

SYMPOSIUM ARTICLE

TAKING AIM AT RECENT LEGISLATIVE PROPOSALS TO CURB GUN VIOLENCE FROM MENTAL ILLNESS: A SECOND AMENDMENT RESPONSE

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The Consortium for Risk-Based Firearms Policy’s report Guns, Public Health, and Mental Illness: An Evidence-Based Approach for State Policy has furthered an important conversation at a critical time, because mental health and firearms law are emerging areas of American jurisprudence. Written by an attorney who has represented hundreds of patients alleged to be suffering from a mental illness, and who has represented numerous rehabilitated individuals in firearm rights restoration proceedings, this Article criticizes the Consortium’s Report for consistently seeking to redirect the restoration process away from courts into the territory of mental health professionals. Specifically, three of the Report’s principal recommendations should be reconsidered. First, the majority of federal circuit courts that have decided the issue have held that temporary detention does not impose a federal firearms disability; therefore, firearm rights restoration petitions that arise from temporary detention should not be subject to time-based jurisdictional limitations. Second, testimony of a mental health pro-

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essional should not be a jurisdictional prerequisite for courts to conduct firearm rights restoration hearings. And third, the prospective removal of firearms from an individual with or without a warrant should not be imposed absent an order of involuntary commitment where the individual has received due process. These proposals reflect underappreciation for, and an occasional misunderstanding of, the practical and legal realities of firearms rights restoration proceedings. Moreover, their ability to withstand Second Amendment scrutiny is subject to doubt.

I. INTRODUCTION

Virginia law has sanctioned firearm rights restoration proceedings since 1982.¹ Today, a felon who wishes to petition her local trial court to prove that she is rehabilitated and should be able to lawfully possess firearms again may do so after the governor removes the petitioner's political disabilities.² But Virginia no longer limits firearm rights restoration proceedings exclusively to rehabilitated felons. In 2008, the Virginia General Assembly passed legislation whereby individuals previously diagnosed with a mental illness may also bring a firearm rights restoration proceeding in their local state trial court.³

In July 2011, the *New York Times* reported on one mental health firearm rights restoration proceeding held in the General District Court of Pulaski County, Virginia.⁴ Pulaski County is located in rural southwest Virginia and is home to about 35,000 residents.⁵ The *New York Times* article was critical of these proceedings and contended that the results "often seem haphazard."⁶ This characterization may be unfair, but it is not uncommon criticism from individuals "who have spent most of their lives in urban areas and who fail to appreciate that Virginia is primarily rural and firearms-related activities are a huge part of the cultural and social fabric of the polity."⁷

On one hand, it is reasonable for a state electorate to conclude that its cultural familiarity with firearms authorizes a more lenient process for the restoration of firearm rights, as opposed to what a legislature elsewhere may

¹ See 1982 Va. Acts 851 (codified at VA. CODE ANN. § 18.2-308.2 (West 2015)).

² See VA. CODE ANN. § 18.2-308.2(C) (West 2015). In Virginia, the removal of a petitioner's political disabilities is provided in the form of a one-page certificate bearing the seal of the Secretary of the Commonwealth, and includes the restoration of his or her right to vote, hold public office, serve on a jury, and be a notary public. An example of this certificate is reproduced in one of the author's earlier publications. See Robert Luther III, *The Quiet Army: Felon Firearm Rights Restoration in the Fourth Circuit*, 23 WM. & MARY BILL RTS. J. 237, 255 (2014).

³ See 2008 Va. Acts 1397-98 (amending and reenacting VA. CODE ANN. § 18.2-308.1:3).

⁴ See Michael Luo, *Some with Histories of Mental Illness Petition to Get Their Gun Rights Back*, N.Y. TIMES (July 2, 2011), http://www.nytimes.com/2011/07/03/us/03guns.html?page_wanted=all&_r=0 [<http://perma.cc/SG72-6NMY>].

⁵ *Pulaski County, Virginia, State & County Quick Facts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/51/51155.html> [<http://perma.cc/4B3A-28JN>] (last updated Oct. 14, 2015).

⁶ Luo, *supra* note 4.

⁷ Robert Luther III, *Mental Health and Gun Rights in Virginia: A View from the Battlefield*, 40 NEW ENG. J. CIV. & CRIM. CONFINEMENT 345, 358 (2014).

enact in a state where firearms are less familiar to the polity. In fact, that is one of the benefits of federalism, and of representative democracy. When it comes to important life and death decisions implicating firearms and mental health, however, perhaps it would be wiser for data to drive these conclusions.

Less than 200 miles to the southeast of Pulaski County, Dr. Jeffrey Swanson of Duke University and his colleagues have completed empirical research on the relationship between mental illness and firearms violence in an attempt to bridge that gap for the benefit of legislatures.⁸ Their work argues that legal policymakers can promote the reduction of incidences of gun violence resulting from mental illness by adopting preventive measures grounded in epidemiological data.⁹ Studies like Dr. Swanson's have historically targeted stakeholders such as legislators, policymakers, and members of the mental health community, because the judiciary tends to accept change slowly and in small doses. Still, empirical studies are serving an increased role in influencing judges, prosecutors, defense attorneys, and civil liberties advocates. For example, Judge Richard A. Posner's recent book, *Reflections on Judging*, argues that judges should increasingly consult empirical evidence prior to ruling on cases.¹⁰ According to Judge Posner, effective public policy solutions in the areas of "gun violence," "medical evidence and epidemiology," and "mental illness" require interdisciplinary cooperation.¹¹

The Consortium for Risk-Based Firearms Policy's report, *Guns, Public Health, and Mental Illness: An Evidence-Based Approach for State Policy* (the "Report") adopts the recent interdisciplinary efforts recommended by Judge Posner.¹² The Consortium—which styles its members "the nation's leading researchers, practitioners and advocates in gun violence prevention and mental health"¹³—first presented the findings of its Report on December 2, 2013, at the University of Virginia's Frank Batten School of Leadership and Public Policy.¹⁴ The Report proposes a range of recommendations re-

⁸ See Jeffrey W. Swanson et al., *Mental Illness and Reduction of Gun Violence and Suicide: Bringing Epidemiologic Research to Policy*, 25 ANNALS OF EPIDEMIOLOGY 366, 374 (2015).

⁹ See *id.*

¹⁰ RICHARD A. POSNER, REFLECTIONS ON JUDGING 6 (2013) ("[O]penness to facts not limited to those found in the judicial records is what I want to stress.").

¹¹ *Id.* at 14–15 (citing, inter alia, "Gun Violence," "Medical Evidence and Epidemiology," and "Mental Illness," as "sources of complexity that are external to the judicial system").

¹² See generally CONSORTIUM FOR RISK-BASED FIREARM POLICY, GUNS, PUBLIC HEALTH, AND MENTAL ILLNESS: AN EVIDENCE-BASED APPROACH FOR STATE POLICY (Dec. 2, 2013) [hereinafter REPORT], <http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/GPHMI-State.pdf> [<http://perma.cc/9MKL-TDKT>].

¹³ *Id.* at 2.

¹⁴ See H. Brevy Cannon, *Expert Group Unveils New 'Risk-Based' Firearms Policy Approach at U.Va.*, UVATODAY (Dec. 4, 2013), <http://news.virginia.edu/content/expert-group-unveils-new-risk-based-firearms-policy-approach-uva> [<http://perma.cc/K4GW-8K9J>].

garding firearms and mental health, with the purpose of promoting an effective balance between public safety and civil liberties.¹⁵ The considerable effort invested in the Report suggests that its recommendations are worthy of close consideration.

Despite the Report's laudable efforts, this Article argues that the Consortium should reconsider three of its principal recommendations. First, the majority of federal circuit courts that have decided the issue have held that temporary detention does not impose a federal firearms disability;¹⁶ therefore, firearm rights restoration petitions that arise from temporary detention should not be subject to time-based jurisdictional limitations. Second, testimony of a mental health professional should not be a jurisdictional prerequisite for courts to conduct firearm rights restoration hearings. Third, the prospective removal of firearms from an individual with or without a warrant should not be imposed absent an order of involuntary commitment where the individual has received due process.

This Article aims to spur a necessary debate by showcasing underexplored dimensions of the firearm disabilities and restoration processes. While the Consortium's Report covers only the tip of the iceberg on these issues, its recommendations are consistent with the general trend of scholarship in the firearm disabilities arena: it exists in an anti-gun echo chamber that ignores basic due process considerations that authorities are required by law to take into account before imposing substantial obstacles on interaction with firearms. This Article responds to the Report's recommendations by identifying their deficiencies and recommending alternatives that are consistent with basic due process rights.

Part II discusses the central considerations of due process that must not be ignored when proposing recommendations for firearm rights restoration policies. In addition to discussing the proper place of the courts as the only body with the authority to restore firearm rights, this section clarifies the types of detention that should result in the imposition of firearm disabilities, provides additional perspective on time-limited firearm rights deprivations, and considers the proper burden of proof under the Second Amendment. Next, Part III disputes the Report's recommendation that testimony from a mental health professional should be mandatory at a firearm rights restora-

¹⁵ See REPORT, *supra* note 12, at 2.

¹⁶ Compare *United States v. Rehlander*, 666 F.3d 45, 50 (1st Cir. 2012) (reversing conviction imposed under 18 U.S.C. § 922(g)(4), because temporary hospitalization “does not constitute a ‘commitment’ under” that section), *United States v. Giardina*, 861 F.2d 1334, 1337 (5th Cir. 1988) (reversing conviction imposed under 18 U.S.C. § 922(g)(4), because the federal firearms prohibition does not “prohibit the possession of firearms by persons who had been hospitalized for observation and examination, where they were found not to be mentally ill” and “a commitment is required”), and *United States v. Hansel*, 474 F.2d 1120, 1122–23 (8th Cir. 1973) (same), with *United States v. Waters*, 23 F.3d 29, 31–36 (2d Cir. 1994) (defining “commitment” to include temporary detention for purpose of bar from interaction with firearms under 18 U.S.C. § 922(g)(4)). It is unlikely that *Waters* remains good law after the United States Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

tion proceeding. Finally, Part IV examines the practical realities of firearm rights deprivation, and offers alternative perspectives to some of the practical shortcomings apparent in the Consortium's Report. Part V concludes.

II. DUE PROCESS CONSIDERATIONS

Over twenty years ago, Professor Tom R. Tyler acknowledged the tension between the medical and legal professions in the context of involuntary commitment proceedings.¹⁷ He said: "Discussions about the appropriate degree of judicial due process that should be involved in commitment procedures raise the question of whether attention to due process is wise. Attention to these rights increases judicial authority at the expense of professional authority."¹⁸

Recently, this tension between judicial authority and professional authority has expanded beyond traditional, involuntary commitment proceedings into firearm rights restoration proceedings. Although medical professionals are an important component of firearm rights restoration proceedings, this Article argues that the testimony of these individuals is merely one piece of the firearm rights restoration puzzle.

A. Who Should Restore Firearm Rights?

The Consortium's instinct to reassign restoration authority is best evidenced by its recommendation addressing "[w]ho determines whether firearm rights should be restored."¹⁹ The Report "[a]ssume[s] that most states will adopt a judicial restoration process, [but] recognize[s] that some states may want to delegate these decisions to an administrative agency."²⁰ However, civil liberties advocates skeptical of agency decision-making may object if an administrative agency is delegated the task of restoring firearm rights.

The Supreme Court of Virginia recently held that under Article VI, Section 1 of the Virginia Constitution, only judges—not the governor, the General Assembly, or any quasi-judicial or administrative body—have the authority to restore firearm rights.²¹ In reaching its decision, the Supreme Court declined to defer to the judgments of "professional authority," implicitly acknowledging that a judge trained in the art of listening to testimony and weighing evidence and arguments is the decision-maker best situated to

¹⁷ See generally Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433 (1992).

¹⁸ *Id.* at 435.

¹⁹ REPORT, *supra* note 12, at 14.

²⁰ *Id.* at 14 n.1.

²¹ See *Gallagher v. Commonwealth*, 732 S.E.2d 22, 27 (Va. 2012) ("[T]he Governor is empowered to remove political disabilities, but not to restore all rights lost as a result of a felony conviction. The jurisdiction to restore firearm rights lost in those circumstances is vested solely in the circuit courts.").

weigh the competing values at stake in firearm rights restoration proceedings. The Consortium should follow the Supreme Court of Virginia's lead and reject any recommendation that grants firearm rights restoration authority to an individual, body, or agency that is not a judge sitting in a court of general jurisdiction.

B. Temporary Detention Does Not—and Should Not—Impose a Firearms Disability

The Report claims that “[c]urrent state law should be strengthened to temporarily prohibit individuals from purchasing or possessing firearms after a short-term involuntary hospitalization. Concurrently, the process for restoring firearm rights should be clarified and improved.”²² The Report recommends that states enact temporary firearms prohibitions of five years following a person's short-term involuntary hospitalization based upon a physician-certified emergency involuntary admission.²³ The Report contends its temporary detention disqualification recommendation meets constitutional concerns by: (1) limiting the restriction to five years, at which time the person's rights would be restored absent another disqualifying event; and (2) providing a fair and meaningful opportunity for individuals to have their rights restored after a one-year waiting period.²⁴

This recommendation should not be adopted by legislatures for three reasons. First, legislation should not require a period of time to have passed as a jurisdictional prerequisite for a court to consider the merits of a restoration petition. Detention of an individual that does not result in her involuntary commitment often occurs as the consequence of a false or vindictive report to law enforcement filed by an ex-lover or someone with a grudge against her.²⁵ To saddle these victims of what is essentially abuse of process with an automatic five-year prohibition on interaction with firearms would be grossly unfair and unjust. Ultimately, proponents' concerns should be assuaged given that any adjudicating court will decide whether the petitioner is fit for the restoration by weighing all of the evidence presented. Practically speaking, the amount of time since the petitioner's detention will be a factor in the court's decision to grant or deny the petition. Consequently, courts should not require that a certain amount of time elapse before hearing the case.

Second, this recommendation would go against the majority of federal circuits that have already decided the issue and held that temporary detention

²² REPORT, *supra* note 12, at 8.

²³ *Id.* at 10.

²⁴ *See id.* at 11–12.

²⁵ Cf. Jon J. Racklin, *Orders of Protection—The Most “Abused” Area of the Law?*, ISBA: FAMILY LAW (Jan. 2013), <http://www.isba.org/sections/familylaw/newsletter/2013/01/ordersof-protectionthemostabusedarea> [<http://perma.cc/FZ34-3XVF>] (expressing concern about abuse of orders of protection).

(i.e., a 24–72 hour “holding period” of hospitalization resulting in the individual’s release prior to a hearing before a judge) does not impose a federal firearms disability.²⁶ Federal law prohibits any individual who “has been adjudicated as a mental defective or has been committed to any mental institution” from transporting, possessing, carrying, or receiving firearms.²⁷ This federal disability is permanent unless the individual obtains relief following a successful petition in a participating state trial court.²⁸ In *United States v. Rehlander*, a recent federal appellate decision addressing the interplay between temporary detention and 18 U.S.C. § 922(g)(4), the First Circuit held that the recommended, automatic, five-year ban likely violates due process because temporary detention provides no opportunity to contest allegations against an individual in front of a neutral third party.²⁹ *Rehlander* held that a firearms disability may not be imposed on an individual unless he actually suffers involuntary commitment by a court: “because the procedure involved in the involuntary hospitalization did not include an adversarial proceeding, then no due process occurred [and] this could not suffice for a commitment for the purposes of disqualifying a person from gun purchase or possession.”³⁰ Legislatures have granted law enforcement the authority to temporarily detain individuals suspected of posing a risk to themselves or others because, in this limited context, the interest in public safety outweighs the individual’s liberty.³¹ This detention, however, may not be memorialized on an individual’s mental health record unless the individual is involuntarily committed.³²

Third, even if *Rehlander* is discounted, five years is a substantial period of time. The lengthy duration of the temporary ban only buttresses the argu-

²⁶ See, e.g., *United States v. Rehlander*, 666 F.3d 45, 50 (1st Cir. 2012); *United States v. Giardina*, 861 F.2d 1334, 1337 (5th Cir. 1988); *United States v. Hansel*, 474 F.2d 1120, 1122–23 (8th Cir. 1973).

²⁷ 18 U.S.C. § 922(g)(4) (2012).

²⁸ See *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 775 F.3d 308, 313 n.3 (6th Cir. 2015) (contending that between fifteen and twenty-six states have enacted firearm rights restoration proceedings for individuals previously diagnosed with mental illness), *vacated, reh’g en banc granted*, Order, *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, ECF No. 50-1 (Apr. 21, 2015) (No. 13-876). In its brief, the federal government contended that twenty-four states had provided for these proceedings. See Brief for Federal Appellees at 8, *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 775 F.3d 308 (6th Cir. 2015) (No. 13-1876).

²⁹ See *Rehlander*, 666 F.3d at 48–49 (“[G]iven ordinary due process requirements that the Court has adopted in the past, it is highly doubtful that it would deem section 922(g)(4) adequate if it were read to embrace . . . emergency hospitalization—at least absent further protective procedures or remedies.”).

³⁰ Jana R. McCreary, “*Mentally Defective*” *Language in the Gun Control Act*, 45 CONN. L. REV. 813, 846 (2013).

³¹ See, e.g., TEX. HEALTH & SAFETY CODE ANN. § 573.001(a)(1)(B) (West 2015) (allowing detention by police officer if officer has reason to believe and actually believes person has a mental illness and “there is a substantial risk of serious harm to the person or to others unless the person is restrained”).

³² See, e.g., *Rehlander*, 666 F.3d at 50; Luther, *supra* note 7, at 347 (“[T]he Fourth Circuit would likely conclude that the temporary detention of an individual—without an order ultimately authorizing involuntary commitment—does not impose a federal firearms disability on him.”).

ment that there should be no temporary ban at all unless the patient suffers involuntary commitment by court order.³³

C. Automatic Time-Limited Deprivations

The Report also makes the bold assertion that “[s]ubsequent cases demonstrate that the deprivation of gun rights after short-term involuntary hospitalization will pass constitutional muster so long as the deprivation is time-limited.”³⁴ But this assertion is uncited. The single case cited in this section of the Report is *People v. Jason K.*, a state intermediate appellate court decision interpreting a provision of California law.³⁵ Presumably, the Report’s claim is grounded in the statement from *Jason K.* that “the deprivation of the right is lengthy, but temporary, lasting for five years.”³⁶ But *Jason K.* predates *Rehlander*, so the California appellate court did not have the benefit of *Rehlander*’s extended due process discussion.³⁷ Thus, *Rehlander* is a more persuasive precedent than *Jason K.* because it is consistent with traditional notions of due process that require an actual adjudication before the loss of fundamental rights—like liberty, property, and the right to possess a firearm.³⁸

Regrettably, *Jason K.* discounted the import of the petitioner’s loss of property, concluding that “the infringement concerns the loss of property, and does not involve deprivation of physical liberty or severance of familial ties.”³⁹ This statement is a mischaracterization of the interest at stake. Although the petitioner in *Jason K.* was attempting to obtain firearms the government had seized from his home (i.e., his property), his petition was broader because he also sought the restoration of his ability to use the seized firearms.⁴⁰

Jason K. went on to conclude that “the deprivation is thus not akin to the types of cases such as termination of parental rights, civil commitment, withholding of nutrition/hydration, forced sterilization, or deportation where a clear and convincing evidence standard is typically imposed.”⁴¹ The court’s conclusion was a misstatement of law. Although *District of Columbia v. Heller* and *City of Chicago v. McDonald* permit authorities to restrict the firearm rights of the “mentally ill,” the Supreme Court’s references to prohibitions on firearms access by the mentally ill in both of those cases are

³³ See *Rehlander*, 666 F.3d at 48–50.

³⁴ REPORT, *supra* note 12, at 18.

³⁵ See generally *People v. Jason K.*, 116 Cal. Rptr. 3d 443 (Ct. App. 2010).

³⁶ *Id.* at 452.

³⁷ See *Rehlander*, 666 F.3d at 48–50.

³⁸ See *id.*

³⁹ *Jason K.*, 116 Cal. Rptr. 3d at 452.

⁴⁰ See *id.*

⁴¹ *Id.*

written in the present tense;⁴² therefore, they arguably suggest a constitutional standard that may be used as a sword against the statutory standard embodied in 18 U.S.C. § 922(g)(4). At the minimum, the restrictions referenced by the Court cover only individuals who are actively suffering from mental illness.⁴³ There was no evidence introduced at Jason K.'s hearing that he was actively suffering from mental illness on that date. On the contrary, the evidence recounted in the California appellate court's opinion suggests that Jason K. was fit to possess a firearm on the day of the hearing.⁴⁴ Moreover, the trial judge was bound by the constraints of a restoration process that examined the petitioner's past conduct, not his present condition, through the lens of the lowest standard of review a petitioner must satisfy to prevail in a civil case—a preponderance of the evidence.⁴⁵ In short, Jason K. was set up for a fight he was destined to lose, rendering the decision in his case of limited value.

One of the problems with 18 U.S.C. § 922(g)(4) as it presently reads is that this mental illness ban does not distinguish between types of mental illnesses.⁴⁶ A person who is hospitalized for anorexia is treated the same as someone hospitalized for paranoid schizophrenia with a history of violence. Fortunately, federal appellate decisions concerning firearms and mental health are trending away from cramped decisions like *Jason K.* Although the opinion had not issued at the time the Consortium published its Report, a significant case of first impression, *Tyler v. Hillsdale County Sheriff's Department*, held that 18 U.S.C. § 922(g)(4) violated the Second Amendment as it applied to an individual who had suffered a brief period of involuntary commitment twenty-eight years earlier.⁴⁷ Tyler, the petitioner, resided in

⁴² See *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by . . . the mentally ill.”); *McDonald v. City of Chi.*, 561 U.S. 742, 786 (2010) (repeating *Heller*'s assurances that its holding “did not cast doubt” on laws that prohibit the mentally ill from purchasing and possessing firearms).

⁴³ See *Heller*, 554 U.S. at 626; *McDonald*, 561 U.S. at 786.

⁴⁴ See *Jason K.*, 116 Cal. Rptr. 3d at 447 (“At the beginning of the continued hearing, the court complimented Jason on his presentation and his responsible attitude, and stated it appeared that Jason had ‘snapped’ on the evening of the incident.”).

⁴⁵ See *id.* at 449. Notably, given that there was no evidence that Jason K. was actively suffering from a mental illness on the date of the restoration hearing, if Jason K. were a resident of Virginia instead of California, his petition would have been granted. Compare *Paugh v. Henrico Area Mental Health & Developmental Servs.*, 743 S.E.2d 277, 278 (Va. 2013) (holding that Va. “Code § 37.2-821 requires that the circuit court determine whether an individual meets the requirements for involuntary commitment on the date of the circuit court hearing,” and not whether the evidence below was sufficient to involuntarily commit the individual on the date of the underlying commitment), with *Jason K.*, 116 Cal. Rptr. 3d at 453 (focusing on Jason K.'s past hospitalization).

⁴⁶ 18 U.S.C. § 922(g)(4) (2012) reads: “[i]t shall be unlawful for any person who has been adjudicated as a mental defective or who has been committed to a mental institution [to interact with firearms].”

⁴⁷ See *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 775 F.3d 308, 311 (6th Cir. 2015), *vacated, reh'g en banc granted*, Order, *Tyler v. Hillsdale Cty. Sheriff's Dep't*, ECF No. 50-1 (Apr. 21, 2015) (No. 13-876).

Michigan, where state law did not provide an avenue for him to seek relief from the federal firearms disability imposed incident to his involuntary commitment.⁴⁸ As the First Circuit did in *Rehlander*, the Sixth Circuit reasoned that it was a due process violation to impose a federal, lifetime bar on an individual without affording that individual any path to secure relief from his firearms disability.⁴⁹

Moving forward, legislators concerned about preserving basic notions of due process should reject all efforts directed at the imposition of any firearms disabilities in the absence of an adjudication of mental illness rendered by a court, consistent with the due process concerns described in *Rehlander*⁵⁰ and *Tyler*.⁵¹

D. Burdens of Proof

An additional issue for discussion is the burden of proof standards that must be satisfied at the restoration hearing. The Report recommends that: (1) the petitioner should bear the burden of initiating the restoration proceeding; (2) he should bear the burden of proof at the restoration hearing; and (3) the burden of proof the petitioner has to satisfy should be a preponderance of the evidence.⁵² Here, the Report parts ways with *Jason K.*, wherein the burden was on the state to prove by a preponderance of the evidence that the petitioner should not have his firearm rights restored.⁵³

Strictly speaking, the Report's proposal is less friendly to the Second Amendment than *Jason K.*, because, in that case, the presumption was in favor of the petitioner and the burden was on the state to disprove the presumption.⁵⁴ Under the standard established by *Jason K.*, the state presented evidence first and it was Jason K.'s burden to rebut that evidence.⁵⁵ That said, in practice, this presumption rarely inures to the petitioner's benefit. In most other states, the burden falls on the petitioner to prove by a preponderance of the evidence that he should be entitled to restoration relief.⁵⁶ The Report would be improved if it explained the reasoning behind endorsing the change in the standard of proof from a case that the Consortium has otherwise endorsed without reservation.

The Report's recommendation should be adopted by legislatures, despite its unexplained break from the standard applied in *Jason K.*⁵⁷ In this

⁴⁸ See *id.* at 313.

⁴⁹ See *id.* at 315.

⁵⁰ See *United States v. Rehlander*, 666 F.3d 45, 48–50 (1st Cir. 2012). For further discussion of *Rehlander*, see McCreary, *supra* note 30, at 846.

⁵¹ See 775 F.3d at 343 n.42.

⁵² See REPORT, *supra* note 12, at 15.

⁵³ See *People v. Jason K.*, 116 Cal. Rptr. 3d 443, 448 (Cal. Ct. App. 2010).

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See, e.g., VA. CODE ANN. § 18.2-308.1:2(B) (West 2015).

⁵⁷ See *Jason K.*, 116 Cal. Rptr. 3d at 448.

instance, the Report's proposed standard of proof provides a better framework for courts to approach these cases because the petitioner will now present his evidence first—in essence, requiring him to “make his case” and to “prove it” rather than to play defense against the evidence the state presents in its case in chief.

For example, in Virginia:

“If the court determines, after receiving and considering evidence concerning the circumstances regarding the disabilities [imposed incident to involuntary commitment] and the person's criminal history, treatment record, and reputation as developed through character witness statements, testimony, or other character evidence, that the person will not likely act in a manner dangerous to public safety and that granting the relief would not be contrary to the public interest, the court shall grant the petition.”⁵⁸

Factors courts might examine when considering whether the petitioner has satisfied this standard are: (1) the opinion, if any, of the petitioner's mental health professional or other expert witness; (2) the testimony of those with whom the petitioner lives or works; (3) the petitioner's history of violence, if any; (4) the petitioner's employment history; and (5) the petitioner's asserted justification for the restoration of his firearm rights. Federal courts do not adjudicate firearm rights restoration proceedings; instead, federal law looks to whether an individual has obtained the restoration of his firearm rights under state law, usually through a state court restoration proceeding.⁵⁹ Therefore, state legislatures considering action in this area may wish to advise courts within their jurisdictions to consider the factors enumerated above on the record at restoration hearings.

III. TESTIMONY OF MENTAL HEALTH PROFESSIONALS AT FIREARM RIGHTS RESTORATION HEARINGS

The Report recommends that any petition seeking relief from a mental health firearms disability “shall be accompanied by an opinion of a psychiatrist or licensed clinical psychologist.”⁶⁰ This recommendation should not be adopted by legislatures.

Whether an attorney is representing a petitioner or the state, part of the adversarial process is framing the client's case in the most favorable light. An attorney fails to frame his client's case in that most favorable light if he fails to proceed without at least one letter from a mental health professional. Ideally, the attorney would present the live testimony of a mental health

⁵⁸ VA. CODE ANN. § 18.2-308.1:2(B) (West 2015).

⁵⁹ See *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 775 F.3d 308, 313 n.3 (6th Cir. 2015), *vacated, reh'g en banc granted*, Order, *Tyler v. Hillsdale Cty. Sheriff's Dep't*, ECF No. 50-1 (Apr. 21, 2015) (No. 13-876).

⁶⁰ REPORT, *supra* note 12, at 13.

professional. However, there is a material difference between framing a client's case in the best light as an advocate, and the Report's suggestion that a petitioner be required to ("shall") furnish an expert, or else the court lacks jurisdiction to hear the case.⁶¹ Most attorneys who have handled these cases do so as a public service, and experts are not inexpensive. Some are kind enough to write letters pro bono, but if the state wishes to exercise its right to cross-examine the expert, it will prevail on its motion to exclude the letter. Moreover, the rules of evidence do not allow documents to be admitted under the business records exception when they are prepared for the purpose of litigation.⁶² Although the Report does not explicitly state that an expert must physically attend the restoration hearing,⁶³ the state will likely argue that live testimony is required if this recommendation is adopted. What would likely happen is that the market would respond and in this instance that would mean that mental health professionals who were previously willing to write letters in support of petitioners will decline to do so; by providing a letter, the expert would subject herself to the jurisdiction of a state subpoena. The expert would be obligated to comply with the subpoena and appear in court, yet she would not be compensated by the state for her compelled attendance. In short, the potential inconvenience imposed by obligating petitioners to furnish an expert is likely to incentivize experts to opt out entirely.

Legislatures may respond to this criticism by asking whether these concerns would be assuaged if the state compensated the court-appointed mental health professional. If a legislature seeks to obtain the endorsement of those who represent petitioners in these proceedings, it will presumably require governmental commitment of funds for court-appointed experts on behalf of both the petitioner and the state. Still, the process would be better if mental health expert testimony in firearm restoration proceedings remained optional. In Virginia, the burden is already on the petitioner. It should remain his burden to prove that he is fit for restoration—but on his own terms. Perhaps he or his attorney believes that he can achieve this result without an expert witness. A petitioner's litigation strategy should be his and his attorney's call. Accordingly, the word "shall" should be amended to read "may."⁶⁴ With that amendment, and the removal of the one-year jurisdictional bar, the remainder of the recommended language provides a substantive set of factors for judges to weigh when considering whether to order the restoration.

⁶¹ *Id.*

⁶² See FED. R. EVID. 803(6); *Palmer v. Hoffman*, 318 U.S. 109, 113 (1943) (holding that accident report prepared in anticipation of litigation was inadmissible because it was not prepared in the regular course of business).

⁶³ See REPORT, *supra* note 12, at 13 (mandating in "Recommended Restoration Language" that "the petition shall be accompanied by an opinion of a psychiatrist or licensed clinical psychologist").

⁶⁴ See *id.*

Court proceedings are presumptively open but may close when they involve juveniles or an ongoing governmental investigation.⁶⁵ Yet the Report is silent on the question of what mandatory mental health professional testimony would mean for the privacy interest the adult petitioner retains in his mental health history. For example, Jason K.'s case was captioned in an abbreviated form for the purpose of protecting his privacy interests in his mental health records.⁶⁶ If this recommendation ultimately persuades legislators as it is presently written, then the Consortium should supplement the existing language with language requiring that these proceedings be held in closed courtrooms to protect the petitioner's medical privacy. Even if the proceeding were closed, its outcome would still be publicly available in the court clerk's office and on the state's online docket databases, just as the outcomes in other civil, criminal, and domestic cases are available. It may very well be in the community's interest to require evidence from a mental health professional, but the privacy interests of the petitioner must temper that interest. Obviously, the further the community wishes to delve into the petitioner's mental health history, the less his privacy is protected. A closed hearing where the result will be publically available—like all other adult dispositions—addresses both concerns.

IV. PRACTICAL REALITIES

A. *Removal of Firearms Only After an Order of Involuntary Commitment and Receipt of Due Process*

The Report recommends that states:

“[d]evelop a mechanism to authorize law enforcement officers to remove firearms when they identify someone who poses an immediate threat of harm to self or others. States should also provide law enforcement with a mechanism to request a warrant authorizing gun removal when the risk of harm to self or others is credible, but not immediate.”⁶⁷

The Report also recommends that in emergency situations, this authority can be exercised without a warrant.⁶⁸

⁶⁵ See *Waller v. Georgia*, 467 U.S. 39, 48 (1984) (establishing four-part test for closing a courtroom: “the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure”). But see *United States v. Daoud*, 755 F.3d 479, 479 n.* (7th Cir. 2014) (referencing “a classified argument” heard by the court of appeals that was closed to the public in this national security case).

⁶⁶ See *People v. Jason K.*, 116 Cal. Rptr. 3d 443, 443 (Ct. App. 2010).

⁶⁷ REPORT, *supra* note 12, at 23 (Recommendation 3).

⁶⁸ *Id.* at 24–27 (Recommendation 3.1).

This recommendation should not be adopted by legislatures. The “with or without a warrant” language casually ignores the judicial check on the state that a warrant serves against arbitrary and overreaching acts of government. As one commentator has said: “The government taking things away from people is never a good thing. They come and take your stuff and give you 14 days for a hearing. Would anybody else be okay if they just came and took your car and gave you 14 days for a hearing?”⁶⁹ If this quotation seems closer to hyperbole than reality, consider the following case from Wisconsin.

B. What is “immediate”? What is “emergency”? What is a “warrant”?

The recent case of *Sutterfield v. City of Milwaukee*⁷⁰ presents all of these questions in the context of gun ownership by an individual alleged to be suffering from mental illness. In 2011, Krysta Sutterfield attended an outpatient appointment with a psychiatrist.⁷¹ On the way out the door from her appointment, she said, “I guess I’ll go home and blow my brains out.”⁷² Because Sutterfield had arrived at her appointment wearing an empty holster for a handgun, the psychiatrist surmised that Sutterfield owned a handgun.⁷³ As the psychiatrist was concerned that Sutterfield might cause harm to herself, the psychiatrist promptly relayed the situation to City of Milwaukee law enforcement.⁷⁴

Two City of Milwaukee police officers made their way to Sutterfield’s home, but she was not there.⁷⁵ Around 2:45 PM, the officers completed an emergency detention form in Sutterfield’s name.⁷⁶ At 4:00 PM, the officers went off duty.⁷⁷ A new officer was assigned and over the next few hours she familiarized herself with the case and inquired with various medical facilities to determine whether Sutterfield had been admitted.⁷⁸ At approximately 8:30 PM, nearly nine hours after her purported suicide threat, officers returned to Sutterfield’s home.⁷⁹ They knocked, and she was home.⁸⁰ Through the storm door, officers asked her to let them in, but she refused.⁸¹ An extended verbal exchange occurred, resulting in the officers forcibly entering

⁶⁹ Dave Collins, *States look to gun-seizure law after mass killings*, WASH. POST (July 6, 2014), http://www.washingtonpost.com/politics/states-look-to-gun-seizure-law-after-mass-killings/2014/07/06/61515f42-0539-11e4-a0dd-f2b22a257353_story.html [http://perma.cc/UH24-26YJ].

⁷⁰ 751 F.3d 542 (7th Cir. 2014).

⁷¹ *See id.* at 545.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *See id.*

⁷⁵ *See id.*

⁷⁶ *See id.* at 545–46.

⁷⁷ *Id.* at 546.

⁷⁸ *See id.*

⁷⁹ *See id.*

⁸⁰ *See id.*

⁸¹ *See id.* at 546–47.

Sutterfield's home.⁸² A "brief struggle ensued," and Sutterfield was tackled, handcuffed, and taken into custody.⁸³ At that point the officers conducted a "protective sweep" that took them into the kitchen.⁸⁴ On the kitchen table, officers located a "soft-sided case, which was locked."⁸⁵ An officer "forced the case open and discovered a semi-automatic handgun inside,"⁸⁶ which he seized. Sutterfield subsequently brought a civil rights action against the police department. Although a federal district court rejected the suit on qualified immunity grounds,⁸⁷ the court of appeals affirmed.⁸⁸

The Seventh Circuit held "that the warrantless entry into Sutterfield's home was justified under the exigent circumstances exception to the Fourth Amendment's warrant requirement."⁸⁹ The court reasoned that "the officers had a reasonable basis to believe that Sutterfield posed an imminent danger of harm to herself,"⁹⁰ so they should not be subject to monetary liability even if their conduct was not perfect.⁹¹ Yet as the court acknowledged, "more than nine hours had transpired after the police were first notified of the suicide threat before the officers entered Sutterfield's home."⁹²

The court also analyzed the district court's characterization of the emergency detention form as "a quasi-arrest warrant."⁹³ Lest there be any doubt, an emergency detention form is not an arrest warrant, "quasi" or otherwise. Emergency detention forms require no statements sworn under oath that are subject to prosecution for perjury.⁹⁴ Emergency detention forms require no corroborating witness testimony.⁹⁵ Most importantly, emergency detention forms require no independent, judicial authorization.⁹⁶ Consequently, emergency detention forms fail to provide even the most basic due process protections for the "accused." Ironically, the emergency detention form that Wisconsin and many other states employ affords less due process protection at this initial stage for persons sought by law enforcement for emergency detention purposes than for persons sought for criminal offenses.

⁸² *Id.* at 547.

⁸³ *Id.*

⁸⁴ *See id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *See id.* at 547–48, 550.

⁸⁸ *Id.* at 579.

⁸⁹ *Id.* at 545.

⁹⁰ *Id.*

⁹¹ *Id.* at 579.

⁹² *Id.* at 548.

⁹³ *See id.*

⁹⁴ *See* WIS. STAT. ANN. § 51.15 (West 2015); WISCONSIN FORM ME-901, STATEMENT OF EMERGENCY DETENTION BY LAW ENFORCEMENT OFFICER, <http://naminc.org/nn/blet/wisc-emergency-detention.pdf> [<http://perma.cc/K9DY-ZHTU>].

⁹⁵ *See* WIS. STAT. ANN. § 51.15 (West 2015); WISCONSIN FORM ME-901, STATEMENT OF EMERGENCY DETENTION BY LAW ENFORCEMENT OFFICER, <http://naminc.org/nn/blet/wisc-emergency-detention.pdf> [<http://perma.cc/K9DY-ZHTU>].

⁹⁶ *See* WIS. STAT. ANN. § 51.15 (West 2015); WISCONSIN FORM ME-901, STATEMENT OF EMERGENCY DETENTION BY LAW ENFORCEMENT OFFICER, <http://naminc.org/nn/blet/wisc-emergency-detention.pdf> [<http://perma.cc/K9DY-ZHTU>].

While there are numerous well-settled exceptions to the warrant requirement for non-imminent, exigent emergencies arising in the criminal context,⁹⁷ a nine-hour delay arising from this “emergency detention” effort does not fall into any of them. The officers should not have: (1) traversed Sutterfield’s kitchen; (2) opened up a sealed container on her kitchen table; or (3) seized her handgun, particularly since she was already in custody at that point. Indeed, as the court acknowledged, “[t]he defendants’ brief is conspicuously devoid of citation to any authority that justified the search of the locked case.”⁹⁸

If the Report’s recommendations on prospective firearms removal are adopted, police, law enforcement, and local governments can expect to see a substantial increase in similar incidents and resulting lawsuits. One problem is that there is no consensus on the definition of “immediate” danger. *Sutterfield* makes this ambiguity clear. There, nine hours was considered “immediate,” at least when holding otherwise would have meant imposing civil liability on the city.⁹⁹

C. Civil Detention Warrant

One way to curb the “immediacy” problem at the heart of *Sutterfield* is for state legislatures to develop a “civil detention warrant,”¹⁰⁰ with the expectation that it will be approved by a judge just like a criminal warrant—not merely an unsworn document signed by a police officer after only a phone call. As mentioned in Part IV.B, the Wisconsin authorities in *Sutterfield* commenced their investigation on the basis of a completed emergency detention form, formally captioned a “Statement of Emergency Detention by Law Enforcement Officer.”¹⁰¹ Under Wisconsin law, when an officer “has cause to believe that the subject is mentally ill,” he may complete this form and then proceed to locate and detain an individual believed to be at risk of harm to self or others, pending the outcome of a mental health evaluation hearing that must be provided within 72 hours.¹⁰² This single-page form only requires that the responding officer identify biographical

⁹⁷ See generally *Warrantless Searches and Seizures*, 44 GEO. L.J. ANN. REV. CRIM. PROC. 48 (2015).

⁹⁸ *Sutterfield*, 751 F.3d at 567.

⁹⁹ See *id.* at 562–63.

¹⁰⁰ See *id.* at 565 (citing Megan Pauline Marinos, Comment, *Breaking and Entering or Community Caretaking? A Solution to the Overbroad Expansion of the Inventory Search*, 22 GEO. MASON U. CIVIL RIGHTS L.J. 249, 284–89 (2012)) (“At least one writer has argued in favor of a community-caretaking warrant as a means of guarding against unnecessary intrusions into the sanctity of the home and against police abuses.”); *id.* at 579–80 (Manion, J., concurring) (recommending that the Wisconsin legislature consider adopting a civil detention warrant).

¹⁰¹ See WISCONSIN FORM ME-901, STATEMENT OF EMERGENCY DETENTION BY LAW ENFORCEMENT OFFICER, <http://naminc.org/n/blet/wisc-emergency-detention.pdf> [<http://perma.cc/K9DY-ZHTU>].

¹⁰² See WIS. STAT. ANN. § 51.15(4)(b) (West 2015).

background information on the individual suspected to be suffering from a mental illness, such as “witnesses to the dangerous behavior (including officers who observed behavior).”¹⁰³ The form concludes by requiring the responding officer to “describe [the individual’s] behavior.”¹⁰⁴

In *Sutterfield*, the complainant was a mental health professional, so the testimony was reliable enough to initiate an investigation. As Sutterfield’s mental health professional, the psychiatrist possessed particularized, first-hand knowledge of Sutterfield’s state of mind that lent credibility to her communication to law enforcement. But what if the complainant were not a doctor, but a co-worker or a stranger on the street? How much detail would be required to justify law enforcement intervention? If the stakeholders agree that a single phone call is sufficient proof to involve law enforcement, they should first take stock of the fact that not all—or even most—reports communicated to law enforcement that allege an individual is in need of a mental health evaluation are equally meritorious.

In sum, while the Report recommends “[a]uthoriz[ing] law enforcement to remove guns from any individual who poses an immediate threat of harm to self or others,”¹⁰⁵ it fails to articulate the minimum standards that both the complainant and the documenting officer must satisfy to seize the firearms of an individual suspected to be actively suffering from mental illness. States that wish to have the authority to seize the firearms of their citizens should obtain a copy of Wisconsin’s existing Statement of Emergency Detention and pass legislation that improves it and creates a civil detention warrant—akin to a criminal warrant—that must be reviewed and signed by a judge.

V. CONCLUSION

The Report has furthered an important conversation at a critical time, because mental health and firearms law are emerging areas of American jurisprudence. Yet, regrettably, the Report consistently seeks to redirect the restoration process away from courts into the territory of mental health professionals. Three of the Report’s principal recommendations should be reconsidered by the Report’s authors: (1) since the majority of federal circuit courts that have decided the issue have held that temporary detention does not impose a federal firearms disability, firearm rights restoration petitions that arise from temporary detention should not be subject to time-based jurisdictional limitations; (2) testimony of a mental health professional should not be a jurisdictional prerequisite for courts to conduct firearm rights restoration hearings; and (3) the prospective removal of firearms from an individ-

¹⁰³ See WISCONSIN FORM ME-901, STATEMENT OF EMERGENCY DETENTION BY LAW ENFORCEMENT OFFICER, <http://naminc.org/nn/ble/wisc-emergency-detention.pdf> [<http://perma.cc/K9DY-ZHTU>].

¹⁰⁴ See *id.*

¹⁰⁵ REPORT, *supra* note 12, at 24 (Recommendation 3.1).

ual with or without a warrant should not be imposed absent an order of involuntary commitment where the individual has received due process.¹⁰⁶ Legislative efforts to unreasonably encumber firearm rights or to move restoration authority away from the courts are likely to end up back in court and will face an uphill battle to survive Second Amendment scrutiny.

¹⁰⁶ See *United States v. Rehlander*, 666 F.3d 45, 48–50 (1st Cir. 2012).