

## Chapter 3

### *Juveniles & Prohibited Persons*

prohibition represents a separate disqualification. For example, a “commitment” means a formal commitment, not a voluntary stay. Excluded are stays for observation only. Nor does the term include a stay in a mental institution that never involved any form of adjudication by a lawful authority. However, a stay that began as a voluntary stay may be subsequently transformed into a disqualifying stay if a court, board, or other lawful authority makes a determination that the person is a danger to self or others. Moreover, a voluntary stay that is by itself not disabling could be later converted into a formal commitment and therefore be disabling.

For purposes of a Federal firearms disability, ATF interprets “adjudicated mental defective” to include anyone adjudicated to be a “danger to him or herself,” “a danger to others,” or lacking “the mental capacity to contract or manage their own affairs.” For purposes of Federal law, “danger” means any danger, not simply “imminent” or “substantial” danger as is often required to sustain an involuntary commitment under State law. Thus, for example, adjudication that a person was mentally ill and a danger to himself or others would result in Federal firearms disability, whether the court-ordered treatment was on an inpatient or outpatient basis. This is because the adjudication itself (a finding of danger due to mental illness) is sufficient to trigger the disability.

It should be emphasized that whatever adjudication procedure a State employs, the Constitution requires certain guarantees of due process. In order for a particular commitment order to qualify as a prohibiting commitment, ATF historically has required that traditional protections of due process be present, including adequate notice, an opportunity to respond, and a right to counsel. Such protections are important because whether a person has been adjudicated a mental defective or committed to a mental institution, the firearms disability is permanent.

We recognize that the procedures that result in a person being prohibited vary widely under State law and we encourage each of you to work closely with ATF to determine whether your statutory or regulatory mental health commitment or adjudication procedures under a particular set of facts might result in a determination that qualifies as a Federal prohibition.<sup>87</sup>

*Federal Relief.* While the emphasis of the NICS Improvement Amendments Act of 2007<sup>88</sup> was to increase reporting by federal and state agencies to the NICS,<sup>89</sup> it also included provisions for those prohibited under federal law from possessing a firearm because of a previous mental condition to regain their firearm

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<sup>87</sup> ATF Open Letter to the States’ Attorneys General, May 9, 2007.

<sup>88</sup> NICS Improvement Amendments Act of 2007, 110 P.L. 180, 121 Stat. 2559.

<sup>89</sup> Efforts to increase reporting of the failed NICS were attempted again under the Fix NICS Act of 2017 (Pub.L.115-141).

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rights. The law initially states that federal departments and agencies may not provide “any record of an adjudication related to the mental health of a person or any commitment of a person to a mental institution” if any of three circumstances exists:

- 1) the adjudication or commitment, respectively, has been set aside or expunged, or the person has otherwise been fully released or discharged from all mandatory treatment, supervision, or monitoring;
- 2) the person has been found by a court, board, commission, or other lawful authority to no longer suffer from the mental health condition that was the basis of the adjudication or commitment, respectively, or has otherwise been found to be rehabilitated through any procedure available under law;
- 3) the adjudication or commitment, respectively, is based solely on a medical finding of disability, without an opportunity for a hearing by a court, board, commission, or other lawful authority, and the person has not been adjudicated as a mental defective consistent with section 922(g)(4) of title 18, United States Code.<sup>90</sup>

In addition, the law, which became effective in 2008, provides that any federal department or agency that has made “any adjudication related to the mental health of a person or imposes any commitment to a mental institution” is required to establish a program “that permits such a person to apply for relief from the disabilities imposed” by Section 922(d)(4) and 922(g)(4)’s prohibited person provisions.<sup>91</sup> The federal department or agency is required to process an application under this process within 365 days after receipt, but if the application is not resolved in that time, “for any reason, including the lack of appropriate funds,” the application is “deemed for all purposes” to have been denied.<sup>92</sup>

“Any name or information provided in violation” of the restrictions for either providing information to NICS that should not have been provided for for failing to abide by the review process “shall be removed from the National Instant Criminal Background System.”<sup>93</sup>

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<sup>90</sup> NICS Improvement Amendments Act of 2007, 110 P.L. 180, 121 Stat. 2559, ¶ 101(c)(1). However, “nothing in this section or any other provision of law shall prevent a Federal department or agency from providing to the Attorney General any record demonstrating that a person was adjudicated to be not guilty by reason of insanity, or based on lack of mental responsibility, or found incompetent to stand trial, in any criminal case or under the Uniform Code of Military Justice.” (*Id.*)

<sup>91</sup> NICS Improvement Amendments Act of 2007, 110 P.L. 180, 121 Stat. 2559, ¶ 101(c)(2)(A).

<sup>92</sup> NICS Improvement Amendments Act of 2007, 110 P.L. 180, 121 Stat. 2559, ¶ 101(c)(2)(A)(i).

<sup>93</sup> NICS Improvement Amendments Act of 2007, 110 P.L. 180, 121 Stat. 2559, ¶ 101(c)(4).

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If the petition is denied, the person may pursue review of the denial by a federal court. Subsequent judicial review “of any petitions brought under this clause shall be de novo”, meaning that the court may review the petition without being bound by any findings made by the federal department or agency.<sup>94</sup> Moreover, “relief and judicial review” of applications for relief submitted under a program developed by a federal department or agency “shall be available according to the standards prescribed in [18 U.S.C.] section 925(c).”<sup>95</sup> While Congressional funding restrictions preclude the ATF from acting on Section 925(c) applications,<sup>96</sup> these restrictions do not apply to other federal departments and agencies making decisions regarding mental disabilities.

If a person’s application is denied by the federal department or agency, but reversed by a federal court, that court “shall award the prevailing party, other than the United States, a reasonable attorney’s fee for any and all proceedings in relation to attaining such relief, and the United States shall be liable for such fee. Such fee shall be based upon the prevailing rates awarded to public interest legal aid organizations in the relevant community.”<sup>97</sup>

If adjudication related to the mental health of a person or a commitment of a person to a mental institution is favorable, either because the record is not reportable or because the person has been granted relief, “the adjudication or commitment, respectively, shall be deemed not to have occurred for purposes of [the mental health disabilities under the Gun Control Act].”<sup>98</sup> Moreover, the department or agency must “notify such person that the person is no longer prohibited under 922(d)(4) or 922(g)(4) of title 18, United States Code, on account of the relieved disability for which relief was granted pursuant to a proceeding conducted under this subparagraph, with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms.”<sup>99</sup>

*State Relief.* The NICS Improvement Amendments Act of 2007 also provides for the states to grant relief for firearm disabilities arising from mental health. A state’s “relief from disabilities” program is acceptable for granting relief under federal law if the program:

- (1) permits a person who, pursuant to State law, has been adjudicated as [a mental defective], or has been committed to a mental institution, to apply to the State for relief

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<sup>94</sup> NICS Improvement Amendments Act of 2007, 110 P.L. 180, 121 Stat. 2559, ¶ 101(c)(2)(A)(ii).

<sup>95</sup> NICS Improvement Amendments Act of 2007, 110 P.L. 180, 121 Stat. 2559, ¶ 101(c)(2)(A)(iii).

<sup>96</sup> Consolidated Appropriations Act, 2016, H.R. 2029-61. “Since 1992, Congress, in every annual bill appropriating funds for ATF, has prohibited ATF from expending any funds to act upon applications for relief from federal firearms disabilities.” (*United States v. Bean*, 537 U.S. 71, 72 (2002).)

<sup>97</sup> NICS Improvement Amendments Act of 2007, 110 P.L. 180, 121 Stat. 2559, ¶ 101(c)(2)(A)(iii).

<sup>98</sup> NICS Improvement Amendments Act of 2007, 110 P.L. 180, 121 Stat. 2559, ¶ 101(c)(2)(B).

<sup>99</sup> NICS Improvement Amendments Act of 2007, 110 P.L. 180, 121 Stat. 2559, ¶ 101(c)(2)(B).

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from the disabilities imposed by subsections (d)(4) and (g)(4) of such section by reason of the adjudication or commitment;

- (2) provides that a State court, board, commission, or other lawful authority shall grant the relief, pursuant to State law and in accordance with the principles of due process, if the circumstances regarding the disabilities referred to in paragraph (1), and the person's record and reputation, are such that the person will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest; and
- (3) permits a person whose application for the relief is denied to file a petition with the State court of appropriate jurisdiction for a de novo judicial review of the denial.<sup>100</sup>

If relief is granted under the state program, “the adjudication or commitment, as the case may be, is deemed not to have occurred for purposes” of the Gun Control Act’s Section 922’s provisions for mental health disabilities.<sup>101</sup> The NICS Improvement Amendments Act of 2007 also provided that states are required to update the NICS “on being made aware that the basis under which a record was made available [to NICS of a firearm disqualification] does not apply, or no longer applies.”<sup>102</sup> Specifically, states must:

- (i) update, correct, modify, or remove the record from any database that the Federal or State government maintains and makes available to the National Instant Criminal Background Check System, consistent with the rules pertaining to that database; and
- (ii) notify the Attorney General that such basis no longer applies so that the record system in which the record is maintained is kept up to date.<sup>103</sup>

“The Attorney General upon receiving [this] notice . . . shall ensure that the record in the National Instant Criminal Background Check System is updated, corrected, modified, or removed within 30 days of receipt.”<sup>104</sup>

The form required “to be used by a State to certify to the U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) that it has established a qualifying mental health relief from

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<sup>100</sup> NICS Improvement Amendments Act of 2007, 110 P.L. 180, 121 Stat. 2559, ¶ 105(a).

<sup>101</sup> NICS Improvement Amendments Act of 2007, 110 P.L. 180, 121 Stat. 2559, ¶ 105(b).

<sup>102</sup> NICS Improvement Amendments Act of 2007, 110 P.L. 180, 121 Stat. 2559, ¶ 102(c)(A).

<sup>103</sup> NICS Improvement Amendments Act of 2007, 110 P.L. 180, 121 Stat. 2559, ¶ 102(c)(B).

<sup>104</sup> NICS Improvement Amendments Act of 2007, 110 P.L. 180, 121 Stat. 2559, ¶ 102(c)(B).

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firearms disabilities program that satisfies certain minimum criteria under the NICS Improvement Amendments Act of 2007” is ATF Form 3210.12, Certification of Qualifying State Relief.

Social Security & Veterans Affairs Beneficiaries

One of the federal government’s more recent efforts to strip away Second Amendment rights is the practice of federal agencies to conclude that if persons are mentally incapable of handling their own finances, they must be reported to the Department of Justice as being mentally defective and prevented from possessing or purchasing firearms. Both the Department of Veterans Affairs and the Social Security Administration have pursued efforts to begin making these determinations and reporting their adverse findings to the Department of Justice for inclusions in the NICS system, preventing these individuals from possessing or purchasing firearms.

While the statutes do not define who can make the determination that someone is a “mental defective,” the Department of Justice has decided who has that authority by issuing regulations that provide an expansive list to include not only a court, but a “board, commission, or other lawful authority.”<sup>105</sup> Other executive branches of the federal government have determined they qualify as such authority, including the Social Security Administration and U.S. Department of Veterans Affairs. The Department of Veterans Affairs has reported approximately 177,000 veterans to the NICS without any formal proceedings. The Social Security Administration issued its own regulations which became effective January 18, 2017, but “compliance is not required until December 19, 2017.”<sup>106</sup> In response, H.J. Res. 40 was introduced by Congress on January 30, 2017, to nullify these rules. It specifically provided: “Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Social Security Administration relating to Implementation of the NICS Improvement Amendments Act of 2007 (published at 81 Fed. Reg. 91702 (December 19, 2016)), and such rule shall have no force or effect.” The Joint Resolution was passed by the House and the Senate and then signed by President Trump on February 28, 2017.

The process leading to these regulations began on January 4, 2016, when the White House issued a “Fact Sheet” for “New Executive Actions to Reduce Gun Violence and Make our Communities Safer.” One of these Executive Actions stated that “The reporting that SSA, in consultation with the Department of Justice, is expected to require will cover appropriate records of the approximately 75,000 people each year who have a documented mental health issue, receive disability benefits, and are unable to manage those benefits because of their mental impairment, or who have been found by a state or federal court to be legally incompetent.”<sup>107</sup> Waiting until the regulations would not have a negative impact on the elections, the Social Security Administration added the new set of extensive regulations in December 2016

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<sup>105</sup> 27 C.F.R. § 478.11.

<sup>106</sup> 81 Fed. Reg. 91702 (12/19/2016).

<sup>107</sup> The White House, Office of the Press Secretary, “FACT SHEET: New Executive Actions to Reduce Gun Violence and Make Our Communities Safer,” January 4, 2016.