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CC: mwb86@scdmh.org
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Date: 3/14/2013 1:54:09 PM

Subject: Re: Agenda for Today's 2:30 PM Working Group

Adam, I have asked Anne Cushman with Leg. Council to attend the meeting to explain what we need to do to address the concerns expressed by Sen. Malloy last week regarding commitment for alcohol abuse.

Jeff

In a message dated 3/14/2013 9:10:34 A.M. Pacific Daylight Time, apiper@scag.gov writes:

Thursday, March 14, 2013
2:30 PM – Gressette 105
S, 413/ H. 3560

Agenda:

- Introduction of Participants – Adam Piper
- Legislative Remarks/Needs – Members of the General Assembly
- Perspective from Ashley Hall Parents – Anna Murray
- Compliance needs with NICS – Lin Rolin/Kathryn Richardson, SLED
- Process Needs
- Amendments Needed

Confirmed Participants include those from the following:

Members, SC House
Members, SC Senate

Ashley Hall Parents
Attorney General's Office
Court Administration
Police Chiefs/Law Enforcement Officers Association
Probate Court
Prosecution Commission/Solicitors' Association
Sheriffs Association
SLED

Note: Participants in the working group from the NRA and Mental Health are unable to make today's meeting and are cc'd on today's agenda.

If others need to be present or if anyone was omitted from this distribution, please feel free to forward this agenda as an invitation.

This working group meeting is being convened for the purpose of fine tuning amendments and improving the legislation.

Copied and pasted below is my memo from last week. Since then, additional amendments have been suggested and need to be made.

Also below are items of consideration forwarded from DMH.

-Adam

March 4, 2013

To: Mental Health Bill Working Group
From: Adam Piper
Re: S. 413/H. 3560

Per today's conversation/meeting regarding various fixes to H. 3560/S. 413, here is an outline of amendments needed.

Follow up items include a meeting to be set up by Rep. Stavrinakis with Court Administration as well as a conversation with Senate Sponsors and Senate Staff regarding these changes.

Additional follow up is needed regarding the revocation of concealed weapons permits for those individuals who have been adjudicated and found to not be able to carry, purchase or possess a firearm.

Below is a summary of the changes we discussed this afternoon and an amended version of the bill.

1. Change language in Section 23-31-1010(I), from "and includes" to "which includes"
2. Change language in Section 23-31-1030(B) regarding notice and service.
3. Change language in Section 23-31-1030(D), to remove the "and" at the end of subsection (2) and insert a semi-colon and the word "and" added to subsection (3).
4. Change language in Section 23-31-1030(G), to correct a typo and read "*in camera*"
5. Add a period of time for the petition to be heard of 90 days as a new Section 23-31-1030 (F)
6. Change language in 23-31-1030(E) to strike probate court and add "is admissible" to the end of the section.

Since our meeting concluded, Mark Binkley at DMH forwarded the following feedback from ATF which should be incorporated to ensure the state is eligible for NICS grant monies.

ATF has concerns with "mentally incapacitated" since it does not mirror the language in 18 U.S.C. § 922 (d)(4) and (g)(4). ATF is not fond of "mental defective" either, but states and ATF have to use it until Congress changes the language.

- If the definitions do not change, SC must strike "and for the purposes of 18 U.S.C. Section 922(d)(4) and (g)(4)" in Section 23-31-1010. As it stands it could appear to be a conflict between state and federal laws, with state law attempting to change federal definitions.
- In Section 23-31-1030 (E), (G), (I), and (K): concerns with "18 U.S.C. § 922 (d)(4) or (g)(4)" and "as a result of adjudication as mentally incapacitated" in the same sentence. Again, mentally incapacitated does not mirror the federal language. ATF suggested the possibility of striking "as mentally incapacitated" and leaving it to read "as a result of adjudication or commitment . . ."
- Additionally, §23-31-1030 (I) uses "mentally incompetent" while (E), (G), and (K) use "mentally incapacitated." Don't know if that is intentional or if it needs to be changed for consistency.

- It is a problem that the civil commitment for drug abuse was dropped. All (d)(4) and (g)(4) categories must have the same opportunity to petition for relief.

N.B. All additions are marked in **bold underlined text**. Deletions are marked in strike through text.

A BILL

TO AMEND SECTION 16-23-30, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO, AMONG OTHER THINGS, INDIVIDUALS WHO ARE PROHIBITED FROM POSSESSING OR ACQUIRING A HANDGUN, SO AS TO ALSO PROHIBIT A PERSON ADJUDICATED MENTALLY INCAPACITATED OR COMMITTED TO A MENTAL INSTITUTION FROM POSSESSING OR ACQUIRING A HANDGUN; TO AMEND SECTION 44-22-100, RELATING TO THE CONFIDENTIALITY OF MENTAL HEALTH COMMITMENT AND TREATMENT RECORDS, SO AS TO AUTHORIZE REPORTING INFORMATION IN THESE RECORDS TO THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) TO BE UTILIZED IN DETERMINING IF A PERSON IS DISQUALIFIED FROM PURCHASING A FIREARM; AND BY ADDING ARTICLE 10, CHAPTER 31, TITLE 23 SO AS TO ESTABLISH A CONFIDENTIAL PROCESS FOR COMPILING AND TRANSMITTING INFORMATION ON PERSONS WHO HAVE BEEN ADJUDICATED MENTALLY INCAPACITATED OR COMMITTED TO A MENTAL INSTITUTION, THEREBY BEING DISQUALIFIED FROM POSSESSING OR ACQUIRING A HANDGUN AND TO REQUIRE THE STATE LAW ENFORCEMENT DIVISION (SLED) TO TRANSMIT THIS INFORMATION TO NICS; TO REQUIRE SLED TO CROSS CHECK THE NAMES SENT TO NICS WITH SLED'S DATABASE FOR CONCEALED WEAPONS PERMITS TO ASCERTAIN IF ANY PERMITS MUST BE REVOKED; AND TO ESTABLISH A JUDICIAL PROCESS FOR PERSONS PROHIBITED FROM POSSESSING FIREARMS, DUE SOLELY TO AN ADJUDICATION AS MENTALLY INCAPACITATED OR COMMITMENT TO A MENTAL INSTITUTION, TO OBTAIN REMOVAL OF THE DISQUALIFICATIONS THAT PROHIBITED THEM FROM POSSESSING FIREARMS.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Section 16-23-30(A)(1) of the 1976 Code, as last amended by 192 of 2008, is further amended to read:

(1) a person who:

- (a) has been convicted of a crime of violence in any court of the United States, the several states, commonwealths, territories, possessions, or the District of Columbia; or who
- (b) is a fugitive from justice; or
- (c) is a habitual drunkard or a drug addict; or who
- (d) has been adjudicated mentally incompetent;
- (e) has been adjudicated mentally incapacitated or committed to a mental institution, both as defined in Section 23-31-1010;"

SECTION 2. Section 44-22-100 of the 1976 Code is amended to read:

"Section 44-22-100. (A) Certificates, applications, records, and reports made for the purpose of this chapter or Chapter 9, Chapter 11, Chapter 13, Article 1 of Chapter 15, Chapter 17, Chapter 20, Chapter 23, Chapter 24, Chapter 25, Chapter 27, or Chapter 52 of this title and directly or indirectly identifying a mentally ill or alcohol and drug abuse patient or former patient or individual whose commitment has been sought must be kept confidential and must not be disclosed unless:

- (1) the individual identified or his guardian consents;
- (2) a court directs that disclosure is necessary for the conduct of proceedings before it and that failure to make the disclosure is contrary to the public interest;
- (3) disclosure is required for research conducted or authorized by the department or the Department of Alcohol and Other Drug Abuse Services and with the consent of the patient;
- (4) disclosure is necessary to cooperate with law enforcement, health, welfare, and other state or federal agencies or when furthering the welfare of the patient or his family; or
- (5) disclosure is necessary to make reports to the Judicial Department or State Law Enforcement Division for the limited purpose of providing notice to the federal National Instant Criminal Background Check System, established pursuant to section 103(d) of the Brady Handgun Violence Prevention Act, 18 U. S. C. Section 922, and in accordance with Article 10, Chapter 31, Title 23; or
- (6) disclosure is necessary to carry out the provisions of this chapter or Chapter 9, Chapter 11, Chapter 13, Article 1 of Chapter 15, Chapter 17, Chapter 20, Chapter 23, Chapter 24, Chapter 25, Chapter 27, or Chapter 52 of this title.

(B) Nothing in this section:

- (1) precludes disclosure, upon proper inquiry, of information as to a patient's current medical condition to members of his family, or the Governor's ombudsman office; or
- (2) requires the release of records of which disclosure is prohibited or regulated by federal law.

(C) A person who violates this section is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned not more than one year, or both."

SECTION 3. Chapter 31, Title 23 of the 1976 Code is amended by adding:

"Article 10

Disqualification from Purchasing and Possessing Firearms

Section 23-31-1010. As used in this article, and for the purposes of 18 U. S. C. Section 922(d)(4) and (g)(4):

(1) 'A person adjudicated as mentally incapacitated' means a person with intellectual disability or a mental illness, condition, or disease who has been determined to be a danger to himself or herself or others or to lack the mental capacity to manage his or her own affairs by a court, board, commission or other lawful authority, which includes a person who has been found to be:

- (a) in need of court-ordered involuntary inpatient or outpatient treatment pursuant to Chapter 17, Chapter 20, or Chapter 24;
- (b) not guilty by reason of insanity pursuant to Section 17-24-40;
- (c) guilty but mentally ill pursuant to Section 17-24-70;
- (d) incapable of standing trial pursuant to Section 44-23-430; or
- (e) an 'incapacitated person' as defined in Section 62-5-101.

(2) 'Committed to a mental institution' means to have been involuntarily committed for treatment by a court pursuant to the provisions of Chapter 17, Chapter 20, or Chapter 24.

(3) 'Mental institution' means a facility or part of a facility used for the treatment of persons involuntarily committed for treatment pursuant to the provisions of Chapter 17, Chapter 20, or Chapter 24.

Section 23-31-1020. (A) The Judicial Department and the Chief of the State Law Enforcement Division, or his designee, shall cooperate with the appropriate court of each county in compiling and maintaining a database containing the names and identifying information of persons who have been adjudicated to be mentally incapacitated or who have been committed to a mental institution. The database must be maintained by the State Law Enforcement Division.

(B) The name and identifying information of any person who has been adjudicated to be mentally incapacitated or who has been committed to a mental institution must be provided to the Judicial Department or the State Law Enforcement Division, or both, for inclusion in the database. Upon receipt of the information, it must be transmitted to the National Instant Criminal Background Check System.

(C) Commencing upon the effective date of this article, the appropriate court of each county shall supply to the Judicial Department or the State Law Enforcement Division, or both, for inclusion in the database the name and available identifying information required by the Judicial Department of all persons who are adjudicated to be mentally incapacitated or who are committed to a mental institution and on an ongoing basis shall continue to provide this information as adjudications and commitments occur. Under no circumstances may the database contain information relating to a person's diagnosis or treatment.

(D) The information within the database provided for in this article must be kept confidential and may only be disclosed to the National Instant Criminal Background Check System established pursuant to Section 103(d) of the Brady Handgun Violence Protection Act, 18 U. S. C. Section 922, or for purposes directly related to that act.

(E) Notwithstanding subsection (D), if a person's name and other identifying information has been added to the database provided for in this article, the State Law Enforcement Division shall review the State concealed weapons permit holders database and if the review reveals that the person possesses a current concealed weapons permit, the permit must be revoked and the sheriff in the county of the permit issuance must be informed of the revocation.

(F) Information within the database provided for in this article which is also contained in court orders or in other state or local agency records is not affected by this section, and these court orders or other state or local agency records may be disclosed in accordance with existing laws and procedures.

Section 23-31-1030. (A) A person who is disqualified from possessing, purchasing, transferring, shipping, or receiving a firearm under 18 U.S.C. Section 922 (d)(4) or (g)(4) or Section 16-23-30(A)(1)(e) or Section 23-31-215, as a result of adjudication as mentally incapacitated or commitment to a mental institution, may petition the court that issued the original order to remove all such disqualifications. The person may file the petition upon the expiration of any current inpatient or outpatient commitment order.

(B) The petition must be accompanied by an authorization and release signed by the petitioner, authorizing disclosure of petitioner's current and past medical records, including records of mental health and substance abuse treatment.

(C) The petitioner shall pay a fifty dollar fee to the court and shall serve his petition on the local Sheriff for the jurisdiction of the court and notice **interested parties** as identified by the court.

(D) At the hearing on the petition, the court shall receive and consider evidence concerning the following:

- (1) the circumstances regarding firearms disqualifications imposed by 18 U.S.C. Section 922(d)(4) and (g)(4) or Section 16-23-30(A)(1)(e) and Section 23-31-215;
- (2) the petitioner's record, which must include, at a minimum, the petitioner's mental health and criminal history records;

- (3) the petitioner's reputation developed through character witness statements, testimony, or other character evidence; **and**
- (4) a current evaluation presented by the petitioner conducted by the Department of Mental Health or a physician licensed in this State specializing in mental health specifically addressing whether due to mental incapacity or mental illness the petitioner poses a threat to the safety of the public or himself or herself.
- (E) In order to protect the public, the probate court shall consider **all** information and records which otherwise are confidential or privileged relevant to the criteria for removing all disqualifications from possessing, purchasing, transferring, shipping, or receiving a firearm under 18 U.S.C. Section 922 (d)(4) or (g)(4) or Section 16-23-30(A)(1)(e) or Section 23-31-215, as a result of adjudication as mentally incapacitated or commitment to a mental institution in this State **is admissible**.
- (F) After all information has been gathered and submitted to the court, the court shall have ninety (90) days to hear the petitioner's case.**
- (G) The hearing must be closed to the public, unless the court finds that the public interest would be better served by conducting the hearing in public. If the court determines the hearing should be open to the public, upon motion by the petitioner, the court may allow for the **in camera** inspection of any mental health records. The court may allow the use of the record but shall restrict it from public disclosure, unless it finds that the public interest would be better served by making the record public.
- (H) Except as provided in subsection (I), the court shall remove all disqualifications from possessing, purchasing, transferring, shipping, or receiving a firearm under 18 U.S.C. Section 922 (d)(4) or (g)(4) or Section 16-23-30(A)(1)(e) or Section 23-31-215 arising from adjudication as mentally incapacitated or commitment to a mental institution if the petitioner proves by a preponderance of the evidence that:
- (1) the petitioner is no longer required to participate in court-ordered inpatient or outpatient psychiatric treatment;
 - (2) the petitioner is determined by the Department of Mental Health or by a physician licensed in this State specializing in mental health to be not likely to act in a manner dangerous to public safety;
 - (3) granting the petitioner relief will not be contrary to the public interest.
- (I) The court when entering its order must make findings as to whether the petitioner will or will not be likely to act in a manner dangerous to public safety and as to whether granting the relief sought will or will not be contrary to the public interest. The court shall include in its order the specific findings of fact on which it bases its decision. The decision of the court may be appealed by either the petitioner or an interested party pursuant to the provisions of Section 14-8-200.
- (J) If a preponderance of the evidence in the record supports a finding that the petitioner has engaged in acts of violence subsequent to the petitioner's last adjudication as mentally incompetent or last commitment to a mental institution, the petitioner bears the burden of proving by clear and convincing evidence that he or she is not likely to act in a manner dangerous to public safety.
- (K) Medical records, psychological reports, and other treatment records which have been submitted to the court or admitted into evidence under this section must be part of the record, but must be sealed and opened only on order of the court.
- (L) The court issuing an order pursuant to this section that removes all disqualifications prohibiting the petitioner from possessing, purchasing, transferring, shipping, or receiving a firearm under 18 U.S.C. Section 922 (d)(4) or (g)(4) or pursuant to Section 16-23-30(A)(1)(e) or Section 23-31-215, arising from adjudication as mentally incapacitated or commitment to a mental institution, shall provide the State Law Enforcement Division with a certified copy of the order. The State Law Enforcement Division promptly shall inform the National Instant Criminal Background Check System of the court action removing these disqualifications."

SECTION 4. This act takes effect upon approval by the Governor.

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Items for consideration from DMH:

I won't be available that afternoon.

For everyone's consideration, there were some comments by some members of the Senate sub-committee at the hearing last week about creating an exception or exemption (my words) from reporting individuals who are the subject of a guardianship or conservatorship, though they are disqualified under the federal definition of "adjudicated as a mental defective" (27 C.F.R. §478.11, below.) Also, the current version of the legislation omits reference to, and reporting of, individuals civilly committed under Title 44, Chapter 52, which is the civil commitment law for chemically dependent persons in need of involuntary treatment (definition re-printed below,) although they are disqualified under the federal definition of "committed to a mental institution."

Even if the legislation creates a State reporting system to NICS which intentionally leaves out particular federal disqualifying adjudications, those individuals would still have disqualifying adjudications under federal law, they just would not likely ever

be included in the NICS data base. One of the concerns voiced by ATF (fully set forth below) about the relief section (Proposed §23-31-1030) is that omitting a category of disqualifying adjudications then does not give such persons a procedure to seek the removal of their disqualification:

- It is a problem that the civil commitment for drug abuse was dropped. All (d)(4) and (g)(4) categories must have the same opportunity to petition for relief.

I think the answer/response to those who desire to exclude from reporting to NICS certain persons who are the subject of a disqualifying adjudication but who are not generally considered dangerous is that the legislation also includes a procedure to enable non-dangerous disqualified individuals to petition for the removal of the federal disqualification. To me, that's the most appropriate way to address the issue, and preferable to going through a process of determining which federally disqualifying adjudications South Carolina will report and which it won't.