



LESSONS FROM VIRGINIA TECH: RECOMMENDATIONS FOR STATE LAW CHANGES TO CLOSE LOOPHOLES IN BACKGROUND CHECK SYSTEMS

Prepared by Legal Community Against Violence

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In light of the recent tragedy at Virginia Tech, much focus has been placed on provisions in federal and state law governing background checks and prohibited purchasers. LCAV is providing this analysis to highlight what states can do to close loopholes in the background check system that allow dangerous individuals such as the Virginia Tech shooter to obtain firearms.

Federal Law Overview

Federal law establishes the baseline regarding the types of persons who are ineligible to purchase firearms. The federal Gun Control Act of 1968, codified at 18 U.S.C. § 922, prohibits the sale of firearms to certain individuals such as felons, illegal aliens and the mentally ill.¹ Most states and some local governments also have enacted laws prohibiting these and other individuals from purchasing firearms.

18 U.S.C. § 921, et seq. (the “Brady Act”), requires federally licensed firearms dealers (FFLs) to perform background checks on prospective firearm purchasers to ensure that the prospective purchaser is not prohibited from purchasing a firearm under federal, state or local law.² Since 1998, the Brady Act has been implemented through the National Instant Criminal Background Check System (NICS).³ The Brady Act does not apply to unlicensed sellers.

States have the option of serving as a state Point of Contact (POC) and conducting their own NICS checks, or having those checks performed by the FBI.⁴ Licensed dealers initiate a NICS check by contacting the FBI or state POC (typically by telephone or

¹ The complete list of prohibited purchasers under 18 U.S.C. § 922 includes any person who is underage; has been convicted of, or is under indictment for, a crime punishable by imprisonment for more than one year; is a fugitive from justice; is an unlawful user of or addicted to a controlled substance; has been adjudicated as a mental defective or committed to a mental institution; is an illegal alien; has been dishonorably discharged from the military; has renounced his or her U.S. citizenship; is subject to a court order restraining him or her from harassing, stalking or threatening an intimate partner, his or her child or a child of a partner; or has been convicted of a misdemeanor offense of domestic violence.

² 18 U.S.C. § 922(s).

³ As originally adopted, the Brady Act included interim as well as permanent provisions. The Act’s interim provisions, implemented on February 28, 1994, applied to handgun sales only. On November 30, 1998, the permanent provisions of the Brady Act went into effect, establishing the NICS system and extending the Act’s application to purchasers of long guns and persons who redeem a pawned firearm.

⁴ Bureau of Justice Statistics, U.S. Department of Justice, *Survey of State Procedures Related to Firearm Sales, 2005 3-4* (Nov. 2006), at <http://www.ojp.gov/bjs/pub/pdf/ssprfs05.pdf>.

computer) after the prospective purchaser has provided a government-issued photo I.D. and completed a federal Firearms Transaction Record (also known as Form 4473).⁵

A state POC search includes the state's independent criminal history database as well as the three federal databases accessed by the FBI during a NICS check.⁶ According to the FBI, state POC background checks are more thorough than those performed by the FBI because of the access to independent state criminal history databases in addition to the databases maintained by NICS. State databases typically include information that is unavailable to the FBI, including mental health records, outstanding felony warrants, domestic violence restraining orders and final disposition records (those showing whether an arrest resulted in an acquittal or a conviction).

Virginia Tech Tragedy Provides an Example of Dangerous Loopholes

Tragically, the Virginia Tech shooting illustrates loopholes in the background check system that undermine the effectiveness of the federal prohibited purchaser provisions in many states. Although the Virginia Tech shooter purchased firearms through a licensed dealer and passed two background checks, LCAV's analysis of the facts as they have been reported, and the applicable law, indicates that Mr. Cho was, in fact, prohibited from purchasing a firearm under federal law.

A Virginia special justice declared Mr. Cho to be "an imminent danger" to himself as a result of mental illness, and directed him to seek outpatient treatment. Federal law prohibits any person from selling or otherwise transferring a firearm to any person who has been adjudicated as a mental defective or committed to a mental institution.⁷ Federal regulations define "adjudication as a mental defective" to include "determination by a court, board, commission or other lawful authority" that as a result of incompetency or a mental illness, condition or disease, the person is a "danger to himself or to others."⁸ Mr. Cho fit this description based on the special justice's order, and should have been precluded from purchasing a firearm because he was adjudicated as a mental defective.

Virginia law is similar to federal law in that it prohibits a person from purchasing a firearm if he or she has been involuntarily committed to a mental health facility due to mental illness.⁹ However, unlike federal law, Virginia does not prohibit firearm purchases for those who have been deemed to be a danger to themselves or others. Rather, Virginia law prohibits purchase of firearms by any person adjudicated legally incompetent, mentally incapacitated, or incapacitated.¹⁰ These terms generally apply to

⁵ 27 C.F.R. § 478.124.

⁶ *Survey of State Procedures Related to Firearm Sales*, *supra* note 5, at 3-4. The three federal databases that comprise a NICS check are the National Crime Information Center (NCIC), which includes records regarding wanted persons (fugitives) and persons subject to protective/restraining orders; the Interstate Identification Index, which contains state criminal history records; and the NICS Index, which contains records of other persons prohibited under federal law from receiving or possessing firearms.

⁷ 18 U.S.C. § 922(d)(4).

⁸ 27 C.F.R. § 478.11.

⁹ Va. Code Ann. § 18.2-308.1:3.

¹⁰ Va. Code Ann. § 18.2-308.1:2.

an individual who is incapable of managing his or her own health or property.¹¹ Mr. Cho did not fall into this category and therefore he was not prohibited from purchasing a firearm under state law. Federal law should have barred Mr. Cho from purchasing a firearm, but the background check conducted by the state (Virginia is a POC state) did not reveal his adjudication as a mental defective. Virginia law only requires mental health records that would disqualify a purchaser under *state* law be sent to the state criminal history database.¹² It appears that, for this reason, the record of the proceeding deeming Mr. Cho to be an imminent danger to himself was not forwarded to the state database (or to NICS) and his status as a prohibited purchaser under federal law was not revealed during either of the two background checks he passed.¹³

What Every State Should Do to Close Loopholes

1. State law should, at a minimum, mirror federal law with regard to prohibited purchasers. The federal categories of prohibited purchasers are the prevailing minimum for all states. Most states incorporate at least some classes of federally-prohibited purchasers into their state laws so that they may prosecute violators. States should ensure that their laws governing prohibited purchasers at least mirror prohibitions under federal law. In the case of mental health, this means that states must, at a minimum, prohibit purchasers who have been adjudicated as mental defectives and/or committed to mental institutions. States must clearly define these terms in a way that is consistent with federal definitions. Therefore, "adjudicated as a mental defective" should be defined to include the following:

- a determination by a court, board, commission or other lawful authority that as a result of incompetency or a mental illness, condition or disease, a person is a danger to himself or to others or lacks the ability to contract or manage his or her own affairs;
- a finding of insanity by a court in a criminal case;
- a finding of incompetence to stand trial
- a finding of not guilty by reason of lack of mental responsibility pursuant to the Uniform Code of Military Justice.

Likewise, "commitment to a mental institution" should be defined to include, at a minimum, involuntary commitment to a mental institution.¹⁴

¹¹ *Id.*

¹² Va. Code Ann. § 37.2-1014 requires the clerk of the circuit court to certify and forward to Virginia's Central Criminal Records Exchange a copy of any order adjudicating a person incapacitated (as defined by state law) and section 37.2-819 requires the clerk to certify and forward a copy of any order for involuntary admission to a mental health facility. Mr. Cho was not deemed incapacitated as defined by state law and his treatment was outpatient in nature.

¹³ Note that Virginia Governor Timothy Kaine issued Executive Order 50 on April 30, 2007 directing all executive branch employees to consider outpatient treatment as "involuntary admission to a mental health facility" for purposes of VA. Code Ann. § 37.2-1014. The Order further directs law enforcement to include records of involuntary outpatient as well as inpatient care in the state database and forward such records to federal law enforcement.

¹⁴ 27 C.F.R. § 478.11 provides the federal definitions of the terms "adjudicated as a mental defective" and "committed to a mental institution."

These basic prohibitions will ensure that states at least mirror federal law in the area of mental health and will allow states to prosecute violators and help close loopholes in the background check system.¹⁵

2. States should pass laws requiring that records be sent to state databases (if applicable) and to the NICS database. Federal law does not require that states send criminal and mental health records to the FBI for inclusion in the NICS database.¹⁶ Therefore, it is essential that states enact laws requiring that all records relevant to the Brady Act be timely forwarded to the state POC database, if applicable, and to the NICS database.¹⁷ It is important for POC states to require that records be sent to the state database *and* to NICS so that records can be accessed in another state if an individual changes his or her state of residence.

Mental health records are particularly sensitive to privacy issues and states can protect these records by including provisions that limit the use of such records to the determination of eligibility to purchase a firearm. For example, the California law requiring the state department of mental health to supply mental health records to the state department of justice provides that the records “shall not be furnished or made available to any person unless the [department of justice] determines that disclosure of any information in the records is necessary to carry out its duties with respect to applications for [firearms] permits...or to determine the eligibility of a person to acquire, carry, or possess a firearm.”¹⁸

Conclusion

LCAV is available to provide free legal assistance and expertise to support enactment of the measures described above. We hope that state activists and public officials will act quickly to close these loopholes that allow dangerous individuals to slip through the cracks and have access to firearms. For additional information or assistance, contact LCAV Staff Attorney Laura Cutilletta at (415) 433-2062 or laura@lcav.org.

¹⁵ Most states expand on federal law by applying broader standards to some or all of the federally prohibited purchaser categories. In addition, many states designate additional classes of prohibited purchasers not found in federal law. LCAV believes that states should enact laws that are stronger than federal law to close the many loopholes in federal prohibited purchaser provisions that allow dangerous individuals to purchase guns. For example, persons who have been voluntarily committed to mental health facilities are not prohibited under federal law from purchasing firearms. Delaware, Illinois, Massachusetts, Minnesota, North Carolina, Utah and the District of Columbia have all closed this loophole to varying degrees. LCAV is available to consult with jurisdictions on ways to strengthen their state laws governing prohibited purchasers.

¹⁶ State contribution to the NICS database is voluntary. See 28 C.F.R. 25.4. Note that *Printz v. U.S.*, 521 U.S. 898 (1997), stands for the proposition that the federal government may not mandate that state officials administer or enforce a federal regulatory program. Although this proposition has not been applied to a case directly involving the contribution of state records to NICS, it may limit the ability of the federal government to require that states do so. According to an FBI press release dated April 9, 2007, the following 22 states voluntarily contribute mental health records to NICS: Alabama, Arizona, Arkansas, California, Colorado, Florida, Iowa, Kansas, Kentucky, Maryland, Michigan, Missouri, New Hampshire, New York, North Carolina, Ohio, South Carolina, Tennessee, Utah, Virginia, Washington and Wyoming.

¹⁷ Note that a bill currently pending before the U.S. House of Representatives (H.R. 297, McCarthy) would, among other things, provide financial incentives for state officials to send all relevant records, including those pertaining to mental health, to the NICS system in a timely manner.

¹⁸ Cal. Welfare and Institutions Code § 8104.