

Mental Health and Gun Rights in Virginia: A View from the Battlefield

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ABSTRACT

This article discusses my experiences representing hundreds of patients who have been involuntarily committed to a mental health facility in Virginia—a state where firearms are very much a part of the culture. Because an individual subject to involuntary commitment loses his or her rights to transport, possess, carry, or receive a firearm, I have occasionally been asked by former clients to help them with the restoration of their firearm rights after they have recovered. This article discusses some of the obstacles imposed by state and federal law that may arise during that restoration process. Perplexingly, in Virginia, an individual who signs him/herself in for voluntary admission to a mental health facility is saddled with the same firearms disability as an individual who is involuntarily committed by a court. This article argues that imposing the same firearms disability on an individual who seeks voluntary admission exposes the public to unnecessary harm because some individuals who may be inclined to seek voluntary treatment will forgo doing so if they know they will lose their firearm rights. This article argues that it would be in the best interest of the patient and the community to amend Virginia’s voluntary admission form so that individuals who seek voluntary mental health treatment are not automatically relieved of their firearm rights.

I. INTRODUCTION

Between 2009 and 2013, I represented hundreds of individuals that the Commonwealth of Virginia designated likely to be in need of involuntary commitment to a mental health facility. Although I had no formal training in psychology beyond general college courses, I was intrigued to learn that my home of Williamsburg, Virginia was also home to “America’s first

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psychiatric hospital.”¹ I enjoyed movies like *One Flew Over the Cuckoo's Nest*, *American Psycho*, and *Fight Club* where the plotlines addressed mental health issues, and I surmised that agreeing to represent individuals at a time of great crisis in their lives and in the lives of their families would be a meaningful cross-disciplinary public service. The initial training I received was brief but supplemented by a helpful conversation with a local attorney who had been on the rotation for about thirty years. One piece of advice he offered that remained with me was as follows: “remember that you are not appointed as a guardian *ad litem* but as an advocate. Do what your client wants.” Beyond that, I was on my own. From that point forward, the standard I imposed on myself was as follows: if I were in my client’s shoes in the midst of this crisis, what would I want my lawyer to be thinking about to exhaust every possible defense to my involuntary commitment?

In my experience, individuals who may be in need of mental health treatment are typically identified by family members, social workers, or law enforcement, who then bring these individuals to mental health treatment facilities due to unusual or antisocial behaviors, a suicide attempt, or drug or alcohol abuse believed to be caused by an underlying mental health issue. Virginia law permits a facility to hold an individual detained pursuant to a temporary detention order (TDO) for a period not to exceed forty-eight hours.² After an individual is served with TDO papers, a hearing on an individual’s continued detention must be held within forty-eight hours, or he or she must be released.³ Two federal courts of appeals outside the jurisdiction of Virginia have split on the question of whether an individual’s temporary detention, that does not result in his involuntary commitment, imposes adverse collateral consequences to the individual’s mental health record for firearm interaction purposes.⁴ The United States Court of Appeals for the Fourth Circuit, with jurisdiction over Virginia, has not yet considered this precise issue. However, in *United States v. Midgett*,⁵ it affirmed an unlawful possession of a firearm conviction of a Virginian who had spent a long time in a mental health facility.⁶ In reaching its decision,

1. *Eastern State Hospital*, VIRGINIA.GOV, <http://www.esh.dbhds.virginia.gov/> (last visited Feb. 25, 2014) (explaining that Eastern State Hospital was established in 1773).

2. See VA. CODE ANN. § 37.2-809(H) (West 2013).

3. *Id.*

4. 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), with *United States v. Waters*, 23 F.3d 29, 31-36 (2d Cir. 1994) (defining “commitment” for purpose of bar from interaction with firearms under 18 U.S.C. § 922(g)(4)).

5. *United States v. Midgett*, 198 F.3d 143, 147 (4th Cir. 1999) (affirming 18 U.S.C. § 922(g)(4) conviction arising out of Virginia).

6. *Id.* at 144.

the Fourth Circuit said that it will “look to the ordinary, contemporary, common meaning”⁷ of the word “commitment” and the “substance of the state procedure”⁸ to determine whether the defendant is barred from interaction with a firearm as a consequence of having been “committed.”⁹ The court’s decision in *Midgett* does not answer the precise question of whether an individual served with a TDO and temporarily detained at an institution for under forty-eight hours, is subject to a 18 U.S.C. § 922(g)(4) firearms disability, if he was not ultimately involuntarily committed. Rather, the stated rationale of looking to the plain meaning of the word “commitment” suggests that the 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.¹⁰

II. INVOLUNTARY COMMITMENT HEARINGS IN VIRGINIA

So what are the mechanics behind involuntary commitment hearings? In Williamsburg, involuntary commitment hearings are held on Mondays, Wednesdays, and Fridays at the institution. I receive paperwork on each client about forty-eight hours in advance. The paperwork typically consists of a Petition for Involuntary Commitment (prepared by a psychiatrist) that identified the patient, his or her mental health history, and the contact information of known witnesses.¹¹ The paperwork also includes a prescreening report that summarizes in some detail the event that triggered my client’s detention.¹² Upon receipt of the paperwork, I immediately travel to the facility to interview the client. Frequently, my clients are unable to communicate effectively (which was probably one of the underlying grounds for the TDO). But that does not change my duty to my client.

When approaching each client meeting, I open by introducing myself, informing my client that I am his or her attorney, and that a hearing will be held within a day or two to determine whether or not he or she was going to stay in the facility for further treatment, or whether he or she will be released to return home. I then ask my client what happened that caused he or she to be brought to the facility. This is typically the point where I will be able to make a reasonably informed guess concerning whether or not my client will ultimately be involuntarily committed. Regardless, I patiently listen to my client until the conclusion of his or her description of the un-

7. *Id.* at 146 (citation omitted).

8. *Id.*

9. *Id.* at 147.

10. *Id.*

11. *See* VA. CODE ANN. § 37.2-808(A) (West 2013).

12. *See id.* § 37.2-816.

derlying events resulting in the detention. This is important because in many instances, I am the only person my client has on his or her side. After my client finishes speaking, I ask any follow-up questions related to their narrative and also ask questions about any previous involuntary commitments, education level, and whether they are currently or had recently been employed. Finally, I read them a statement of their statutory rights in connection with the hearing.¹³ In essence, this approach to client meetings functions as a written statement of *Miranda*¹⁴ rights for individuals who may be involuntarily committed. Although Virginia law only requires that a written explanation of the involuntary admission process and statutory protections associated with the process be given and explained to the client,¹⁵ consistent with my understanding that these proceedings—although technically civil—were quasi-criminal in nature (implicating many of the same constitutional concerns), it was my practice to provide the “rights form,” explain it, read it aloud verbatim, and then ask if the client had any follow-up questions. I then ask if there were any witnesses or family members whom my client wanted to be at the hearing.¹⁶ If so, I would call them. However, one must keep in mind that if my client did not want to be involuntarily committed but the family member did, then it was my responsibility under the Virginia Rules of Professional Conduct to keep the adverse party out of the hearing—even if that person was a loving family member.¹⁷ On more than one occasion, my adherence to the Virginia Rules of Professional Conduct caused family members to become upset with me.

On the day of the hearing, a Special Justice appointed by the Presiding

13. See *id.* § 37.2-817(D).

A written explanation of the involuntary admission process and the statutory protections associated with the process shall be given to the person, and its contents shall be explained by an attorney prior to the commitment hearing. The written explanation shall describe, at a minimum, the person’s rights to (i) retain private counsel or be represented by a court-appointed attorney, (ii) present any defenses including independent evaluation and expert testimony or the testimony of other witnesses, (iii) be present during the hearing and testify, (iv) appeal any order for involuntary admission to the circuit court, and (v) have a jury trial on appeal. The judge or special justice shall ascertain whether the person whose involuntary admission is sought has been given the written explanation required herein.

Id.

14. See generally *Miranda v. Arizona*, 384 U.S. 436 (1966) (obligating state actors to deliver to defendants a basic statement of their constitutional rights).

15. See § 37.2-814(D).

16. See *id.* § 37.2-817(E).

17. See VA. RULES OF PROF’L CONDUCT R. 1:6(a) (2004) (“A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship . . . the disclosure of which would be embarrassing or would be likely to be detrimental to the client . . .”) (emphasis added).

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Judge of the jurisdiction's circuit court would convene the hearing by announcing the purpose of the hearing, indicating that it would be recorded by audio recording device,¹⁸ and then offering my client the opportunity to sign him or herself in voluntarily.¹⁹ The process of voluntarily signing oneself in for treatment is known as voluntary admission.²⁰ An individual who consents to voluntary admission relinquishes the right to transport, possess, carry, or receive a firearm until that right is restored by a court of competent jurisdiction.²¹ Most of my clients decline this option because most of them want to leave the facility and return home. When that is the case, the Special Justice announces that the standard of proof necessary to enter an order for involuntary commitment is proof by clear and convincing evidence that the person has a mental illness and there was a substantial likelihood that, as a result of mental illness, the person will, in the near future, cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm; or will suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs; and there are no less restrictive treatment alternatives to involuntary inpatient treatment.²² The Special Justice will then consider testimony and evidence from an independent examiner (typically a counselor or individual with a graduate degree in psychology),²³ a community service board representative,²⁴ and finally, my argument and/or testimony from my client (if he or she wishes to testify and I deemed it helpful

18. See § 37.2-818(A).

19. See *id.* § 37.2-814(B).

20. *Id.*

21. See *id.*; see also VA. DEP'T. OF MENTAL HEALTH, APPLICATION FOR VOLUNTARY ADMISSION TO A HOSPITAL OR OTHER FACILITY IN VIRGINIA PURSUANT TO SECTION 37.2-814, CODE OF VIRGINIA (1950), AS AMENDED, available at <http://www.dbhds.virginia.gov/documents/forms\1001BeMH.pdf>

I understand that if I agree to this voluntary admission that I will be prohibited from purchasing, possessing or transporting firearms until a court issues a restoration order. I further understand that any time following my release from this admission, I may petition the general district court in the city or county in which I reside to restore my right to purchase or possess a firearm. If the court determines that I 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 will grant me the right to purchase, possess or transport firearms.

Id.

22. VA. CODE ANN. § 37.2-817(C).

23. *Id.* § 37.2-815(A).

24. *Id.* § 37.2-817(B).

to the case).²⁵ I am also afforded the opportunity to present evidence and witnesses.²⁶ At the conclusion of all the evidence, the Special Justice will either dismiss the petition (leaving my client free to go) or enter an order for involuntary commitment for a period not to exceed thirty days.²⁷ If the latter order is entered, the action will then be placed on my client's mental health record.²⁸ Adverse action on my client's mental health record includes notification to the Virginia State Police that my client had been involuntarily committed resulting in the loss of the right to transport, possess, carry, or receive a firearm until that right was restored by a court of competent jurisdiction.²⁹ Obviously, when a client is involuntarily committed, the committing facility is under the continuing obligation to evaluate each patient and to discharge them as soon as he or she no longer meets the commitment criteria.³⁰

At that point, Virginia law provides a ten-day window to appeal the case to the circuit court for a hearing *de novo*.³¹ The elected prosecutor, known in Virginia as the "Commonwealth's Attorney," represents the committing facility on appeal.³²

III. THE SUPREME COURT OF VIRGINIA'S DECISION IN *PAUGH V. HENRICO AREA MENTAL HEALTH & DEVELOPMENTAL SERVICES* AND COLLATERAL CONSEQUENCES

The most interesting question of law I encountered during my practice in this area was whether the *de novo* appeal from the order for involuntary commitment was moot or not after the patient was released from the facility. Why would the patient care about appealing an order of involuntary commitment if he was already released? Because of the resulting adverse collateral consequences for educational and employment opportunities and for *firearm rights*. While I was handling this exact issue, for one of my own clients earlier this year, I learned that the Supreme Court of Virginia had granted review on this exact issue and in June 2013, it issued *Paugh v.*

25. *But see id.* § 37.2-814(F) ("The petitioner shall be encouraged but shall not be required to testify at the hearing, and the person whose involuntary admission is sought shall not be released solely on the basis of the petitioner's failure to attend or testify during the hearing.").

26. *Id.* § 37.2-814(E).

27. *Id.* § 37.2-817(C).

28. *See id.* § 37.2-818(C).

29. *Id.* § 37.2-819.

30. *See id.* § 37.2-837.

31. *See id.* § 37.2-821(A) to (B); *see also* *Paugh v. Henrico Area Mental Health & Developmental Servs.*, 743 S.E.2d 277, 278 (Va. 2013) (interpreting VA. CODE ANN. § 37.2-821).

32. *See* VA. CODE ANN. § 37.2-821(C) (2010).

*Henrico Area Mental Health & Developmental Services.*³³

On March 19, 2012, Paugh was detained pursuant to a TDO arising from a domestic incident involving suicidal thoughts.³⁴ The next day, he was involuntarily committed pursuant to Virginia Code § 37.2-817.³⁵ Within a few days he was released, but he filed an appeal with the circuit court for a *de novo* hearing authorized by Virginia Code § 37.2-821(B), for the purpose of attacking the collateral consequences of the underlying involuntary commitment on his right to ship, transport, possess, or receive firearms.³⁶ Although Virginia law states that involuntary commitment appeals “shall be given priority over all other pending matters before the court and heard as soon as possible,”³⁷ Paugh’s hearing did not occur until May 18, 2012, long after he was released.³⁸ At the hearing, the Commonwealth’s Attorney argued that Paugh’s appeal was moot because he was no longer involuntarily committed.³⁹ Paugh disagreed because collateral consequences remained from the underlying hearing that would be erased if his underlying involuntary commitment were vacated.⁴⁰ The circuit court held that the appeal was moot and dismissed the case.⁴¹ Paugh appealed to the Supreme Court of Virginia, and the Court reversed and entered judgment for Paugh.⁴²

The Supreme Court of Virginia held that “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, which was what the state argued.⁴³ Because Paugh was no longer involuntarily committed on the date of the *de novo* hearing in the circuit court, he no longer met the criteria that caused him to be involuntarily committed two months earlier.⁴⁴ Additionally, the court explicitly agreed with Paugh that his case was not

33. *See generally Paugh*, 743 S.E.2d at 277.

34. *Id.* at 278.

35. *Id.*

36. *Id.* at 283 n.4 (McClanahan, J., concurring in part and dissenting in part) (“Paugh concedes on brief that he was, in fact, released the day before he filed his 821 appeal.”).

37. *Id.* at 281 (Mims, J., concurring) (citing VA. CODE ANN. § 37.2-821(A)).

38. *Id.* at 278.

39. *Id.* at 278 n.2 (citing *E.C. v. Va. Dep’t of Juvenile Justice*, 722 S.E.2d 827, 831-34 (Va. 2012)).

40. *Id.* at 280 (Mims, J., concurring) (“The collateral consequences for which Paugh seeks redress are real and potentially of constitutional magnitude.”); *id.* at 283 (McClanahan, J., concurring in part and dissenting in part).

41. *Id.* at 278.

42. *Id.* at 280.

43. *Id.* at 278.

44. *Id.*

moot because the collateral consequences of his involuntary commitment remained intact and against his interests.⁴⁵ The opinion of the seven Justice court drew a concurrence and a partial concurrence and dissent.⁴⁶

In her partial concurrence/dissent, Justice McClanahan expressed concern with this decision as follows:

An additional consequence of the majority's construction and application of Code § 37.2-821 is that every individual who is committed under an involuntary commitment order, and thereby prohibited from purchasing, possessing or transporting a firearm pursuant to Code § 18.2-308.1:3(A), will have this restriction negated by a successful 821 appeal. Indeed, avoidance of this prohibition is apparently Paugh's paramount objective in pursuing the instant action.⁴⁷

Justice McClanahan's observations are accurate, but the potential public safety concern brought to light is only one of the reasons this decision is noteworthy.

The *Paugh* case marks the first time the Supreme Court of Virginia has decided a case arising out of an involuntary commitment proceeding and the Court's recognition of the very real collateral consequences that flow from involuntary commitment proceedings is commendable. Has this decision greatly endangered public safety by resulting in a significant increase of individuals with recent histories of mental illness retaining access to firearms shortly—if not immediately—after their release from mental health treatment facilities? Not likely. The more likely effect of this decision is that the Commonwealth's Attorneys' offices will now docket involuntary commitment appeals more quickly (as state law already obligated them to do⁴⁸) than was the accepted past practice. While a very small handful of individuals who filed appeals and were released while *Paugh* was pending may have their involuntary commitment orders vacated, it is important to remember that if those individuals had previous involuntary commitments, past firearms disabilities are not erased by *Paugh*.⁴⁹ In my experience, about half of my clients were facing their first involuntary commitment when I represented them. Ultimately, the total number of individuals who stand to gain from *Paugh* may not exceed Paugh himself and a prompt legislative response from Virginia's General Assembly seems likely.

45. *Id.* at 278-79 n.2.

46. *Id.* at 280-84.

47. *Id.* at 283 (McClanahan, J., concurring in part and dissenting in part).

48. See V.A. CODE ANN. § 37.2-821(A) (“An appeal shall be filed within 10 days from the date of the order and shall be given priority over all other pending matters before the court and heard as soon as possible”) (emphasis added).

49. See generally *Paugh*, 743 S.E.2d at 277.

Change *Paugh's* facts. What if your client has *not* been released by the time his *de novo* appeal matures, and the circuit court concludes that he remains a risk to himself or others, but then a few months later he is released and wants his other firearm rights back? Virginia law provides for a proceeding where an individual who has been subject to involuntary commitment but who has been restored to competency may petition the general district court for the restoration of his firearm rights.⁵⁰

But does the receipt of a state court issued restoration order remove the collateral consequence in the form of a federal firearm disability imposed on an individual who “has been committed to any mental institution” under 18 U.S.C. § 922(g)(4)? Yes, and here’s how.

IV. THE IMPOSITION OF FEDERAL FIREARMS DISABILITIES ON INDIVIDUALS COMMITTED TO A MENTAL INSTITUTION BY STATE LAW

In 1968, Congress passed comprehensive firearms legislation known as the Gun Control Act.⁵¹ Included in this Act was 18 U.S.C. § 922(g), which barred a laundry list of people from interaction with firearms.⁵² Included on that list were felons and those who have been committed to a mental institution. Section 925(c) authorized an application process overseen by the Secretary of the Treasury where individuals, prohibited from interacting with firearms under § 922(g), could challenge this designation effectively barring them for life from interaction with firearms.⁵³ While there was a remedy for felons and others, there was no similar path to relief or restoration for individuals previously committed to a mental institution.⁵⁴

In the early 1980s, one of these seemingly remediless individuals, a New Jersey man named Galioto, brought an Equal Protection challenge to the exclusion of previously committed individuals from access to a path for relief from federal firearms disabilities.⁵⁵ Ten years earlier, Galioto was committed to a mental institution, and as a consequence of that commit-

50. See VA. CODE ANN. §§ 18.2-308.1:1, 1:2, 1:3. Virginia affords a parallel proceeding to individuals convicted of a felony or felonies under state law. See *id.* § 18.2-308(c); see also Robert Luther III, *Felon Firearm Rights Restoration in the Fourth Circuit*, 23 WM. & MARY BILL RTS. J. (forthcoming 2014). Under the current legal landscape, individuals convicted of a felony under federal law lose the right to ship, transport, possess, or receive firearms unless that right is restored to them by a Presidential Pardon. See *id.*; see also *Beecham v. United States*, 511 U.S. 368 (1994).

51. *History of Gun-Control Legislation*, WASH. POST Dec. 22, 2012, http://www.washingtonpost.com/national/history-of-gun-control-legislation/2012/12/22/80c8d624-4ad3-11e2-9a42-d1ce6d0ed278_story.html.

52. 18 U.S.C. § 922(g) (2000); *History of Gun-Control Legislation*, *supra* note 51.

53. 18 U.S.C. § 925(c) (2003).

54. See *id.*

55. U.S. Dep’t of the Treasury, *ATF v. Galioto*, 477 U.S. 556, 557-58 (1986).

ment, he labored under the federal firearm disabilities imposed by 18 U.S.C. § 922(d)(4) and (g)(4).⁵⁶ He argued that it was an Equal Protection violation for 18 U.S.C. § 925(c) to afford an avenue for the removal of federal firearms disabilities to felons but not to recovered mental patients.⁵⁷ The district court agreed, finding “no rational basis for thus singling out mental patients for permanent disabled status, particularly as compared to convicts.”⁵⁸ The district court also concluded that the statutory scheme was unconstitutional because it “in effect creates an irrebuttable presumption that one who has been committed, no matter the circumstances, is forever mentally ill and dangerous.”⁵⁹

While the case was pending before the United States Supreme Court in 1986, Congress came to the conclusion, “as a matter of legislative policy,” that the firearms statutes should be redrafted.⁶⁰ Before a decision was rendered on the merits, the President signed into law Public Law 99-308, Firearm Owners’ Protection Act (FOPA).⁶¹ Section 105 of that statute amended § 925(c) by striking the language limiting utilization of the remedial provision to certain felons, and including any person who is “prohibited from possessing, shipping, transporting, or receiving firearms or ammunition.”⁶² Congress made FOPA “applicable to any action, petition, or appellate proceeding pending on the date of the enactment of this Act.”⁶³ In response, the Supreme Court vacated the district court’s judgment, stating:

This enactment significantly alters the posture of this case. The new statutory scheme permits the Secretary to grant relief in some circumstances to former involuntarily committed mental patients such as appellee. The new approach affords an administrative remedy to former mental patients like that Congress provided for others prima facie ineligible to purchase firearms. Thus, it can no longer be contended that such persons have been “singled out.” Also, no “irrebuttable presumption” now exists since a hearing is afforded to anyone subject to firearms disabilities. Accordingly, the equal protection and “irrebuttable presumption” issues discussed by the District Court are now moot.⁶⁴

This program functioned as planned from about 1986 until 1992 when

56. *Id.* at 557.

57. *Id.* at 558.

58. *Id.* at 559 (quoting *Galioto v. Dep’t of the Treasury, ATF*, 602 F. Supp. 682, 689 (D.N.J. 1985)).

59. *Id.* (quoting *Galioto*, 602 F. Supp. at 690).

60. *Galioto*, 477 U.S. at 559.

61. Firearm Owners’ Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986).

62. *Galioto*, 477 U.S. at 559.

63. *Id.*

64. *Id.* at 559-60.

Congress functionally pulled the plug on it by failing to award the necessary funding appropriations to the U.S. Treasury Department for continued processing of the restoration applications.⁶⁵ Then, in *United States v. Bean*, the U.S. Supreme Court held (in a ruling only lawyers could love) that it could not enjoin Congress' failure to fund the Treasury Department to process restoration applications because mere "inaction" on the Bureau of Alcohol, Tobacco and Firearms' part was not akin to "denial" of relief as to give rise to a due process problem.⁶⁶ A few years later and principally in response to the tragic deaths of thirty-two students and faculty in April 2007 at Virginia Tech, Congress passed the National Instant Criminal Background Check System Improvement Amendments Act of 2007 (NICS).⁶⁷ NICS authorized the creation of a unified criminal and mental health history database. "A number of states, including Virginia, acted quickly either by executive order or legislation, to improve reporting to NICS."⁶⁸

V. RELIEF FROM FEDERAL FIREARMS DISABILITIES THROUGH THE VEHICLE OF STATE FIREARM RESTORATION PROCEEDINGS

Depending on who you ask, the NICS legislation, designed to make it harder for individuals prohibited by law to interact with firearms, had the foresight or gall to include provisions addressing procedures for the relief from firearm disabilities for the benefit of individuals who have spent time in a mental health facility (set forth in subsections (d)(4) and (g)(4)) that were of concern to Galimoto because they were absent.⁶⁹ The NICS legislation instructed the appropriate agencies to process applications for the removal of federal firearms disabilities and directed any federal department or agency that makes determinations pertinent to those sections to process

65. See *United States v. Bean*, 537 U.S. 71, 74-75 (2002) ("Since 1992, however, the appropriations bar has prevented ATF, to which the Secretary has delegated his authority, from using appropriated funds to investigate or act upon applications.") (quoting Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 102-393, 106 Stat. 1732 (1993)).

66. *Id.* at 75-76.

67. National Instant Background Check System Improvement Amendment Act of 2007, Pub. L. No. 110-180, 122 Stat. 2559 (2008) [hereinafter NICS].

68. See James B. Jacobs & Jennifer Jones, *Keeping Firearms Out of the Hands of the Dangerously Mentally Ill*, 47 CRIM. L. BULL. 388, 402 n.88 (2011) ("Governor Kaine of Virginia issued Executive Order 50 in the wake of the Virginia Tech incident which required executive branch employees to collect and submit to the state database the names of individuals whom Virginia courts had ordered to undergo outpatient treatment.").

69. See 18 U.S.C. §§ 922(d)(4), (g)(4) (2012); NICS, Pub. L. No. 110-180, 122 Stat. 2559 (2008).

them within 365 days.⁷⁰ If they did not, their inaction would constitute a denial and the applicant would then be authorized to bring a restoration proceeding in U.S. District Court pursuant to 18 U.S.C. § 925(c).⁷¹ As a function of federalism and to relieve some of the burden from the federal district court docket, the legislation also set aside federal funds for states to implement restoration proceedings of similar substance to those discussed in this article. The legislation states that:

If, under a State relief from disabilities program an application for relief referred to in subsection (a)(1) of this section is granted with respect to an adjudication or a commitment to a mental institution the adjudication or commitment, as the case may be, is deemed not to have occurred for purposes of subsections (d)(4) and (g)(4) of section 922 of title 18, United States Code.⁷²

Virginia is one state that has made these proceedings available in its general district courts.⁷³ Upon receipt of a successful state court order restoring an applicant's firearms, his collateral federal firearms disability is removed, and he will be free from risk of prosecution under 18 U.S.C. § 922(d)(4) or (g)(4).⁷⁴

VI. SUGGESTED LEGISLATIVE ACTION MOVING FORWARD

This symposium piece focuses on the available legal options for attacking the collateral consequences imposed incident to one's involuntary commitment to a mental health facility. As Justice Mims' concurrence in *Paugh* acknowledges, "[d]ue process requires that there be an avenue for constitutionally cognizable collateral consequences to be addressed."⁷⁵ Due process case law also holds that "irrebuttable presumptions,"⁷⁶ such as life

70. NICS, Pub. L. No. 110-180, 122 Stat. 2559 (2008).

71. *Id.*

72. *Id.*

73. See VA. CODE ANN. § 18.2-308.1:1-1:3 (2013).

74. There is no basis to argue that the U.S. Supreme Court's landmark decisions in *District of Columbia v. Heller* or *McDonald v. City of Chicago* alter the landscape that already permitted authorities to restrict the firearm rights of individuals actively suffering from mental illness. 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 Chicago*, 130 S. Ct. 3020, 3047 (2010) (observing that the Court's holding "does not cast doubt" on laws that prohibit the mentally ill from purchasing and possessing firearms).

75. *Paugh v. Henrico Area Mental Health & Dev. Servs.*, 743 S.E.2d 277, 281 (Va. 2013) (Mims, J., concurring) (citing *Zinerman v. Burch*, 494 U.S. 113, 125-26 (1990)) (failure to provide a remedy for an erroneous deprivation of a constitutionally protected interest is an unconstitutional denial of procedural due process).

76. See generally *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (finding an

bars without any hearing or recourse imposed prior to Congress' wise decision to amend 18 U.S.C. §§ 922(d)(4) and (g)(4) subsequent to *Galioto*, are unconstitutional.⁷⁷ Virginia and other states have adopted a safe, reasonable, and fair regime for dealing with individuals who want their firearm rights restored but who have an involuntary commitment in their past.⁷⁸ In such circumstances, the applicant need only file a petition for the restoration of his firearm rights with the clerk of the general district court in the jurisdiction where he or she resides.⁷⁹ The applicant should include the petition information about his mental health history and he must deliver a copy of the filing to the Commonwealth's Attorney for the jurisdiction where he or she resides.⁸⁰ A hearing will then be scheduled and the applicant will have a full opportunity to explain to a neutral decision-maker all the circumstances underlying the commitment and the strides made since that time; the court will then have the opportunity to consider other evidence and testimony as appropriate.⁸¹ If the court concludes that the applicant is no longer a risk to him or herself or to others, the applicant's firearm rights will be restored and no collateral state or federal firearms disabilities will remain to potentially subject the applicant to prosecution for unlawful interaction with a firearm.⁸²

Virginia's firearm rights restoration proceeding affords adequate procedural safeguards to keep at-risk individuals from lawfully possessing fire-

unconstitutional irrebuttable presumption where school policy declared all pregnant women unfit to teach past a certain date during pregnancy); *U.S. Dep't of Agric. v. Murry*, 413 U.S. 508 (1973) (holding unconstitutional irrebuttable presumption where Congress assumed that a child was not presently indigent because the parent claimed the child as a dependent in a tax return for the prior year); *Vlandis v. Kline*, 412 U.S. 441, 442 (1973) (holding unconstitutional irrebuttable presumption where university policy considered student applicant "out of state" if his "legal address at the time of his application for admission to such a unit was outside of Connecticut."); *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding unconstitutional irrebuttable presumption where state law declared father unfit to raise his children after death of mother if he was not married to her); *Bell v. Burson*, 402 U.S. 535 (1971) (holding unconstitutional irrebuttable presumption where state law revoked driver's license for being in any accident regardless of fault).

77. The specific due process problem with irrebuttable presumptions is that once the basic fact is proven the presumed fact is accepted as true regardless of any evidence to the contrary. In this instance, because *Galioto* was committed to a mental health facility (the basic fact) he was designated unsuitable to interact with a firearm (the presumed fact), regardless of the evidence he was able to show to prove he was not ill-suited to interact with a firearm.

78. See, e.g., *Paugh*, 743 S.E.2d at 277.

79. *Id.*

80. See VA CODE ANN. § 18.2-308.1:1-1:3 (2013).

81. *Id.*

82. *Id.*

arms in Virginia and elsewhere where similar procedures are in place.⁸³ As we move forward with an eye towards keeping firearms away from individuals with active mental health issues, we should not fail to recognize that the loss of one's firearm rights can be debilitating from a psychological, emotional, and social standpoint. "Virginia is a unique place for a variety of reasons, but it is worth reminding [audiences] who have spent most of their lives in urban areas that Virginia is primarily rural and firearms-related activities are a huge part of the cultural and social fabric of the polity."⁸⁴ The General Assembly is well-aware of this and should act accordingly to eliminate the requirement that individuals who wish to voluntarily commit themselves for mental health treatment relinquish their firearm rights as a condition to admission. Individuals are naturally hesitant to seek mental health treatment; the Commonwealth should take steps to make it easier—not harder—for them to do so. If the state desires to encourage people to obtain mental health treatment, it should not simultaneously force them to sacrifice a right that may be important to them in order to do so. The problem with the "Application for Voluntary Admission to a Hospital or Other Facility in Virginia Pursuant to Section 37.2-814, Code of Virginia (1950), As Amended" as it reads now is that an individual, who might otherwise be willing to seek voluntary treatment, is likely to forgo it because he does not want to lose his firearm rights. Then, by not voluntarily consenting to treatment, he remains a time-bomb at-large and untreated, potentially posing a danger to himself or others. The Virginia General Assembly should amend the "Application for Voluntary Admission to a Hospital or Other Facility in Virginia Pursuant to Section 37.2-814, Code of Virginia (1950), Amended" during the January 2015 Session.

83. NICS, Pub. L. No. 110-180, 122 Stat. 2559 (2008).

84. Robert Luther III, *The Quiet Army: Rehabilitated Felons and Firearm Rights Restoration*, THE COCKLEBUR (July 31, 2013), <http://www.thecocklebur.com/criminal-law/the-quiet-army-rehabilitated-felons-and-firearm-rights-restoration>.