

12.3 Firearm Ownership and Possession

Generally. The right to keep and bear arms is guaranteed by the Second Amendment to the U.S. Constitution. The Federal Gun Control Act contains provisions prohibiting the ownership or possession of a firearm by certain persons because they have been committed or have been adjudicated as a “mental defective.” The federal statute provides:

“It shall be unlawful for any person—

....

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

....

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”

18 U.S.C. § 922(g).

The statute prohibits not only gun ownership but also possession by certain people. Involuntarily committed adults fall under the statutory definition.

Interplay of federal and state law. The National Instant Criminal Background Check System (NICS) is the mechanism by which North Carolina notifies federal authorities of involuntary mental health commitments subject to the Federal Gun Control Act. NICS was established by the Brady Handgun Violence Prevention Act, Public Law 103-159, 107 Stat. 1536 (1993), and it is maintained by the FBI pursuant to 28 C.F.R. § 25.3. Local law enforcement agencies access NICS through their National Crime Information Center (NCIC) terminal to determine an individual’s status.

The North Carolina General Assembly created an exception to the confidentiality ordinarily required for involuntary commitment records to allow the clerk of superior court to notify NICS of any individual who is involuntarily committed and found to be a danger to self or others or any individual who is acquitted by reason of insanity or who is found incapable of proceeding to trial on a criminal charge (apparently without regard to whether the crime alleged is violent or nonviolent). G.S. 122C-54(d1). This statute does not require reporting to NICS of a commitment for substance abuse treatment. In North Carolina, individuals who are involuntarily committed for mental health reasons and who therefore must be reported to NICS under North Carolina law are prohibited from purchasing, possessing, or transferring a firearm and, pursuant to 18 U.S.C. § 922(g), are subject to federal punishment, including imprisonment, for a violation. *See* 18 U.S.C. § 924. If reported to NICS, an individual who satisfies the conditions in G.S. 122C-54.1 may petition a state court for removal of the firearm bar. *See infra* Appendix A, Form AOC-SP-211.

Under North Carolina statutory and case law, it appears that an adult’s Second Amendment Rights become restricted following a mental health commitment and the

clerk's submission of a report to NICS. G.S. 122C-54(d1) (describing circumstances in which the state notifies federal authorities of commitment); *see also Waldron v. Batten*, 191 N.C. App. 237 (2008) (holding under G.S. 14-404(c), which prohibits handgun permits to be issued to those who have been "adjudicated mentally incompetent" or "committed to any mental institution," that a petition, custody order, first evaluation, and admission to a 24-hour facility did not constitute commitment to a mental institution and did not disqualify the petitioner from obtaining a handgun permit). Therefore, a respondent who changes his status to voluntary prior to an involuntary commitment, or a respondent who is released before the hearing on involuntary commitment, might not be subject to operation of the federal statute because in those circumstances the clerk is not required to submit a report to NICS.

The dilemma for the respondent's counsel is that NICS reporting does not finally determine whether federal authorities may charge under the federal statute. Counsel cannot assure a respondent that G.S. 122C-54 provides any limitation to federal action. The federal statute restricts the gun rights of an individual "committed" to an institution or adjudicated as a "mental defective." Federal authorities may pursue respondents under either definition.

Thus, respondents may be exposed to criminal liability under the federal statute as a result of ever having been involved in the involuntary commitment process. Many psychiatric "commitments" predate the relatively new North Carolina reporting statute. It is likely that a respondent who has been adjudicated incompetent and in need of a guardian is "mentally defective" under the federal statute. Unlike North Carolina's reporting statute, the federal statute presumably encompasses substance abuse commitments as well. In the federal sense, the term "committed" also has been determined to include outpatient commitments. *See U.S. v. B.H.*, 466 F. Supp. 2d 1139 (N.D. Iowa 2006). Although unlikely, even a magistrate's determination of mental illness and dangerousness might be alleged as an adjudication of mental defect.

Whether there is a restriction on the gun rights of minors who suffer commitment or admission to a psychiatric facility is even more complex. The previous discussion applies. However, a juvenile may petition for the expunction of commitment records once the juvenile reaches eighteen years of age. What is the effect of an expunction on the application of the federal statute? Again, there are no definite answers, although it would appear that expunction is not effective to prevent application of the federal statute. *See Appendix 12-1*, E-mail from David C. Lieberman, Assoc. Chief Counsel (Southeast), Bureau of Alcohol, Tobacco, Firearms & Explosives, U.S. Dep't of Justice, to John Aldridge, Special Deputy Attorney Gen., Law Enforcement Liaison Section, N.C. Dep't of Justice (Sept. 7, 2010). Counsel should therefore inform all of these clients of the federal law and its possible application.

Practical concerns. The ability to own or possess a firearm can be important for a number of reasons. Military service and law enforcement are two of a number of professions that require the ability to legally own and possess a firearm. Many people also enjoy hunting,

recreational shooting, and gun collecting, while others desire to keep a firearm for personal safety.

Counsel may advise a client who has not been previously committed of the options to sign in as a voluntary patient if a competent adult or to continue the case pending discharge as ways to lessen the potential for being found to be “committed to a mental institution” under the federal statutes. The lack of clarity and the importance of complying with the federal statutes should be emphasized. Counsel should advise the respondent to consult with an attorney outside the hospital if there is an issue of possessing a firearm, obtaining a permit to own a firearm, or keeping a firearm pursuant to an existing permit. The respondent may want to discuss with outside counsel the possibility of relief under G.S. 122C-54.1 from the federal firearm prohibition under the facts of the respondent’s case.

Other resources. A further discussion of relevant federal statutes and regulations and state statutes, as well as a review of case law interpreting 18 U.S.C. § 922(g)(4), is contained in a paper entitled “Involuntary Commitment and the Federal Gun Control Act,” presented at the Second Annual Civil Commitment Conference (Jan. 23, 2004). The paper is reprinted *infra* in Appendix D. Counsel is referred to this Appendix for additional information concerning the Federal Gun Control Act, particularly section D, “Advising Your Client.” *See also* FIREARMS PROGRAMS DIVISION, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE, ATF PUB. NO. 5300.4 (2005), *available at* <http://www.atf.gov/files/publications/download/p/atf-p-5300-4.pdf>.