

## 2007 DRAFTING REQUEST

### Bill

Received: **05/18/2007**

Received By: **chanaman**

Wanted: **As time permits**

Identical to LRB:

For: **Alberta Darling (608) 266-5830**

By/Representing:

This file may be shown to any legislator: **NO**

Drafter: **chanaman**

May Contact:

Addl. Drafters:

Subject: **Criminal Law - guns and weapons  
Criminal Law - miscellaneous  
Mental Health - detent/commit**

Extra Copies:

Submit via email: **YES**

Requester's email: **Sen.Darling@legis.wisconsin.gov**

Carbon copy (CC:) to: **anne.sappenfield@legis.wisconsin.gov  
Jere.bauerjr@legis.wisconsin.gov  
paul.onsager@legis.wisconsin.gov**

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### Pre Topic:

No specific pre topic given

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### Topic:

Mental health adjudications and background checks for gun purchases

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### Instructions:

See Attached

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### Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	chanaman 05/22/2007	csicilia 05/23/2007		_____			S&L
	dkennedy 05/22/2007			_____			
	chanaman 05/22/2007			_____			

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/1	chanaman 05/29/2007	csicilia 05/29/2007	nmatzke 05/23/2007	_____	lparisi 05/23/2007		S&L
/2	chanaman 05/30/2007	csicilia 05/30/2007	rschluet 05/29/2007	_____	lparisi 05/29/2007		S&L
/3			nmatzke 05/30/2007	_____	lparisi 05/30/2007	sbasford 05/30/2007	

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intro*

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	chanaman 05/22/2007			_____			
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Pre Topic:

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	chanaman 05/22/2007			_____			
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1/2 gjs 5/29/07

Handwritten signatures and initials over the table entries.

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/?	chanaman	1 cjs 5/23 07	nwn 5/23	nwn/sh 5/23			

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Wisconsin law prohibits possession of a firearm by a person who was committed under s. 51.20, Stats., *and* ordered not to possess a firearm. This order is forwarded to DOJ and may be disclosed by DOJ only as part of a firearm background check.

Under federal law, “*adjudicated as a mental defective*” is defined as a determination by a court, board, commission or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease either is a danger to himself or others or lacks the mental capacity to contract or manage his own affairs. The term includes a finding of insanity by a court in a criminal case and those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility under the Uniform Code of Military Justice.

“*Committed to a mental institution*” means a formal commitment of a person to a mental institution by a court, board, commission or other lawful authority. The term includes commitment to a mental institution involuntarily. The term includes a commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

“*Mental institution*” includes mental health facilities, mental hospitals, sanitariums, psychiatric facilities, and other facilities that provide diagnoses by licensed professionals of mental retardation or mental illness, including a psychiatric ward in a general hospital.

s. 51.20—involuntary commitment

- Individual is mentally ill or drug dependant or developmentally disabled and is a proper subject for treatment.
- Individual is dangerous to himself or herself or others.

s. 51.30—court records

s. 51.45(13)—involuntary commitment for alcoholism

- Condition of the person is such that he or she habitually lacks self-control as to the use of alcohol beverages, and uses such beverages to the extent that health is substantially impaired or endangered and social or economic functioning is substantially disrupted.
- Evidenced by a pattern of conduct which is dangerous to the person or to others.

Records governed by s. 51.30.

s. 55.12—protective placement

- The individual has a primary need for residential care and custody.
- Except in the case of a minor who is alleged to be developmentally disabled, the individual has either been adjudicated incompetent by a circuit court, or has had submitted on the minor's behalf a petition for guardianship.
- As a result of developmental disabilities, degenerative brain disorder, serious and persistent mental illness, or other like incapacities, the individual is so totally incapable of providing for his or her own care or custody as to create a substantial risk of serious harm to him or herself or others. Serious harm may be evidenced by overt acts or acts of omission.
- The individual has a disability that is permanent or likely to be permanent.

s. 55.22(1)—court records

s. 54.10 (3)—guardianship due to incompetence

- The individual is at least 17 years and 9 months.
- Because of an impairment, the individual is unable effectively to receive and evaluate information or to make or communicate decisions to such an extent that the individual is unable to meet the essential requirements for his or her physical health and safety.
- The individual's need for assistance in decision making or communication is unable to be met effectively and less restrictively through appropriate and reasonably available training, education, support services, health care, assistive devices, or other means that the individual will accept.

s. 54.75—court records (governed by 51.30??)

Does federal definition include persons not competent to stand trial, or is that qualified by the Military Code language?

Is the CCAP language from SB 403 necessary?

Here is where in WI code I discovered that the records are already submitted to DOJ, and they are required to prohibit those individuals from possession and purchase. It doesn't appear that they are required to include this info into the database for background checks, so that might be the section that we need to address in the bill proposal. Probably just a simple line or two stating that " these records shall be included into the state database for firearms background checks".

**WI code: 51.20 (13) Disposition.** (a) At the conclusion of the proceedings the court shall:

(cv) 1. If the court makes the disposition under par. (a) 3., 4., 4m. or 5. and the court determines, based on evidence presented on the issue of the subject individual's dangerousness, that there is a substantial probability that the individual may use a firearm to cause physical harm to himself or herself or endanger public safety, the court shall prohibit the individual from possessing a firearm, order the seizure of any firearm owned by the individual and inform the individual of the requirements and penalties under s. 941.29.

2. A prohibition on the possession of a firearm under subd. 1. shall remain in effect until the commitment order and any subsequent consecutive commitment orders expire and the court determines, based on evidence presented on the issue of the subject individual's dangerousness, that there is no longer a substantial probability that the individual may use a firearm to cause physical harm to himself or herself or endanger public safety. If the court makes this determination, it shall cancel the prohibition and order the return of any firearm ordered seized under subd. 1.

3. In lieu of ordering the seizure under subd. 1., the court may designate a person to store the firearm until the prohibition has been canceled under sub. (16) (gm).

4. If the court prohibits a subject individual from possessing a firearm under subd. 1. or cancels a prohibition under subd. 2., the court clerk shall notify the department of justice of that fact and provide any information identifying the subject individual that is necessary to permit an accurate involuntary commitment history record search under s. 175.35 (2g) (c). No other information from the subject individual's court records may be disclosed to the department of justice except by order of the court. The department of justice may disclose information provided under this subdivision only as part of an involuntary commitment history record search under s. 175.35 (2g) (c).



court only  
→ the trigger

Just  
prohibition

Justice -  
Feds NIC  
State

**U.S. Department of Justice**Bureau of Alcohol, Tobacco,  
Firearms and Explosives*Office of the Director*

Washington, DC 20226

May 9, 2007

**OPEN LETTER TO THE STATES' ATTORNEYS GENERAL**

We at the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), like all Americans, were saddened by the tragic events that unfolded at Virginia Tech last month. In the immediate aftermath, many questions arose about whether the person responsible for the shootings was prohibited under Federal law from possessing a firearm, and how the shooter passed the background check required before purchasing the two firearms used on April 16, 2007.

As the Federal agency responsible for enforcing the Federal firearms laws, ATF works every day to prevent the criminal misuse of firearms. We stand ready to assist our State and local partners in better understanding the Federal prohibitors and how we can work together to prevent future tragedies. This letter serves to explain what ATF has done in response to the events at Virginia Tech and to provide information on the nature and scope of the Federal prohibition.

In the initial weeks after the Virginia Tech shootings, ATF took immediate steps to communicate with our State and local law enforcement partners and the licensed firearms community. In particular, ATF joined the Secretary of Health and Human Services, who, along with the United States Attorney General and the Secretary of Education, embarked on a twelve-State effort to meet with State and local leaders, educators, mental health experts, and law enforcement officials to find out what can be learned from the tragedy at Virginia Tech. A summary of lessons learned will be reported back to the President with recommendations about how the Federal Government, working in conjunction with State and local partners, can prevent such tragedies from happening in the future.

During the first week of May, ATF used the occasion of the annual FBI National Instant Criminal Background Check System (NICS) Users Conference in Portland, Oregon, to reach out to State law enforcement officials to clarify the meaning of the Federal prohibition for those persons adjudicated as a "mental defective" or committed to a mental institution. ATF has also begun the process of clarifying the Firearms Transaction Record (ATF Form 4473), the form that is completed whenever a person purchases a firearm from a federally licensed dealer. The new Form 4473 will make it clear, for example, that any person who has been found by a court, board, or other lawful authority to be a danger to self or others is prohibited from purchasing a firearm or ammunition. ATF will also be sending an open letter to all Federal firearms licensees to further instruct on the meaning of the Federal prohibition.

Many States are already taking steps to identify persons who are prohibited from possessing firearms as a result of their mental health history. However, as of April 2007, only 23 States have submitted any mental health information to the NICS system, and only four regularly report such information. ATF and our FBI partners who operate the NICS system are encouraging State authorities to take the necessary actions to ensure that all disqualifying information is provided to prevent the purchase of firearms by those prohibited from possessing firearms under Federal law. Accordingly, ATF stands ready to assist any State with questions or concerns they may have with respect to collecting additional information regarding whether a person is prohibited from possessing a firearm or ammunition pursuant

to 18 U.S.C. § 922(g)(4). Many States are considering how to enhance their collection efforts in the aftermath of Virginia Tech, ATF would like to provide all necessary assistance with those efforts.

Section 922(g)(4) of 18 U.S.C. makes it unlawful for any person who has been adjudicated as a mental defective or who has been committed to a mental institution to possess firearms or ammunition. This prohibition covers two classes of persons—those who have either been (1) adjudicated as a mental defective; or (2) committed to a mental institution.

Each of these terms is defined by Federal regulation at 27 C.F.R. § 478.11 as follows:

### **ADJUDICATED AS A MENTAL DEFECTIVE**

- a. A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:
  1. Is a danger to himself or to others; or
  2. Lacks the mental capacity to contract or manage his own affairs.
- b. The term shall include—
  1. A finding of insanity by a court in a criminal case; and
  2. Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

### **COMMITTED TO A MENTAL INSTITUTION**

This term means a formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term also includes a commitment for mental defectiveness or mental illness, and commitments for other reasons such as for drug use. The term does not include a person in a mental institution for observation or any voluntary admission to a mental institution.

ATF has historically interpreted these provisions as constituting two distinct prohibitions. Each 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.

We appreciate the interest that Federal, State, and local law enforcement and other stakeholders have in improving the enforcement of our nation's firearms laws, and ATF stands ready to assist the States in improving their efforts to ensure information on disqualified persons is collected and provided to the NICS system. Questions or concerns about any of these issues may be directed to your local ATF field office.



Michael J. Sullivan

Cathlene:

① Can a court cancel an order under 51.20  
(13) (cv) 1. b. ? NO

~~② Need to RN 51.67; 51.67 (1) [(a) + (b)]  
Create 51.67 (2) like 51.45 (13) (i)~~

③ Instead of N/W 51.30 (3) in 51.20  
(13) (cv) 4. + 51.45 (13) (i), I'd create  
51.30 (3) (b) 28.

51.30 (3) (b) 28. To the department  
of justice, under the requirements of  
ss. 51.20 (3) (cv) 4, 51.45 (13) (i),  
and 51.67 (2) and

Because of the creation of 51.30  
(3) (b) 28, don't need to N/W  
54.75 in 54.10 (3) (f) or 55.12 (10)

④ Make condition under 55.12 (10).



FR: Senator Alberta Darling

DT: April 27, 2007

RE: Mental health record access for handgun background checks

**Budget Proposal:** Require handgun background checks to access mental health information that would prohibit a handgun purchase under current federal law. Fund the system through the handgun background search fee, which is currently \$8. Doyle requested the fee be raised to \$30 to fund programs other than a handgun background check. The Attorney General recommended the fee be raised \$5 to simply cover costs of the program. Senator Darling requests that the DOJ determine the cost to develop a system to access mental health information and recommend an appropriate fee level.

This provision strengthens background checks for handgun purchases by closing a loophole that has existed for years under both Attorneys General Jim Doyle and Peg Lautenschlager. A federal law exists that prohibits people with an involuntary mental health commitment from possessing firearms, yet Doyle and Lautenschlager failed to make that information available when background checks for handgun purchases are performed in Wisconsin.

With the recent tragedy at Virginia Tech, this issue is given renewed importance. The shooter would likely have been prohibited under federal law from purchasing firearms, but Virginia law apparently didn't address the loophole. It is known that 22 states implement federal law, allowing mental health records to be accessed for handgun background checks. Wisconsin is not one of them. We must make sure prohibited-purchasers like Cho Seung-Hui can't buy a handgun in Wisconsin because of a loophole that should have been fixed years ago by Attorneys General Jim Doyle or Peg Lautenschlager.

Model provision from 2005 SB 403 LRB Analysis:

**BACKGROUND CHECKS FOR HANDGUN PURCHASERS**

This bill makes certain changes in the law relating to background checks for handgun purchasers. Under current law, when a person seeks to purchase a handgun from a licensed handgun dealer, the dealer must ask DOJ to conduct a background check on the person. In conducting the background check, DOJ searches DOJ records to determine whether the person is ineligible to possess a firearm under state law, but it does not attempt to determine whether federal law bars the person from possessing a firearm based on criteria not covered by state law. This bill requires DOJ, when conducting a background check on a prospective handgun purchaser, to determine whether the person has been the subject of a court order or finding in a Wisconsin court based on the person's mental health that would render the person ineligible to possess a firearm under federal law. Specifically, DOJ must determine whether: 1) the person was the subject of a court order committing the person for treatment in an inpatient mental health facility or a finding by a court that the person is a danger to himself or herself or others or lacks the mental capacity to contract or manage his or her own affairs; 2) the person did not commence the proceeding in which the order was entered or the finding was made; and 3) the order or finding was based on the person having markedly subnormal intelligence or the person's mental illness, incompetency, condition, or disease. If DOJ determines that the prospective purchaser was the subject of such an order or finding, the dealer may not sell the person a handgun.

April 21, 2007

## U.S. Rules Made Killer Ineligible to Purchase Gun

By MICHAEL LUO

WASHINGTON, April 20 — Under federal law, the Virginia Tech gunman Seung-Hui Cho should have been prohibited from buying a gun after a Virginia court declared him to be a danger to himself in late 2005 and sent him for psychiatric treatment, a state official and several legal experts said Friday.

Federal law prohibits anyone who has been “adjudicated as a mental defective,” as well as those who have been involuntarily committed to a mental health facility, from buying a gun.

The special justice’s order in late 2005 that directed Mr. Cho to seek outpatient treatment and declared him to be mentally ill and an imminent danger to himself fits the federal criteria and should have immediately disqualified him, said Richard J. Bonnie, chairman of the Supreme Court of Virginia’s Commission on Mental Health Law Reform.

A spokesman for the federal Bureau of Alcohol, Tobacco, Firearms and Explosives also said that if Mr. Cho had been found mentally defective by a court, he should have been denied the right to purchase a gun.

The federal law defines adjudication as a mental defective to include “determination by a court, board, commission or other lawful authority” that as a result of mental illness, the person is a “danger to himself or others.”

Mr. Cho’s ability to buy two guns despite his history has brought new attention to the adequacy of background checks that scrutinize potential gun buyers. And since federal gun laws depend on states for enforcement, the failure of Virginia to flag Mr. Cho highlights the often incomplete information provided by states to federal authorities.

Currently, only 22 states submit any mental health records to the federal National Instant Criminal Background Check System, the Federal Bureau of Investigation said in

a statement on Thursday. Virginia is the leading state in reporting disqualifications based on mental health criteria for the federal check system, the statement said.

Virginia state law on mental health disqualifications to firearms purchases, however, is worded slightly differently from the federal statute. So the form that Virginia courts use to notify state police about a mental health disqualification addresses only the state criteria, which list two potential categories that would warrant notification to the state police: someone who was “involuntarily committed” or ruled mentally “incapacitated.”

“It’s clear we have an imperfect connection between state law and the application of the federal prohibition,” Mr. Bonnie said. The commission he leads was created by the state last year to examine the state’s mental health laws.

Mr. Bonnie, the director of the University of Virginia Institute on Law, Psychiatry and Public Policy, said his panel would look into the matter. “We are going to fix this,” he said.

“I’m sure that the misfit exists in states across the country and the underreporting exists,” he said.

After two female Virginia Tech students complained about Mr. Cho’s behavior in 2005, he was sent to a psychiatric unit for evaluation and then ordered to undergo outpatient treatment, which would not qualify as an involuntary commitment under Virginia law, Mr. Bonnie said.

“What they did was use the terms that fit Virginia law,” he said. “They weren’t thinking about the federal. I suspect nobody even knew about these federal regulations.”

But Christopher Slobogin, a law professor at the University of Florida who is an expert on mental health, said that under his reading of Virginia law, outpatient treatment could qualify as involuntary commitment, meaning Virginia law should have barred Mr. Cho from buying a weapon as well. Mr. Bonnie said he and the state’s attorney general disagreed with that interpretation.

Mr. Slobogin added that the federal statute “on the plain face of the language, it would definitely apply to Cho.”

A spokesman for the Virginia attorney general's office declined to comment on Friday, saying only that various agencies were "reviewing this situation."

Richard Marianos, a spokesman for the federal firearms agency, said Friday that federal and state officials were looking into the question, studying the court proceedings and testimony.

But Mr. Marianos added, "If he was adjudicated as a mental defective by a court, he should have been disqualified."

Dennis Henigan, legal director at the Brady Center to Prevent Gun Violence, said the oversight on the federal law in Virginia had probably been occurring for some time.

"They may have been doing this for years, just basically assuming, if the guy's not disqualified under state law, then we don't have to send anything to the state police," Mr. Henigan said. "It's a failure to recognize the independent obligation to the federal law."

Most states do not follow the letter of the federal law when it comes to the mental health provisions, said Ron Honberg, legal director for the National Alliance on Mental Illness, an advocacy group.

"I suspect if we look at all the requirements that exist for the states, there's probably a whole lot of them that don't implement them," Mr. Honberg said, explaining that the gap often comes from a lack of resources but also because no one is enforcing the requirements.

"When something like this happens, then people start to pay attention to this," he said.

Representative Carolyn McCarthy, Democrat of New York, has been pushing a bill to require states to automate their criminal history records so computer databases used to conduct background checks on gun buyers are more complete.

The bill would also require states to submit their mental health records to their background check systems and give them money to allow them to do so.

According to gun control advocates, the mental health information currently submitted to the national check system is often spotty and incomplete, something Ms. McCarthy's bill is designed to address.

Representative John D. Dingell, Democrat of Michigan and a former member of the National Rifle Association's board of directors, is co-sponsoring the bill, which has twice passed the House only to stall in the Senate. Congressional aides say Mr. Dingell is negotiating with pro-gun groups to come up with language acceptable to them.

"The N.R.A. doesn't have objections," Mr. Dingell said in an interview. "There are other gun organizations on this that are problems."

A spokesman for the rifle association declined to comment Friday on the legislation, but Mr. Dingell said the measure could prevent future tragedies.

"It resolves some serious problems in terms of preventing the wrong people from getting firearms," he said.