind. Code Ann. § 35-47-14.	

Table 2.	Massachusetts	Illinois
Type of process	Denial of issuance or renewal, or suspension or revocation of a Firearm Identification Card (“FID”).	Denial of application for, or revocation of a Firearm Owner’s Identification Card (“FOID”).
Who initiates the process?	A law enforcement agency.	<ul style="list-style-type: none"> • A law enforcement officer, • Department of State Police (“Department”)
What must be proven?	A law enforcement agency seeking denial of issuance or renewal, or suspension or revocation of an FID must show a preponderance of the evidence there exists: “(i) reliable, articulable, and credible information that the applicant has exhibited or engaged in behavior to suggest the applicant could potentially create a risk to public safety; or (ii) existing factors that suggest the applicant could potentially create a risk to public safety.”	The Department finds that the applicant or the person to whom a FOID card was issued is or was at the time of issuance “[a] person whose mental condition is of such nature that it poses a clear and present danger to the applicant, any other person or persons or the community[.]”
Factors considered in deciding whether the burden has been met	No factors specified.	No factors specified.
Court Review/Approval	Yes, court review or approval is required prior to the prohibition on purchase/possession and removal of firearms taking effect.	No, court review or approval is not required prior to the prohibition on purchase/possession and removal of firearms taking effect.

¹ An officer seizing a firearm from an individual without a warrant shall submit a written statement to the court describing the basis for the seizure. If the court finds probable cause to believe the individual to be dangerous, the law enforcement agency shall retain the firearm(s).

Table 2. (cont'd)	Massachusetts	Illinois
Length of prohibition	Not specified in statute.	Until a successful appeal to the Director of State Police.
How are firearms removed?	The person whose FID is denied, not renewed, suspended or revoked must surrender all firearms and ammunition in his or her possession to the licensing authority. After taking possession, the licensing authority may transfer firearms and ammunition to a licensed dealer for storage.	Within 48 hours of receiving notice of the denial of an application for a FOID card or the revocation of a FOID card, the person who received notice shall surrender his or her FOID card to the law enforcement agency where he or she resides. The person shall complete a Firearm Disposition Record ("Record") disclosing (1) information on each firearm in her or her control or custody, (2) the location each firearm will be held for the prohibited term, and (3) if firearms are transferred to a third party, the name, address, and FOID card number of the transfer. If a person fails to surrender his or her FOID card, complete a record, or surrender his or her firearms, law enforcement may seek a search warrant.
Is a hearing automatically scheduled to provide an opportunity to challenge it, and if so, when is it held?	No hearing is automatically scheduled to provide an opportunity to challenge it.	A denial of an application for a FOID card or the revocation of a FOID card must be appealed by the individual whose application was denied or whose FOID card was revoked to the Director of State Police.
Statute(s)	Mass. Gen. Laws Ann. ch. 140, § 129B Mass. Gen. Laws Ann. ch. 140, § 129D	430 Ill. Comp. Stat. Ann. 65/2 <i>et seq.</i>

Table 3.	California		
Type of process	A civil court order called the Gun Violence Restraining Order ("GVRO").		
Type of GVROs	Temporary Emergency GVRO	Ex Parte GVRO	Final GVRO
Who initiates the process?	Law enforcement only.	Law enforcement or an immediate family member.	Law enforcement or an immediate family member.
What must be proven?	The petitioner must show reasonable cause to believe (1) the subject of the petition poses an immediate and present danger of causing personal injury to himself, herself, or another AND (2) less restrictive alternatives have been ineffective, or are inappropriate or inadequate for the situation.	The petitioner must show a substantial likelihood (1) the subject of the petition poses a significant danger, in the near future, of personal injury to himself, herself, or another AND (2) less restrictive alternatives have been ineffective, or are inappropriate or inadequate for the situation.	The petitioner must prove by clear and convincing evidence (1) the subject of the petition, or person subject to an ex parte GVRO, poses a significant danger of personal injury to himself, herself, or another AND (2) less restrictive alternatives have been ineffective, or are inappropriate or inadequate for the situation.

Table 3. (cont'd)	California		
	Temporary Emergency GVRO	Ex Parte GVRO	Final GVRO
Factors considered in deciding whether the burden has been met	No factors specified.	<p>The court shall consider the following factors:</p> <ul style="list-style-type: none"> • A recent threat or act of violence directed toward himself, herself, or another, • A violation of an emergency protective order, • A recent violation of an unexpired protective order, • A conviction for an enumerated violent offense, • A pattern of violent acts or violent threats within the past 12 months. <p>Judges may consider any other relevant evidence, including, but not limited to:</p> <ul style="list-style-type: none"> • The unlawful, reckless use, display, or brandishing of a firearm, • The history of use, attempted use, or threatened use of physical force, • Any prior arrest for a felony offense, • Any history of a violation of a protective order, • Evidence of alcohol or controlled substance abuse, • Recent acquisition of firearms, ammunition, or other deadly weapons. 	
Court Review/Approval	Court review or approval is required prior to the prohibition on purchase/possession and removal of firearms taking effect.		
Length of prohibition on possession of firearms	21 days.	21 days or less (until hearing).	One year.
How are firearms removed?	Upon request of a law enforcement officer serving a GVRO, firearms and ammunition shall be surrendered immediately to the control of the officer. If no request is made by the law enforcement officer, the respondent shall surrender all firearms and ammunition, within 24 hours, to the control of the local law enforcement agency, to a licensed firearms dealer, or by selling such firearms and ammunition to a licensed firearms dealer. Law enforcement may seek a warrant to search for and seize firearms and ammunition unlawfully possessed by the subject of a GVRO.		
Is a hearing automatically scheduled to provide an opportunity to challenge it, and if so, when is it held?	No.	Yes, within 21 days of the issuance of an ex parte GVRO.	No (the hearing is held before the issuance of a final GVRO).
Statute(s)	Cal. Penal Code § 18100 <i>et seq.</i>		

Table 4.		Washington	
Type of process	A civil court order called the Extreme Risk Protection Order ("ERPO").		
Type of ERPOs	Ex Parte ERPO	Final ERPO	
Who initiates the process?	A law enforcement officer, law enforcement agency, or family or household member.	A law enforcement officer, law enforcement agency, or family or household member.	
What must be proven?	Petitioners must show a reasonable cause to believe that the respondent poses a significant danger of causing personal injury to self or others in the near future by having in his or her custody or control, purchasing, possessing, or receiving a firearm.	Petitioners must prove by a preponderance of the evidence that the respondent poses a significant danger of causing personal injury to self or others by having in his or her custody or control, purchasing, possessing, or receiving a firearm.	
Factors considered in deciding whether the burden has been met	<p>Court may consider any relevant evidence, including, but not limited to the following:</p> <ul style="list-style-type: none"> • Recent act or threat of violence by the respondent against self or others, • A pattern of acts or threats of violence by the respondent within the past 12 months, • Any "dangerous mental health issues, • A violation by the respondent of a protection order or no-contact order, • A previous or existing ERPO issued against the respondent; • A violation of a previous or existing ERPO issued against the respondent; • A conviction of the respondent for a crime of domestic violence; • Ownership, access to, or intent to possess firearms; • Unlawful or reckless use, display, or brandishing of a firearm by the respondent; • History of use, attempted use, or threatened use of physical force by the respondent against another person; • History of stalking another person; • Any prior arrest of the respondent for a felony offense or violent crime; • Corroborated evidence of the abuse of controlled substances or alcohol by the respondent; and • Evidence of the recent acquisition of firearms by the respondent. 		
Court Review/Approval	Court review or approval is required prior to the prohibition on purchase/possession and removal of firearms taking effect.		
Length of prohibition on possession of firearms	14 days or less (until hearing).	One year.	
How are firearms removed?	A law enforcement officer serving any ERPO shall request that the respondent immediately surrender all firearms in his or her custody, control, or possession and any concealed pistol license issued to the respondent. The law enforcement officer shall take possession of all respondent's firearms that are surrendered, in plain sight, or discovered pursuant to a lawful search. If personal service by a law enforcement officer is no possible, or not necessary because the respondent was present at the ERPO hearing, the respondent shall surrender the firearms in a safe manner to the control of the local law enforcement agency within 48 hours of being served with the order by alternate service or within 48 hours of the hearing at which the respondent was present. Where the respondent fails to surrender firearms or a CPL, law enforcement may seek a search warrant.		

Table 4. (cont'd)	Washington	
	Ex Parte ERPO	Final ERPO
Is a hearing automatically scheduled to provide an opportunity to challenge it, and if so, when is it held?	Yes, a hearing shall be held within 14 days of the issuance of an ex parte ERPO.	No (the hearing is held before the issuance of a final ERPO).
Statute(s)	Wash. Rev. Code Ann. § 7.94.010 <i>et seq.</i>	

III. Article

Doctors, Patients, and Guns: The First Amendment Rights of Doctors to Counsel Patients about Gun Safety and the Statutory Privacy Rights of Firearm Owners

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In the case of *Wollschlaeger v. Governor, Florida*,¹ decided in February of 2017, the 11th Circuit Court of Appeals struck down limitations placed by the Florida legislature on doctors' ability to ask their patients about their possession of firearms as part of the doctors' routine health assessment and counseling of their patients.

The Florida Statute

In 2011, the Florida legislature, responding to complaints from constituents that their doctors were asking them questions about the presence of firearms in their homes², enacted the Firearms Owners' Privacy Act (FOPA; Fla. St. 381.026, 456.072, 790.338). FOPA included restrictions on four different actions by doctors in addressing gun ownership with patients in the course of treatment:

- (1) Inquiry: doctors "should refrain from making a written inquiry or asking questions concerning the ownership of a firearm or ammunition by the patient or by a family member of the patient, or the presence of a firearm in a private home" unless he or she in "good faith believes that this information is relevant to the patient's medical care or safety, or the safety of others..."
- (2) Record-keeping: a doctor "may not intentionally enter any disclosed information concerning firearm ownership into [a] patient's medical record" if he or she "knows that such information is not relevant to the patient's medical care or safety, or the safety of others."
- (3) Discrimination: a doctor "may not discriminate against a patient based solely" on the patient's ownership and possession of a firearm.
- (4) Anti-harassment: a doctor "should refrain from unnecessarily harassing a patient about firearm ownership during an examination."

Doctors found in violation of the law faced a range of disciplinary actions, including fines and the possibility of suspension or revocation their medical license.

¹ *Wollschlaeger v. Governor of the State of Florida*, No. 12-14009 (11th Cir. 2017).

² According to the published decision of the Eleventh Circuit Court of Appeals, a total of six anecdotes were presented to the legislature. *Wollschlaeger v. Governor, Florida*, No. 12-14009 (11th Cir., 2017).

The Litigation

A number of doctors and medical organizations filed suit in federal district court, challenging some of the Act's provisions as unconstitutional. That district court held that FOPA's inquiry, record-keeping, anti-discrimination and anti-harassment provisions violated the First and Fourteenth Amendments, and it entered a permanent injunction against their enforcement. On appeal by the state, a divided three-judge panel upheld FOPA's restrictions on doctors' interactions with patients regarding firearms as acceptable and incidental consequences of the state's "legitimate regulation" of the medical profession.

The full court reversed the three-judge panel (*Wollschlaeger v. Governor, Florida*, No. 12-14009 (11th Cir., 2017)), ruling that the FOPA restrictions on doctor inquiry, record-keeping and "harassment" "constitute speaker-focused and content-based restrictions on speech." The Court rejected the panel's finding that a "rational basis" test should be used in assessing the constitutionality of the state's restrictions on doctor's speech because these restrictions were incidental intrusions on speech that were a consequence of legitimate state regulation of a licensed profession. Instead, the Court noted that such speech is an integral part of medical practice, with questions about firearms normally being just one part of doctors' larger inquiry about their patients' health and safety:

As part of their medical practices, some doctors routinely ask patients about various potential health and safety risks, including household chemicals, drugs, alcohol, tobacco, swimming pools, and firearms. *See* Joint Statement of Undisputed Facts, D.E. 87, at ¶ 18. A number of leading medical organizations, and some of their members, believe that unsecured firearms "in the home increase risks of injury, especially for minors and those suffering from depression or dementia." *Id.* at ¶ 20.

Given these findings, the Court wrote, the state's restrictions on free speech were subject at least to a "heightened scrutiny" test, obligating the state to show "at least that the [provisions] directly advance[] a substantial governmental interest and that the measure[s] [are] drawn to achieve that interest. There must be a 'fit between the legislature's ends and the means chosen to accomplish those ends.'" (p. 27)

The Court found an utter lack of evidence to support the four major rationales offered by the state to justify the broad restrictions on speech placed on doctors in the FOPA: (1) protecting against "private encumbrances" on the Second Amendment rights of Floridians to keep and bear arms (with the Court noting that there was "no evidence whatsoever" of any such encumbrance by doctors); (2) protecting patient privacy (with the Court again finding no evidence of any doctor conduct creating a risk of privacy breach in regard to gun ownership); (3) ensuring access to health care without discrimination or harassment (with the Court finding that certain *conduct* by doctors—"such as failing to return messages, charging more for the same services, declining reasonable appointment times, not providing test results on a timely basis, or delaying treatment because a patient (or a parent of a patient) owns firearms"—*is* appropriate to

regulate, but finding that the vague content-based restrictions on doctors' speech violated the doctors' first amendment speech rights); and (4) the need to regulate the medical profession in order to protect the public. In regard to this fourth area cited by the state to justify the FOPA restrictions, the Court noted that the state has an obligation to produce evidence of the harm to the public that is being remedied with this restriction. The state produced only two anecdotes of patients claiming that doctors told them—incorrectly—that Medicaid would not provide reimbursement for their care if the firearms questions were not answered. The Court wrote that, if these anecdotes were symptomatic of a statewide problem (something that the record did not demonstrate) the state could have addressed this by specifically prohibiting such conduct by the doctors. Instead, the broad restrictions that FOPA imposed on physician inquiries with patients under the guise of protection of the public from inappropriate medical practice had no foundation in fact and ran counter to the recommendations of national medical associations for physician conduct. The Court wrote:

"Injuries are the leading cause of death and morbidity among children older than one year, adolescents, and young adults." Joint Statement of Undisputed Facts, D.E. 87, at ¶ 25. As a result, the American Medical Association and the American Academy of Pediatrics each recommend that doctors and pediatricians routinely ask patients about firearm ownership, and educate them about the dangers posed to children by firearms that are not safely secured. *Id.* at ¶¶ 4, 16. These policies, however, do not justify FOPA's speaker-focused and content-based restrictions on speech. There is no claim, much less any evidence, that routine questions to patients about the ownership of firearms are medically inappropriate, ethically problematic, or practically ineffective. Nor is there any contention (or, again, any evidence) that blanket questioning on the topic of firearm ownership is leading to bad, unsound, or dangerous medical advice. *Cf.* Eric J. Crossen et al., *Preventing Gun Injuries in Children*, 36 *Pediatrics Rev.* 43, 47-48 (2015) ("safe storage of firearms and ammunition helps to insulate children against unintentional firearm injuries"). (p. 37).

The second majority opinion, signed by seven justices, fully agreed with the first opinion's free speech determinations, but added that FOPA's anti-harassment provision, which states that health-care practitioners "shall respect a patient's legal right to own or possess a firearm and should refrain from unnecessarily harassing a patient about firearm ownership during an examination," was "incomprehensibly vague" because it provided no guidance of any kind to doctors as to when their presumably "necessary" harassment of a patient regarding firearms became "unnecessary." Noting that severe consequences, including loss of the license to practice medicine, can result from crossing the undefined line into "unnecessary harassment," the Court found this provision was also void for vagueness.

The Increasing Commitment of Doctors to Treating Gun Deaths as a Public Health Issue

The *Wollschlaeger* decision highlights the importance of understanding gun deaths in the United States as a major public health issue in which physicians can play an important role. It also illuminates some of the obstacles to informed public discussion and research on gun violence as a public health problem.

As was noted in an article in the October 2015 issue of *DMHL* (and updated in this issue) regarding state laws authorizing “Gun Violence Restraining Orders” (GVROs) to temporarily remove firearms from persons who pose a real potential for harming themselves or others, those GVRO laws have been invoked most often in cases where imminent danger of *self*-harm is the concern. It is notable that, while over 30,000 people in the United States die each year from gun violence, over 20,000 of those deaths are suicides. While research on gun violence has been limited, often due to funding problems and, relatedly, the political sensitivities surrounding any action that might conceivably lead to a reduction in gun use or gun access, research has clearly established that access to firearms dramatically increases the odds that a person contemplating suicide will carry out the act.

The website for the [Harvard Injury Control Research Center](#) includes a page on suicide that summarizes a variety of key research findings regarding suicide and access to guns, and provides information on the sources of those findings. Among the key findings set out there:

- Gun availability is a risk factor for suicide.
- Across states and regions, using different analytic constructs, more guns = more suicides.
- Differences in mental health cannot explain the regional more guns = more suicide connection.
- Gun owners do not have more mental health problems than non-owners. (Differences in mental health do not explain why gun owners and their families are at higher risk for completed suicide than non-gun owning families.)
- Gun owners are not more suicidal than non-owners. (Survey respondents with firearms in the home were no more likely to report suicidal thoughts, plans or attempts, but if they had a suicidal plan, it was much more likely to involve firearms. The higher rates of suicide among gun owners and their families cannot be explained by higher rates of suicidal behavior, but can be explained by easy access to a gun.)
- Adolescents who commit suicide with a gun use the family gun.
- The case-fatality rate for suicide attempts with guns is higher than other methods. (Across the Northeast, case fatality rates ranged from over 90% for firearms to under 5% for drug overdoses, cutting and piercing (the most common methods of attempted suicide).

The site goes on to note research showing that the general public does not understand how important “method availability” is to individuals in carrying out a suicide. There is instead a widespread public belief that a person who wants to commit suicide will succeed in doing so. In contrast, the research shows that the “availability of lethal means” increases the suicide rate, with firearms having the most dramatic impact on lethality. A 2008 article by Dr. Matthew Miller and Dr. David Hemenway in the *New England Journal of Medicine* is cited for its message that physicians need to take an active role in reducing the access of potentially suicidal patients to lethal instruments.

That message has continued across the medical profession and appears to be gaining increased urgency. Dr. Miller is cited again in a 2013 piece by National Public Radio entitled, “How a Patient’s Suicide Changed a Doctor’s Approach to Guns” (available [here](#)). Dr. Miller notes in an interview the importance of asking patients if they have guns in the house or have access to guns. If someone tries to commit suicide without using a gun, he points out, they probably will not succeed. “The likelihood of their dying is of an order of magnitude lower,” he says. “Instead of there being a 90-plus percent chance of death, there’s a greater than 90 percent chance that they’ll live.”

In an editorial entitled Primary Care Physicians’ Role in Counseling About Gun Safety in the November 2014 issue of *American Family Physician*, Anupam Jena, M.D., and Vinay Prasad, M.D., address some of the practical obstacles physicians confront in providing gun safety counseling to patients, noting that such counseling “competes with other clinical care priorities, such as counseling about weight loss, smoking, and exercise, and the diagnosis and management of chronic medical conditions.” The doctors argue that there is a cost-benefit issue for time-strapped doctors, and that, given this, physicians “must be able to identify patients who are at highest risk of gun-related injury. The doctors write that research suggests key categories of “vulnerable persons” and “vulnerable time periods” carrying an elevated risk of suicide:

It seems reasonable to inquire about access to guns among adolescents and parents of adolescents in an effort to reduce firearm-related suicide and assault risk. The same is true of hospitalized adults being discharged from psychiatric inpatient facilities, particularly those who are older, male, and unemployed, and those with poor social support systems. Physicians should also consider counseling patients with depression or other mental illness. A review of systems for all of these patients may include questions about the availability of guns in the household and tailored advice thereafter.

In their editorial, the doctors cite the position paper issued by the American College of Physicians (ACP), the executive summary of which was published in the *Annals of Internal Medicine* on June 17, 2014 (found [here](#)).

The ACP’s position paper recommends a public health approach to firearms-related violence and the prevention of firearm injuries and deaths, and calls for a national effort, including a wide array of stakeholders, to reduce this violence. The set of policy

recommendations is comprehensive, including legislative and regulatory initiatives; modification of firearms to provide personalization and built-in safety features; and ensuring “best practices” by firearms owners. Significantly, in regard to firearms and persons with mental illness, the ACP states that it “cautions against broadly including those with mental illness in a category of dangerous individuals.” Instead, it writes, the focus should be on treatment and prevention work with “the subset of individuals with mental illness who are at risk of harming themselves or others.” To accomplish this, access to care, diagnosis, treatment, and appropriate follow-up “are essential.” The ACP also recommended that health professionals “should be trained to respond to patients with mental illness who might be at risk of injuring themselves or others” and that reporting laws be designed “to protect confidentiality and not create a disincentive for patients to seek mental health treatment,” while protecting health professionals’ use of professional judgment to determine when to report.

In an article in the May 17, 2016 issue of the *Annals of Internal Medicine*, entitled Yes You Can: Physicians, Patients and Firearms, Drs. Garen Wintemute, Marian Betz and Megan Ranney provide a “how to” guide for doctors, providing a summary of doctors’ legal right to speak with patients about firearms, a recommended framework for identifying patients most needing that conversation, and a recommended approach for having a productive conversation that results in greater safety for the patient.

These authors outline that firearm information would be “directly relevant” to the health of a patient and that patient’s close contacts under three general conditions:

- (1) “when a patient provides information or exhibits behavior suggesting an acutely increased risk for violence, such as explicit or implicit endorsement of suicidal or homicidal intent or ideation”;
- (2) when a patient presents other “individual-level risk factors for future violence” (many of which the authors list, noting among other details that serious mental illness alone is a “relatively minor risk factor for violence to others,” and that alcohol and drug abuse, prior violence and violent victimization are usually the real source of risk in cases where such risk is “ascribed to mental illness;” whereas self-harm is a different story, with suicide risk “increased by a factor of at least 10 across a range of psychiatric diagnoses.”); and
- (3) when a patient is in a “demographic group” that is at increased risk for firearm-related injury.

The authors emphasize that, when the subject of firearms is raised with a patient, it is important to have a respectful, non-prescriptive conversation, one that focuses on “well-being and safety,” acknowledges cultural norms, and is individualized to the patient. The article includes a chart showing a number of recommended safe firearms practices that might be discussed, along with explanatory notes. Another chart provides a list of helpful information sources.

Interestingly, the authors discuss the “right” of doctors to disclose to police the danger of a potentially violent patient, citing the provisions of HIPAA that allow such disclosure, but they do not discuss either: (1) the possible narrower permissions for such disclosure under some applicable state laws, which would take precedence over a broader authorization for disclosure under HIPAA, or (2) *mandatory* reporting requirements under state laws for physicians regarding a person who has threatened harm or appears to pose a danger of harm.

The future

The Eleventh Circuit Court’s decision in *Wollschlaeger* has affirmed and protected a significant first amendment right for physicians in engaging and counseling their patients to prevent self-harm and harm to others from firearms violence. There is growing hope in the health care field that physicians nationwide will be increasingly open to engaging and counseling patients regarding gun safety as part of a larger public health campaign to reduce the terrible toll of firearms violence that still plagues this country.

IV. Case Law Developments

United States Supreme Court Decision

Intellectual disability; execution: U.S. Supreme Court reverses the ruling of the Texas Court of Criminal Appeals that defendant convicted of a capital crime was not intellectually disabled. The Supreme Court found that the state court deviated from the consensus of the medical community and relied on lay stereotypes of intellectual disability rather than accepted clinical standards.

Moore v. Texas, 137 S.Ct. 1039 (2017)

Background: In 1980, Bobby Moore was convicted of murder and sentenced to death. In 2014, a state habeas court determined that Moore was intellectually disabled according to current diagnostic criteria accepted in the medical community, making his death sentence a violation of the Eighth Amendment prohibition of cruel and unusual punishment under *Atkins v. Virginia*, 536 U. S. 304 (2002), and *Hall v. Florida*, 572 U. S. ___ (2014). The habeas court recommended that the Texas Court of Criminal Appeals (CCA) reduce Moore’s sentence to life in prison, or grant him a new trial.

The Texas Court of Criminal Appeals (“CCA”) rejected the habeas court’s recommendation, finding that the habeas court erred by relying on the medical community’s currently accepted standards for determining intellectual disability and by failing to follow the standards set forth in *Ex parte Briseno*, 135 S. W. 3d 1 (2004). Following the *Briseno* standards, which included a reliance on the classifications of level of intellectual disability set out by the American Association for Mental Retardation (now the AAIDD) in 1992, the court determined that Moore was not intellectually disabled. In doing so, the CCA ignored several of Moore’s IQ scores and ignored the standard-error

range in the scores it considered. The CCA claimed that even if Moore was disabled, his intellectual and adaptive deficits were not related as required by the AAMR-9, which it demonstrated by pointing to Moore's adaptive strengths, such as developing skills in prison. The CCA claimed that the habeas court further erred by failing to consider that Moore's adaptive deficits may have been caused by childhood trauma and not an intellectual disability. The CCA maintained Moore's death sentence. Moore appealed the matter to the U.S. Supreme Court.

Holding: The U.S. Supreme Court reversed. The Court held that, while the states maintain discretion in choosing the methods used to determine whether a defendant is intellectually disabled, the Court in *Hall v. Florida* had clearly instructed that those methods must nonetheless be "informed by the views of medical experts." The Supreme Court held that CCA's reliance on the nonclinical *Briseno* factors was a violation of the Eighth Amendment and current Supreme Court precedent.

Discussion: The Court not only took the CCA to task for failing to follow the current consensus in the medical community on the definition, standards and methodologies to be used in determining whether a person is intellectually disabled, it also found that factors adopted by the CCA in *Briseno* for determining intellectual disability were an "invention" of the CCA and "untied to any acknowledged source." The Court explained that the *Briseno* factors may not be used to determine whether an individual is intellectually disabled.

Federal Circuit Court Decisions

Administration of psychotropic medication; due process: Seventh Circuit reverses summary judgment awarded by the district court to facility physician who prescribed and arranged for dispensing of psychotropic medication over an inmate's objection, finding that an inmate can pursue claims that his resulting unknowing taking of the medication violated his constitutional due process rights and constituted common law medical battery.

Johnson v. Tinwalla, 855 F.3d 747 (7th Cir. 2017)

Background: Terry Johnson, an inmate at a state-run facility for treatment and incarceration of persons prone to sexual violence, brought suit against his psychiatrist, Dr. Tinwalla, alleging that he violated Illinois law and Johnson's constitutional due process rights when he caused Johnson to take antipsychotic medication without Johnson's knowledge or consent. Dr. Tinwalla prescribed Risperdal for Johnson after he complained of irritability, hopelessness, and the desire to assault a staff member. Johnson initially signed the consent form, but scratched out his signature, revoking consent, which was noted by Tinwalla. Despite the revocation of consent, Tinwalla prescribed Risperdal and did not advise Johnson that he had done so. Tinwalla then ordered the drug dispensed to Johnson. The Risperdal was dispensed to Johnson by nurses who provided him with small cups containing pills for his various ailments, with the unmarked Risperdal mixed in with the others. Johnson was not advised that he was being given Risperdal and

consumed it unknowingly. The district court granted Dr. Tinwalla's motion for summary judgment, concluding that, at worst, the doctor's failure to notify Johnson of the medication may have been negligent. Johnson appealed the grant of summary judgment.

Holding: The U.S. Seventh Circuit Court of Appeals reversed, finding that the inmate could pursue claims for common law medical battery and constitutional due process violations stemming from the psychiatrist's prescription and arrangement for surreptitious dispensation of psychotropic medication to an objecting inmate.

Discussion: The court noted that federal common law recognizes a Fourteenth Amendment liberty interest in avoiding the unwanted administration of antipsychotic drugs, due to the physical intrusion, magnitude of side effects, and the alteration of brain functioning. The court explained that this liberty interest gives way only in limited circumstances; for example, when the state can establish that the prisoner has a mental disorder likely to cause harm to himself or others unless he is medicated.

There was no evidence that Johnson met federal or state criteria for medication over objection. The court found that, while Dr. Tinwalla had not ordered his staff to force Johnson to take the Risperdal, the circumstances under which Johnson was provided the medication were essentially tantamount to physically forcing him to ingest it. The court dismissed the district court's opinion that the doctor's conduct amounted "at worst" to negligence. The court concluded that, because Tinwalla was aware of the facility's unmarked pill dispensation method and of Johnson's daily pill regimen, a jury could reasonably find that Tinwalla was "deliberately indifferent" to Johnson's right to refuse. The court also concluded that a jury could reasonably find Johnson to have been a victim of the common-law tort of medical battery because the doctor intended to cause Johnson to come into "offensive contact" with the unwanted medication.

Exhaustion doctrine—modification when claimant compromised by mental illness: Seventh Circuit reverses the district court's grant of summary judgment to prison officials on inmate's Eighth Amendment claim, on the grounds of inmate's failure to exhaust administrative remedies, finding that inmate's capacity to make required timely administrative complaints and appeals was compromised by his mental illness and by the actions of prison officials in response to that illness.

Weiss v. Barribeau, et al., 853 F.3d 873 (7th Cir. 2017)

Background: Mark Weiss, a Wisconsin inmate, filed a federal civil rights suit alleging that Department of Corrections employees failed to prevent an assault that resulted in a broken ankle, and that despite his complaints they did not treat his ankle for months, in violation of the Eighth Amendment's prohibition of cruel and unusual punishment. The initial injury occurred in February 2014. Weiss complained of pain and requested an x-ray, but his request was denied. In March 2014, Weiss submitted a timely complaint about his lack of treatment, but was told to resubmit the complaint within 14 days. During that time, he was transferred to a mental health facility to be treated for bipolar disorder. He was placed on psychotropic medication that produced serious side effects. In

August 2014, after receiving treatment for the broken ankle, Weiss submitted a second administrative complaint, which was rejected as being untimely. The district court granted summary judgment for the Department of Corrections employees, finding that Weiss failed to exhaust his administrative remedies before suing, as required by the federal Prison Litigation Reform Act.

Holding: The Seventh Circuit reversed, finding that the inmate's capacity to make the required administrative complaints and corresponding appeals was compromised by his mental illness and by the actions of prison officials in response to that illness.

Discussion: The court reasoned that during the time allotted to Weiss for exhausting his administrative remedies, he was being treated for mental illness, had been heavily medicated, and may not have been sent the appropriate administrative forms. The court referenced Seventh Circuit precedent noting that a prisoner could not be required to exhaust remedies to which he has no access, such as when a prisoner cannot obtain or complete the necessary forms (see *Hernandez v. Dart*, 814 F.3d 836). The court also noted that Wisconsin law prohibits prison administrators from excluding impaired, disabled, or illiterate inmates, who may need assistance in filing grievances, from participating in the grievance filing process. The court concluded that because Weiss may not have received the appropriate forms, had not been instructed about how to pursue grievances while hospitalized, and because he was undergoing intensive psychiatric treatment when the appropriate forms were reportedly sent to him, there were in fact no administrative remedies actually available to him.

Eighth Amendment violations due to inhumane prison conditions and lack of treatment; inmate suicide: Third Circuit reverses the trial court's grant of defendants' motions to dismiss claims brought by estate of inmate who committed suicide in prison, holding that the district court erred by (1) improperly applying the guidelines for determining the liability of facility staff for an inmate's suicide, and (2) improperly denying claims that the prison was liable for subjecting the inmate to inhumane conditions and being deliberately indifferent to his documented mental illness, separate and apart from his suicide.

Palakovic v. Wetzel, 854 F.3d 209 (3rd Cir. 2017)

Background: Brandon Palakovic, an inmate with mental illness at Pennsylvania's SCI Cresson facility, committed suicide after repeatedly being placed in solitary confinement. His estate brought a civil rights action following his death. The district court dismissed the estate's Eighth Amendment claims against prison and medical officials for failure to state a claim.

According to the complaint, Palakovic was placed at the SCI Camp Hill facility for initial processing. He informed screening staff of his prior self-harm, suicide attempts, and his current plan for committing suicide. He was diagnosed with alcohol dependence, anti-social personality disorder, and impulse control disorder, and was identified as a suicide risk. He was later transferred to the SCI Cresson correctional facility, where he exhibited

depressive symptoms, and expressed suicidal desires, but no suicide risk assessment was performed and no psychiatric counseling was provided. Mental health interviews were conducted through a slot in Palakovic's solitary confinement unit. He was subjected to numerous 30-day periods of solitary confinement, during which he was isolated for 23 to 24 hours per day in a cement cell smaller than 100 square feet. He was not allowed phone calls, and experienced a severe reduction in social interaction. While Palakovic was incarcerated at CSI Cresson, the U.S. Department of Justice (DOJ) conducted an investigation into the facility's handling of mentally ill inmates, finding, among other issues, faulty recordkeeping, poor screening, insufficient mental health staff, and insufficient crisis response training. In 2012, prior to the release of the DOJ's findings, Palakovic committed suicide while in solitary confinement.

Palakovic's estate filed a civil rights complaint against prison officials, alleging Eighth Amendment violations relating to the inhumane conditions of Palakovic's confinement, and inadequate mental health treatment. The district court granted defendants' motion to dismiss finding that the plaintiff failed to meet the "vulnerable to suicide" standard, which required a claim that (1) an inmate had a particular vulnerability to suicide, (2) that prison officials knew or should have known about the vulnerability, and (3) that the officials acted with reckless indifference to that vulnerability. Plaintiff appealed, arguing that the Eighth Amendment claims should not have been considered through the lens of the vulnerable to suicide framework because they were not seeking to hold the facility liable for Palakovic's suicide, but rather, the conditions of his treatment in solitary confinement.

Holding: The Third Circuit reversed the trial court's grant of defendants' motions to dismiss, holding that the district court erred by (1) improperly applying the guidelines for determining the liability of staff for an inmate's suicide, and (2) improperly denying the estate's claims that the prison was liable for subjecting the inmate to inhumane conditions and being deliberately indifferent to his documented mental illness. The Court concluded that the allegations supported a finding that prison officials knew of Palakovic's condition and deliberately ignored it when they repeatedly placed him in solitary confinement. The matter was remanded to the district court, where the estate would be permitted to proceed on 8th Amendment claims concerning conditions of confinement, inadequate mental healthcare, vulnerability to suicide, and failure to train.

Discussion: The estate argued that the "vulnerable to suicide" framework required by the trial court did not apply because the claim related to Palakovic's treatment in solitary confinement while he was alive. The Court of Appeals stated that this framework applies when a plaintiff seeks to hold prison officials accountable for failing to prevent a suicide, but that it does not preclude other types of claims, even if they relate to an individual who committed suicide while incarcerated. The Court determined that the estate should have been permitted to bring Eighth Amendment claims regarding Palakovic's confinement to the same extent that he would have been able to had he remained alive.

The Court of Appeals turned to the issue of whether the estate's claim that prison officials were aware of Palakovic's mental illness and were deliberately indifferent to his

placement in inhumane confinement conditions was plausible enough to withstand a motion to dismiss. The court found that the estate's original complaint adequately alleged the prison officials' awareness of Palakovic's mental state because he had been screened and diagnosed at SCI Camp Hill, discussed suicide attempts and ideations, had been prescribed antidepressants, and had been placed on SCI Cresson's mental health roster. The Court found that the complaint adequately alleged that officials were aware that solitary confinement was psychologically harmful, supported in part by the officials' awareness of the ongoing DOJ investigation. The Court found that the estate's claim of deliberate indifference was sufficiently pleaded. The Court also noted that the district court erroneously used a subjective, rather than objective standard in determining the prison officials' knowledge, stating that the proper test is what the officials *should* have known, and not what they actually *did* know.

Excessive force; qualified immunity: Ninth Circuit reverses district court's refusal to grant sheriff deputy's motion for summary judgment based on qualified immunity, finding that, while the officer's use of lethal force was objectively unreasonable, there were no existing court decisions at the time of the event that were specific enough to give the deputy clear prior notice that his use of force in those particular circumstances would be unreasonable.

S.B. v. County of San Diego, et al., 2017 WL 1959984 (9th Cir. May 12, 2017)

Background: In August 2013, sheriff's deputies responded to a call at David Brown's home for an involuntary psychiatric hold. The deputies were advised that Brown suffered from bipolar disorder and schizophrenia, had consumed alcohol and valium, and was behaving aggressively. Two officers entered Brown's home with a gun and taser drawn. When the officers encountered Brown, he appeared disoriented and had knives protruding from his pockets. Brown was agitated and his speech was rambling. Brown was ordered to his knees and complied with the order. At this point, the officers' accounts of Brown's shooting become inconsistent. Brown was either kneeling or preparing to stand with a knife in his hand (the deputies made inconsistent statements on this) when an officer fired on him, fatally wounding him. David Brown's surviving minor children brought a federal civil rights claim alleging excessive force in Brown's shooting death. The defendants moved for summary judgment based on qualified immunity for the officer who killed Brown. The district court denied the motion on the grounds that inconsistencies in the officers' statements created a triable dispute over whether the officer's conduct violated established case law precedent, rendering qualified immunity inapplicable. Defendants appealed.

Holding: The Ninth Circuit reversed, holding that, while the officer's use of lethal force was objectively unreasonable, there were no existing court decisions at the time of the shooting that were specific enough to give the deputies clear prior notice that the use of force in these particular circumstances would be unreasonable.

Discussion: In assessing whether the officer was entitled to qualified immunity, the court considered (1) whether the officer had violated a constitutional right, and (2)

whether the constitutional right was clearly established at the time of the officer's alleged misconduct. If either prong was answered in the negative, qualified immunity would apply. Regarding the first prong, the Fourth Amendment allows officers to use objectively reasonable force. This assessment considers several factors, the most important of which is whether the suspect posed an immediate threat to the safety of the officers or others. The court determined that, given the inconsistencies in the officers' accounts, a jury could conclude that when Brown was shot, he had just touched the knife, was on his knees, and was beyond striking distance, and that non-lethal alternatives were available to the officer. Viewing the facts in this light, the court determined that the officer's use of deadly force under such facts was not objectively reasonable and violated the Fourth Amendment prohibition of excessive force.

The court then turned to the second prong of the qualified immunity test: whether it was "clearly established" at the time of the officer's alleged misconduct that the use of deadly force under such facts constituted excessive force in violation of the Fourth Amendment. The court noted the U.S. Supreme Court's emphasis in recent decisions that, to be clearly established, the right must be sufficiently clear that a reasonable officer would understand that their use of deadly force "in these particular circumstances" would be excessive. The court found that there was no Fourth Amendment case law predating Brown's shooting that mirrored those facts closely enough to have given the officer notice that his conduct would be in violation of Brown's constitutional rights. Accordingly, because the officer did not have sufficiently clear guidance to understand that his actions constituted excessive force, qualified immunity applied, and the district court's refusal to grant summary judgment was erroneous.

Execution of incompetent defendant: Eleventh Circuit holds that defendant who, as a result of dementia developing after his conviction for capital murder had become incapable of remembering or understanding that he had committed the crime for which he was to be executed, was incompetent for execution under *Ford v. Wainwright* and *Panetti v. Quarterman*.

Madison v. Alabama Dept. of Corrections, 851 F.3d 1173 (11th Cir. 2017)

Background: Vernon Madison was convicted of capital murder and sentenced to death for a 1985 homicide. His conviction and sentence were affirmed by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. Mr. Madison sought both state and federal habeas relief, but was denied. In 2015 and 2016, while awaiting execution, Madison suffered strokes that resulted in memory loss and disorientation. Following the strokes, Madison's counsel noticed significant cognitive deficiencies and requested that the Alabama trial court convene a hearing to determine whether Madison was competent to be executed. At the hearing, both the state and Madison presented testimony from mental health experts. Madison presented testimony from a neuropsychologist, who opined that Madison had experienced significant cognitive decline because of his strokes and that he suffered from vascular dementia, substantial working memory deficits, and retrograde amnesia, and that because of these conditions, he had no memory of committing the murder for which he was to be executed. The neuropsychologist

determined that Madison could not recall the murder, believed that he had never killed anyone, and that he did not have a rational understanding of the state's motive to seek his execution.

The state presented the testimony of the psychologist who evaluated Madison prior to the hearing, who acknowledged Madison's cognitive decline, but also testified that Madison was able to discuss his legal matters with his attorneys, including his appeals and legal theories, and thus had a rational understanding of his sentence. The trial court relied on the testimony from the state's psychologist in ruling that Madison was competent to be executed. Madison appealed, arguing that the finding of competency relied on an unreasonable factual determination and an unreasonable application of the federal precedents that establish the standard for competency for execution.

Holding: The Eleventh Circuit found that, as a result of dementia developing since his commission of capital murder, the defendant had become incapable of remembering or understanding that he had committed the crime for which he was to be executed, which rendered him incompetent for execution.

Discussion: The Eleventh Circuit Court applied the standard for competence to be executed as described in *Panetti v. Quarterman*: an individual cannot be executed if (1) they do not understand that an execution will result in their death, or (2) they lack a rational understanding of the reason for their execution; that is, if the prisoner is not able to rationally understand the relationship between the crime and their impending punishment then the punishment's purpose is nullified.

It was conceded that Madison understood that he was scheduled to be executed, and understood that this would result in his death, and that he was informed that the reason for his execution was a murder he committed. The court reviewed the two experts' evidence regarding Madison's understanding of the relationship between the underlying crime and his execution. It noted the neuropsychologist's conclusions that Madison suffered from a serious mental disorder, had significant memory impairments, could not recall the underlying murder, believed he had never killed anyone, and could not make a rational connection between the crime and his punishment beyond merely parroting back what he had been informed of by the court. The Eleventh Circuit concluded that the state court's decision that Madison was competent to be executed was based on an unreasonable determination of the facts and did not appropriately apply the Supreme Court's standard laid out in *Panetti*.

State Court Decisions

Involuntary commitment; due process: The Supreme Court of Florida rules that the constitutional due process rights of individuals in involuntary commitment hearings include the right to have the judicial officer physically present for such hearings. A local court's plan for the judicial officer to be present through videoconferencing is disapproved.

Doe v. Florida, 217 So.3d 1020 (Fla. 2017)

Background: Individuals awaiting involuntary commitment hearings (governed by Fla. Stat. 394.467, and known as ‘Baker Act’ hearings in Florida) alleged that their constitutional due process rights were violated when a county court judge instituted a policy allowing judges to preside over the hearings remotely from their courthouses, via a videoconferencing system, while patients, witnesses, and attorneys would be physically present at the receiving facility. Several patients with pending hearings petitioned the district court to require the judicial officers to be physically present for the hearings. After the district court ruled that there was no legal duty for judges presiding over Baker Act hearings to be physically present, the matter was taken up by the Supreme Court of Florida.

Holding: The Supreme Court of Florida held that individuals subject to commitment hearings under the Baker Act are entitled, pursuant to their due process rights, to the physical presence of the presiding judicial officer at said hearings. This right can only be abrogated by a voluntary waiver by the patient.

Discussion: The court noted that fundamental due process rights are applicable at Baker Act hearings, guaranteeing individuals the right to counsel, the right to testify, the right to present evidence, the rights to confront and cross examine witnesses, and notably here, the right to be physically present at the commitment hearing. The court noted that the patient’s right to be present at a hearing would be rendered meaningless if the judicial officer was not also present for the hearing, and that convenience to the court alone is insufficient justification for the physical absence of the judicial officer.

The court rejected the possibility of transferring the patient to the courthouse in lieu of the judicial officer’s presence at the holding facility, citing the Florida legislature’s preference articulated in Fla. Stat. 394.467 that the hearings be conducted at the patient’s facility in a manner not likely to harm the patient’s condition.

Involuntary commitment hearings; right to effective representation by counsel:
Maine Supreme Court holds that individuals subject to involuntary commitment proceedings have the right to effective representation by counsel, and may claim ineffective counsel as part of an appeal of commitment.

In re Henry B., 159 A.3d 824 (Me. 2017)

Background: Patient Henry B. was admitted into hospital care pursuant to Maine’s psychiatric emergency procedures, and the hospital then applied for further involuntary commitment. Henry B. was represented by appointed counsel at his subsequent district court commitment hearing. The district court concluded, based on the testimony of the hospital’s psychiatric center director, an independent medical examiner, and Henry B.’s sisters, that there was sufficient evidence to find that Henry B. was mentally ill and that he had suffered an acute, possibly schizophrenia-related psychotic episode. The court further concluded that Henry B. posed a serious risk of harming himself or others, and

that neither community nor family resources were sufficient to care for and treat him. On appeal to the Maine Supreme Judicial Court, Henry B. claimed that he was not provided with the effective assistance of counsel at the initial district court commitment hearing.

Holding: The Supreme Court of Maine held that at all stages of involuntary commitment proceedings, individuals subject to such proceedings are entitled to the effective assistance of counsel. Patients have a corresponding right to challenge the commitment order based on a claim of ineffective assistance of counsel.

Discussion: Because Maine law already required that patients in involuntary commitment hearings be represented by counsel, the court reasoned that it would be contrary to the intent of the Maine legislature to guarantee representation, but not to guarantee the effectiveness of that representation.

In assessing the merits of the claim, the court held that the standard enunciated by *Strickland v. Washington*, 466 U.S. at 668 (1984) shall apply. To prove an ineffectiveness claim under *Strickland*, the aggrieved party must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) that but for counsel's unprofessional errors, the result of the proceeding would have been different. The court noted that a "more intrusive post-trial inquiry could encourage the proliferation of ineffective challenges, and possibly delay the permanency necessary to stabilize a mentally ill individual's treatment in a safe environment."

Involuntary medication to restore competency to stand trial; due process: Washington State Court of Appeals holds that a defendant has a due process right to obtain and present expert testimony on whether the findings required under *Sell* for involuntary medication to restore competency to stand trial have been proven by the state.

Washington v. Lyons, 2017 WL 2438687 (Wash. Ct. App. June 6, 2017)

Background: Christopher Lyons was charged with assault and subsequently underwent a competency evaluation that found he suffered from delusions and was incapable of assisting with his defense. The evaluation indicated that involuntary medication was necessary for to restore competence. The court ordered a 90-day competency restoration commitment, but did not order involuntary medication. During a subsequent commitment period, Lyons's psychiatrist requested that the prosecutor obtain an involuntary medication order. An involuntary medication hearing ("*Sell* hearing") date was set. Lyons did not receive details regarding the state's request, nor did he receive the medical evidence the state intended to present. At the hearing, the state presented expert testimony and Lyons made several requests for a continuance to obtain his own expert to testify to the resistance of delusional disorder to medication and to the claim that medication induced competency restoration can often take at least three to four months, but the trial court denied his requests. The court then issued an involuntary medication order and Lyons was involuntarily medicated. Despite being medicated, Lyons's delusions persisted. The court deemed him incompetent to stand trial, and found that competency

restoration was unlikely. The criminal case was thereafter dismissed, and Lyons was committed pending an evaluation for civil commitment. The Washington Court of Appeals granted Lyons's request for review of the lower court's decision to deny him the opportunity to obtain an expert for the *Sell* hearing.

Holding: The court held that a criminal defendant has a procedural due process right to present a complete defense, and that in some cases this includes the right to obtain an expert to present relevant, admissible evidence on whether the State has proven the findings required under *Sell* for involuntary medication to restore competency to stand trial. Accordingly, the court reversed the trial court's involuntary medication order.

Discussion: The court reasoned that the potential unwanted administration of antipsychotic drugs implicates Due Process rights because it interferes with an individual's rights to privacy, idea production, and a fair trial. The court also reasoned that because *Sell* hearings involve a meticulous examination of scientific information, including potential medication efficacy and likelihood of competency restoration, in order to present a complete defense, the defendant would likely need to introduce medical evidence through a qualified expert to effectively challenge the State's request for forced medication.

Involuntary commitment hearings; judicial authorization of treatment; due process: Massachusetts Supreme Court rules that Massachusetts statutes give individuals in involuntary commitment hearings and in judicial authorization of treatment hearings the right to request and obtain a continuance of the hearing beyond the otherwise statutorily required time frames.

In the Matter of N.L., 71 N.E.3d 476 (Mass. 2017)

Background: Patient N.L. was admitted to the hospital under the Massachusetts's emergency hospitalization provisions. The hospital subsequently requested involuntary commitment and filed petitions for determination of incompetency and for corresponding medical treatment. A hearing date for the petitions was set. Due to administrative delays, N.L.'s attorney did not receive N.L.'s medical records until the same day that a retained psychiatrist first met with N.L. The following day, N.L.'s attorney requested a continuance of the hearing to afford the psychiatrist an opportunity to complete N.L.'s evaluation. The request was opposed by the hospital. Without stating its reasoning, the court denied N.L.'s request for a continuance. Following the hearing, N.L. was involuntarily committed and involuntarily medicated. N.L. appealed the lower court's denial of his request for a continuance.

Holding: The Massachusetts Supreme Court held that the state's statutes give individuals in involuntary commitment hearings and judicial authorization of treatment hearings the right to request and obtain a continuance of the hearing beyond the otherwise statutorily required time frames. Such a continuance is mandatory where a denial is reasonably likely to prejudice a person's ability to prepare a meaningful defense.

Discussion: The court reasoned that this interpretation of Massachusetts law was consistent with the legislative intent behind the state statute. The relevant law states that civil commitment hearings “shall be commenced within [five] days of the filing of the petition, unless a delay is requested by the person or his counsel.” The court opined that the word “unless” created an exception to the commencement deadline, and that historically, the legislature had shortened the deadline from fourteen days to five to protect the due process interests of individuals subject to civil commitment hearings by preventing their prolonged pre-hearing detention. The court noted that it would be illogical for a statute that was designed to protect a liberty interest to be used to deny an individual the opportunity to prepare a meaningful defense.

If a court denies the requested continuance, the judge must specifically state on the record the reasons why the denial is not reasonably likely to impair the individual’s ability to prepare a meaningful defense. If appealed, such finding will be reviewed under an abuse of discretion standard. The length of the continuance is left to the judge’s discretion; however, the court notes that the delay should only be long enough to provide the individual sufficient time to prepare a meaningful defense. In assessing the appropriateness of the length of the delay, the court should make the determination based exclusively on what the court deems to be in the patient’s best interest.

Judicial authorization of treatment with psychotropic medication over objection: Montana Supreme Court upholds District Court order in involuntary commitment case in which the Court also authorizes the administration of involuntary medication when it “may be necessary.”

In the Matter of C.B., 392 P.3d 598 (Mont. 2017)

Background: The Yellowstone County Attorney filed four petitions requesting that C.B., a twenty-eight-year-old woman with a history of mental illness, be involuntarily committed. The first three petitions were dismissed when C.B.’s condition improved after the administration of medication. C.B.’s medical records indicated that she was frequently noncompliant with her prescribed medication, and that she had a consistent history of homelessness, unemployment, and aggression toward family members. She had prior encounters with law enforcement that included incidences of C.B. walking in traffic, and creating a danger to herself and others. Her behavior with law enforcement was described by the court as being volatile and occasionally incoherent.

A hearing was convened, and C.B. was subsequently ordered committed to the Montana State Hospital. The district court found that prior to the hearing, C.B. had become compliant with her medication, but had not improved enough to be discharged and her previous hospitalizations only stabilized her for a few days or weeks. The district court found that the state had shown that C.B. suffered from a mental illness to a reasonable degree of medical certainty, that she was unable to care for herself, and that involuntary commitment was the least restrictive available treatment option. The court authorized C.B.’s care providers to involuntarily medicate her “when it may be necessary.” C.B. appealed the district court’s order, arguing, among other claims, that the district court’s

language authorizing the use of involuntary medication “when it may be necessary” was an inappropriate application of Montana law.

Holding: The Montana Supreme Court upheld the district court’s involuntary medication order in an involuntary commitment case, holding that the district court did not err in authorizing involuntary medication “when it may be necessary.”

Discussion: The court reasoned that the district court’s chosen language was an appropriate application of Montana law, which allows courts to place the authority to administer medication in the hands of a facility’s chief medical examiner or designated physician. The court noted that procedural safeguards would prevent caregivers from unnecessarily medicating C.B., and that the particular facts of her case strongly supported the need for involuntary medication. The relevant factors in this determination included C.B.’s specific diagnosis (bipolar affective disorder, manic with psychotic features), her repeated hospital admissions, her ongoing medication noncompliance, the ineffectiveness of her short-term treatment plans, that her mental health prevented her from taking her medication in a controlled manner, and the likelihood that without long term medication her mental and physical health would not improve. Though a previous case, *In re R.H.*, 385 Mont. 530 (2016), held that language similar to that presented here authorizing involuntary medication was inappropriate, the court noted that C.B., unlike R.H., had a significant history of medication noncompliance, rendering the comparison inapposite. The court also noted that Montana law requires courts ordering commitment and involuntary medication to explicitly state why involuntary medication was chosen instead of other alternative measures. The district court did so, noting that C.B.’s particular diagnosis was not curable but would be controllable through a combination of systematically-received long term medication, therapy, and social support.

NGRI; sex offender registration requirements: Louisiana Supreme Court holds that the state’s sex offender registration requirements apply to individuals found not guilty by reason of insanity in regard to their sex offense charges.

Louisiana v. Cook, 2017 WL 1709822 (La. May 3, 2017)

Background: In 1986, Glenn Cook, a 56-year-old man, was found not guilty by reason of insanity (NGRI) of an attempted aggravated rape that took place while Cook was in the midst of a psychotic state. Cook suffered from severe chronic mental illness that involved paranoia, delusional and disordered thought processes, and mood instability. Following the district court’s judgment, Cook was committed to inpatient psychiatric treatment. In 1999, he was placed in a group home, and since that time has lived in supervised residential settings in the community, with periodic psychiatric hospitalizations following psychotic episodes. Cook filed a motion asking to be relieved of his obligation to register as a sex offender, arguing that because he was not “convicted” of a sex offense, the sex offender registration statute was inapplicable to him. The district court granted his request, finding that the sex offender registration law applied to persons *convicted* of a sex offense, not to those who had received an NGRI judgment. The state appealed.

Holding: The Supreme Court of Louisiana reversed the lower court, ruling that the state's sex offender registration requirements are applicable to persons found NGRI of sex crimes who were subsequently civilly committed.

Discussion: The court examined the legislative statement of purpose for Louisiana's sex offender law and noted that it alluded to the inclusion of mentally ill sex offenders within the purview of the statute, and reflected the intent to include certain sex offenders who were not technically convicted in criminal proceedings. The court turned to the 'definitions' section of the sex offender statute to determine the breadth of the term "conviction" and found that it included persons accused of sex crimes and acquitted pursuant to a finding of NGRI, who were subsequently committed to inpatient treatment. Cook's NGRI acquittal and subsequent commitment placed him within the purview of the statute; accordingly, his registration as a sex offender was required.

Criminal sentencing of juveniles; right to new sentencing hearing: California Supreme Court rules that inmate sentenced 20 years ago as a juvenile to life imprisonment without parole under standards violating *Miller v. Alabama* was entitled to seek relief through a *habeas corpus* action and is entitled to re-sentencing under the *Miller* standards.

In re Kirchner, 393 P.3d 364 (Cal. 2017)

Background: In 1993, Kristopher Kirchner, then a juvenile, was tried as an adult and convicted of first degree murder, robbery, and burglary. Though corrections authorities found Kirchner amenable to treatment and rehabilitation, the court nonetheless sentenced Kirchner to a life term without the possibility of parole ("LWOP"). In 2012, the U.S. Supreme Court decided *Miller v. Alabama*, 567 U.S. 460, which held that a court considering a sentence of LWOP for a juvenile must consider evidence that may exist regarding: 1) the offender's age, immaturity, impetuosity, and failure to appreciate risks and consequences, 2) the offender's family and home environment, 3) the circumstances of the homicide, including the extent of the minor's participation and the way they may have been affected by familial or peer pressure, 4) whether the offender might have been charged and convicted of a lesser offense but for incompetencies associated with youth, and 5) the possibility of rehabilitation.

After *Miller* was decided, Kirchner submitted a habeas corpus petition for resentencing, arguing that at the time of his original sentencing the court had not undertaken the mandatory consideration of the factors identified in *Miller*. The state conceded that the *Miller* factors were not applied to Kirchner's sentencing, but argued against retroactively applying *Miller*. The court of appeals found that a California statute (Penal Code §1170(d)(2)) that allowed for the possibility of resentencing was an adequate remedy for Kirchner's complaint, and that habeas corpus relief was inappropriate. Kirchner appealed.

Holding: The California Supreme Court held that a juvenile inmate sentenced 20 years ago to life without parole absent judicial consideration of the *Miller* factors was entitled

to seek habeas corpus relief to be resentenced by a court with full consideration of those factors. The court further held that a presentencing consideration of the *Miller* factors is both mandatory and retroactively applicable to sentences pre-dating *Miller*. The matter was ordered remanded to the superior court for resentencing consistent with *Miller*.

Discussion: The court noted that the California statute identified by the court of appeals is an insufficient remedy for a sentence of life without parole for a juvenile where the sentencing court did not consider the *Miller* factors in determining that sentence. The court reasoned that the statute allows, but does not mandate, judicial consideration of several factors pertaining to the crime and offender, none of which are related to the specific incompetency associated with youth.

Outpatient commitment: Wisconsin Supreme Court rejects argument by plaintiff subjected to repeated renewals of his outpatient commitment order that, because these repeated commitments have not resulted in his “rehabilitation” from paranoid schizophrenia the state cannot continue to forcibly treat him under the outpatient commitment statute.

In the Matter of the Mental Commitment of J.W.J., 895 N.W.2d 783 (Wis. 2017)

Background: In 2015, Waukesha County petitioned to extend, for the sixth time, the involuntary outpatient commitment and treatment orders of J.W.J., an adult male suffering from paranoid schizophrenia. J.W.J. objected, arguing that further involuntary commitment and treatment would not rehabilitate him, making him an improper subject for treatment under Wisconsin law. J.W.J. had an extensive history of drug abuse, including an LSD overdose and treatment for drug-induced schizophrenia. He had several periods of inpatient treatment between 1980 and 2014, including twelve psychiatric hospital admissions, and near continuous commitment since 1990. His extensive criminal record included theft, robbery, intoxicated driving, and a marijuana sale conviction that led to an 18-month prison term. J.W.J.’s medical records indicated a lack of insight into his illness and a history of medication noncompliance that led to hallucinations and hospitalizations.

A physician’s recommendation filed with the county’s petition indicated that in the year prior, J.W.J.’s treatment regimen had resulted in no hospitalizations and helped him maintain medication compliance, though he had not developed insight into his illness or the ability to make informed decisions about his treatment. The recommendation also indicated that J.W.J. was dangerous and an appropriate subject for continuing outpatient commitment. The court granted the county’s petition, extending J.W.J.’s outpatient commitment and medication treatment orders for 12 months. The orders required J.W.J. to attend his appointments, take his medications, not engage in acts, attempts, or threats to harm himself or others, and not take any non-prescription controlled substances or alcoholic beverages. J.W.J. appealed the court order.

Holding: The Wisconsin Supreme Court rejected J.W.J.’s arguments that, because the repeated outpatient commitments had not resulted in his “rehabilitation” from paranoid

schizophrenia, the state could not continue to forcibly treat him under the outpatient commitment statute. The court upheld the order for outpatient treatment.

Discussion: Under Wisconsin law, individuals are deemed appropriate subjects for treatment and outpatient commitment when they demonstrate “rehabilitative potential.” In Wisconsin, an individual possesses rehabilitative potential when their treatment goes beyond controlling activity and controls the disorder and its symptoms. An individual does not have rehabilitative potential and is an inappropriate subject for treatment if said treatment maximizes the subject’s individual functioning and maintenance but fails to control or improve their disorder.

The court disagreed with J.W.J.’s assessment that he did not possess rehabilitative potential, noting the ameliorative effects of his treatment regimen. The court was satisfied that the county had provided clear and convincing evidence that J.W.J.’s treatment controlled his symptoms to the point that he could integrate into society without posing a threat to himself or others. The court observed that without such treatment, J.W.J.’s condition would deteriorate, necessitating further involuntary inpatient commitment orders to properly treat him. Based on these findings, the court determined that J.W.J. possessed rehabilitative potential and was thus an appropriate subject for involuntary outpatient treatment.

Liability to injured third parties; special relationships; duty of care: The Iowa Supreme Court holds that the state owed no duty of care to a private facility resident who was sexually abused by another resident who had been discharged by a court from a state violent sex offender program and then ordered by another court into the private facility due to dementia; further, no duty of care was owed to the private facility.

Gottschalk v. Pomeroy Development, Inc., 893 N.W.2d 579 (Iowa 2017)

Background: In 2009, Mercedes Gottschalk was admitted by her family to the Pomeroy Care Center. In 2010, William Cabbage was civilly committed to the same facility. Previously, Cabbage had been convicted of assault with intent to commit sexual abuse, indecent contact with a child, and two counts of lascivious acts with a child. Following diagnoses of pedophilia, personality disorder with antisocial and narcissistic features, and a doctor’s findings that his diagnoses involved mental abnormalities that hampered his ability to control his sexually dangerous behavior, Cabbage was adjudicated a sexually violent predator and committed to the state’s civil commitment unit for sexual offenders (“CCUSO”) in 2002. In 2006, Cabbage was diagnosed with Alzheimer’s type dementia. CCUSO staff subsequently agreed that Cabbage needed permanent placement in a secure care facility due to his dementia, and that he no longer met Iowa’s definition of a sexually violent predator. In 2010, the district court ordered Cabbage placed in the Pomeroy Care Center after finding that he was seriously mentally impaired and that he presented a danger to himself and others. CCUSO advised the care center that Cabbage was unlikely to be a risk, though the center was unaware that his doctors believed him to be a danger to others at the time of his commitment there. The center was aware of Cabbage’s

pedophilia, but was informed by CCUSO that he would not present a risk to older persons. In 2011, a child visiting the center witnessed Cabbage sexually assaulting Gottschalk.

Gottschalk sued the care center for negligent provision of care. She also sued the state, claiming that it violated its duty to enact a safety plan after Cabbage's placement, and its duty to determine whether appropriate safety measures were being followed. The state moved for summary judgment, arguing that after Cabbage's discharge from CCUSO, it had no duty of care to monitor him or inspect the care center. The district court ruled in favor of the state, finding that, after Cabbage was unconditionally discharged from CCUSO by court action, the state had no statutory or common law duty to supervise, monitor, or approve a safety plan. The district court also ruled that sovereign immunity prevented any claim of misrepresentation against the state. Plaintiffs appealed.

Holding: The Iowa Supreme Court upheld the decision of the district court finding that a special relationship did not exist between the state and Cabbage after he was discharged from CCUSO and committed to the Pomeroy Center by independent court action (and *not* by the state); therefore, the state owed no duty of care to Ms. Gottschalk or other patients at the Pomeroy Center, or to the Center itself.

Discussion: Under Iowa law, a party owes a duty of care to third parties where the party has a "special relationship" with the party posing a risk, such as that between mental-health professionals and patients. In determining whether a duty of care exists, courts examine the relationship between parties, the foreseeability of harm, and public policy concerns. The court turned to Iowa case law, which has held that psychiatrists making patient discharge decisions do not owe a duty of care to the general public, because of the uncertain foreseeability of harm. Iowa has not yet determined whether a duty of care attaches to a discharge decision if the psychiatrist had reason to believe the patient's release would endanger a particular person.

The court determined that no special relationship existed between the State and Cabbage to justify the imposition of a duty of care upon the state because "[t]he courts made the decision to discharge Cabbage, not the state."

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ISSN 1063-9977

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