

**REPORT OF THE DEPARTMENT OF
STATE POLICE, THE SUPREME COURT OF
VIRGINIA, AND THE DEPARTMENT OF
CRIMINAL JUSTICE SERVICES ON**

**Increasing the
Effectiveness of the
Firearms Background Check**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



HOUSE DOCUMENT NO. 16

**COMMONWEALTH OF VIRGINIA
RICHMOND
1994**



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November 1, 1993

TO: The Honorable L. Douglas Wilder, Governor of Virginia
and Members of the General Assembly

House Joint Resolution 711, agreed to by the 1993 General Assembly, requested the Virginia State Police, in coordination with the Executive Director of the Supreme Court of Virginia and the Department of Criminal Justice Services (DCJS), to study ways to increase the effectiveness of the background check system and identify a greater percentage of persons who are prohibited by federal or state law or regulation from possessing a firearm.

In fulfillment of that request, enclosed for your review and consideration is the document titled *Increasing the Effectiveness of the Firearms Background Check*.

Sincerely,

Superintendent

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PREFACE

Study Group Examining The Capability Of The Virginia Firearms Transaction Program

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EXECUTIVE SUMMARY

This study is the result of House Joint Resolution 711, passed by the 1993 General Assembly, which requested that "the Virginia Department of State Police (DSP), in coordination with the Supreme Court of Virginia, and the Department of Criminal Justice Services, study ways to increase the effectiveness of the firearms background check system and to identify a greater percentage of persons who are prohibited by federal or state law or regulation from possessing a firearm." An interagency group was formed, which also included representation from the Department of Mental Health, Mental Retardation, and Substance Abuse Services.

The goal of the group was to maximize the ability of DSP's Virginia Firearms Transaction Program (VFTP) to identify all prospective purchasers of firearms who are ineligible to purchase, possess, or transport firearms. Two objectives were established: (1) to identify any governmental policies or procedures that have impeded the effectiveness or efficiency of VFTP and suggest ways by which these impediments can be overcome and (2) to develop data bases and procedures that either increase the number of prohibitions enforced by VFTP or increase the effectiveness of the enforcement methods currently in place.

The report is organized according to the three Virginia prohibitions and the ten federal prohibitions that VFTP staff attempt to enforce. These prohibitions have been condensed and are reported as: a person's criminal involvement, use of illegal drugs, or mental impairment, or their status as a dishonorably discharged veteran, an alien illegally in the United States, or as one who has renounced their citizenship.

Each prohibition is described and any problems or issues affecting its enforcement identified. If it was found that the General Assembly could, in some way expand or improve VFTP's performance with respect to a prohibition, a recommendation pursuant to this end was made. Most of the prohibitions rest on federal regulatory authority, however, and because the prohibitions are federal in origin, have been interpreted in certain ways by federal courts, or are somewhat ambiguous in language, there is a limit to the changes that could be recommended. Although issues related to enforcement of each prohibition were presented, no recommendations were issued pertaining to the provisions based on criminal involvement, dishonorable discharge, illegal alien status, or renunciation of citizenship.

Three findings and associated recommendations constitute the substance of the report:

1. Because the federal prohibition based on a person's illegal use of or addiction to drugs is worded in the present tense, VFTP staff would have to prove current use or addiction to drugs before denying the purchase of a firearm on the basis of this prohibition. Until the federal language is modified to allow the use of drug convictions or drug treatment commitments as evidence of unlawful use or drug addiction, or new technology allows VFTP staff to test for these conditions in a

quick, reliable, inexpensive, and non-intrusive manner, no attempt to enforce this prohibition should be made.

2. In order to place Virginia in compliance with the federal prohibition that prevents persons found "mentally defective" from possessing or transporting a firearms, a section should be added to the *Code of Virginia*. Specifically, it shall be unlawful for any person found "legally incompetent" or "legally incapacitated" with respect to firearm possession by a Virginia court, to knowingly or intentionally purchase, possess or transport a firearm." Violation of this section shall result in forfeiture of the firearm, although the restoration of firearm rights is possible upon petition to the court. Implementation of this recommendation will require court clerks to report all findings of legal incompetence or legal incapacitation with respect to firearm possession to the Central Criminal Records Exchange. This information will be stored in a separate, confidential file at CCRE, and accessed only for the purpose of screening prospective purchasers of firearms.
3. In order to place Virginia in compliance with the federal prohibition that prevents persons "committed to a mental institution" from possessing or transporting firearms, the study group recommends that a section be added to the *Code of Virginia*. Specifically, it shall be unlawful for any person who is ordered by the court to undergo involuntary treatment at a mental hospital, to knowingly and intentionally purchase, possess, or transport firearms. Violation of this section shall result in forfeiture of the firearms. The restoration of firearm rights is provided by a "sunset clause" activated on the day a person is released from treatment.

Implementation of this recommendation will require court clerks to report all court ordered commitments to the Central Criminal Records Exchange. This information will be stored in a separate, confidential file at CCRE, and accessed only for the purpose of screening prospective purchasers of firearms.

In lieu of the fact that violation of the federal prohibition(s) based on mental impairment can result in fines and/or imprisonment, the study group decided not to attach penalties to the recommended *Code* Sections. To do so would unfairly make criminals of persons who suffer from mental disabilities not of their own choosing.

BACKGROUND

The *Code of Virginia* requires that persons wishing to purchase, rent, barter for, or otherwise obtain firearms from firearms dealers undergo criminal history record checks.¹ Firearms dealers request these checks via telephone from operators who work for the Virginia Firearms Transaction Program (VFTP), a division of the Virginia State Police (DSP). VFTP is a computer based program that was established in order to simplify and speed up the process of conducting criminal record checks. It began operation on November 1, 1989.

The primary purpose of VFTP is to assess the legal eligibility of prospective firearms purchasers and prohibit all who fail to meet certain legal criteria from obtaining firearms.

Once a firearms dealer has verified the identity and residential status of a prospective purchaser, the dealer calls a VFTP operator and informs her or him of the purchaser's name, sex, race, and date of birth. The VFTP operator enters this information and queries the system as to whether any of it matches information stored in the indexes of the following computer files:

1. Computerized Criminal History File or "CCH" file.

This file consists of the automated criminal history records maintained by DSP's Central Criminal Records Exchange (CCRE).

2. Virginia Crime Information Network File or "VCIN" file.

This file contains information about all warrants filed by Virginia law enforcement officials.

3. National Criminal Information Center or "NCIC" Hot File.

This file is a "wanted" file administered by the Federal Bureau of Investigation (FBI). It contains warrant information from all states, territories, military services, and the District of Columbia.

4. Interstate Identification Index (III) or "Triple I" file.

This file, also administered by the FBI, identifies the state primarily responsible for maintaining a person's criminal history record, if the person has been convicted in more than one state. It contains the names of persons wanted in all states, territories, and the District of Columbia as well as the names of persons classified as fugitives from justice and illegal aliens.

¹Va. Code Ann. §18.2-308.2:2

If the descriptive information matches that of any person listed in the indexes of these files, the matching file is examined to determine if the pending sale should be disapproved. If no match is found, the transaction is approved and the dealer is allowed to proceed with the sale and transfer of the firearm. The average time of a typical VFTP record check is less than two minutes.

In its current configuration, VFTP does a good job of screening out persons who have a criminal history, who have been charged with a felony, or are wanted by law enforcement authorities. It has only a limited capacity for screening out persons who have lost their right to firearm possession for other reasons.

STATE AND FEDERAL CRITERIA PRECLUDING FIREARMS OWNERSHIP OR POSSESSION

VFTP Officials attempt to uphold thirteen state and federal prohibitions on firearm possession. These prohibitions are:

VIRGINIA PROHIBITIONS:

1. "any person acquitted by reason of insanity and committed to the custody of the Commissioner of Mental Health, Mental Retardation, and Substance Abuse Services (MHMRSAS)" may not possess or transport a firearm;²
2. "any person convicted of a felony" may not possess, transport, or carry a firearm;³ and
3. "any person under the age of twenty-nine who was found guilty as a juvenile fifteen years of age or older at the time of the offense of a delinquent act which would be a felony if committed by an adult, whether such conviction or adjudication occurred under the laws of this Commonwealth, or any other state, the District of Columbia, the United States or any territory thereof" may not possess, transport, or carry a firearm.⁴

FEDERAL PROHIBITIONS:

Title I of the Federal Gun Control Act of 1968⁵ states that any person who:

4. is under indictment for a felony offense;

²Va. Code Ann. §18.2-308.1:1

³Va. Code Ann. §18.2-308.2

⁴Va. Code Ann. §18.2-308.2

⁵ 44 C.F.R. §922(d)

5. has been convicted of a felony offense;
6. is a fugitive from justice (are wanted by law enforcement authorities who wish to serve him/her with a felony warrant):
7. has been adjudicated mentally defective;
8. has been committed to a mental institution;
9. has been discharged from the Armed Forces under dishonorable conditions;
10. is an unlawful user of marijuana, or any depressant, stimulant or narcotic drug, or any other controlled substance;
11. is addicted to marijuana, or any depressant, stimulant, or narcotic drug, or any other controlled substance;
12. is an alien illegally in the United States; or
13. has renounced their U.S. citizenship,

is prohibited from receiving, possessing, or transporting any firearm.

Though Virginia prohibitions and federal prohibitions overlap in the area of criminal history and mental impairment, the only prohibition specified by both state and federal law is that based on a person's conviction for a felony.

ORIGINS OF HJR 711: CONCERN WITH VFTP LIMITATIONS

VFTP's capacity to screen out all who fall into these categories is limited. For example, NCIC and VCIN data allow VFTP staff to identify some prospective firearm purchasers as fugitives, illegal aliens, or persons who have been dishonorably discharged, yet these data bases do not contain information on all such persons. The ability to screen out persons with mental problems is also limited. VFTP officials have no way of identifying persons who have been involuntarily committed to mental institutions or persons who are "mentally defective." There are also no established criteria by which "unlawful" or "addicted" drug users can be identified, and no way to identify all who have renounced U.S. citizenship.

HOUSE JOINT RESOLUTION 711

In light of these limitations, the 1993 General Assembly passed House Joint Resolution 711 (see Appendix A). The resolution requested:

"that the Virginia State Police, in coordination with the Executive Director of the Supreme Court of Virginia, and the Department of Criminal Justice Services...study ways to increase the effectiveness of the background check system and identify a greater percentage of persons who are prohibited by federal or state law or regulation from possessing a firearm."

Pursuant to the goal of HJR 711, a six person interagency study group was formed. The group included two persons from DSP (an administrator of VFTP and a research analyst); three persons from DCJS (a legal affairs analyst, the director of the information systems and technology division, and an evaluation specialist); and one person from the Supreme Court of Virginia (SCV's Director of Technical Assistance). Representation from the Department of Mental Health, Mental Retardation, and Substance Abuse Services (MHMRSAS) was also secured so that all facts and concerns about the mental health and drug use prohibitions would be articulated. This adjunct member of the group was MHMRSAS's Director of Forensic Services.

The study group established the following study goal and objectives:

Study Goal: To produce recommendations that, upon implementation, will maximize the ability of VFTP staff to identify all prospective purchasers of firearms who are ineligible from possessing firearms.

Objective 1: To identify any governmental policies or procedures that are impeding the effectiveness or efficiency of VFTP and suggest ways by which these impediments can be overcome.

Objective 2: To develop data bases and procedures that either increase the number of prohibitions enforced by VFTP or increase the effectiveness of the enforcement methods currently in place.

STUDY METHODOLOGY

Study group members contacted officials of various federal and state agencies and programs (MHMRSAS, VFTP, CRE, VCIN, NCIC, Supreme Court, INS, etc.) and discussed the limitations of current VFTP database and the prospects for modifying policies and procedures such that VFTP effectiveness would be improved.

Group members contacted the staff of the "instant record check" systems operating in other states (Delaware, Florida, and Illinois) and informed the study group of any data bases, operational definitions, policies and procedures, etc., that were potentially useful to VFTP.

A special sub-committee was formed to investigate the possibility of developing a database for identifying persons whose mental status made them ineligible, in terms of

federal criteria, for possessing a firearm. This subcommittee also examined the possibility of applying the federal drug use and drug addiction criteria.

As information was presented to the study group members, it was discussed until there was consensus about the significance of the information and the role it would play in the generation of study recommendations. The draft of the final report was circulated among study group members until agreement was reached concerning its content and recommendations.

STRUCTURE OF THE REPORT

The findings and recommendations of the study are organized according to the various state and federal prohibitions. Each of the prohibitions is based on behavior, status, or condition that disqualifies an individual from legally owning or possessing a firearm. The prohibitions cluster into six categories:

- Criminal Involvement
- Mental Impairment
- Use of Illegal Drugs
- Dishonorably Discharged
- Alien Illegally in the U. S.
- Renunciation of U. S. Citizenship

As each prohibition is discussed, (1) the current capability of VFTP to enforce, implement, or administer the prohibition is described, (2) the issues or problems that impede its enforcement are identified, and (3) the prospects of, or recommendations for, improving or ensuring enforcement are presented. Several findings or concerns of the study group are interspersed in the text where appropriate. The exact location of the findings, recommendations, and concerns related to a specific prohibition or a subgrouping of prohibitions is identified in the report *Table of Contents*.

STUDY FINDINGS AND RECOMMENDATIONS

CRIMINAL INVOLVEMENT

PROHIBITION 1:

Persons convicted of Felony Offenses.

Enforcement Capability:

Very good. Over the past few years all CCRE records have been automated. This has increased the speed and efficiency of the record check process.

Problems/Issues:

Although improved, there is still some concern with regard to the timeliness and accuracy of the criminal history information reported to CCRE by the courts. Courts sometimes fail to report dismissed or reduced charges, plea agreements that lead to conviction of misdemeanor rather than a felony, successful expungement of reportable offense convictions, or successful restoration of civil rights.

There has been some uncertainty with regard to the court's responsibility to report arrest and disposition information in deferred adjudication cases. The *Code of Virginia* allows judges to delay conviction in some first time drug possession cases⁶ and some first time property cases.⁷ A judge may issue a finding sufficient for guilt but defer conviction for 12 months. When this occurs, the offender is placed on probation and, if he or she is not convicted for the same offense within this twelve month period, the case is dismissed. If the offender is charged with committing the same crime during this period, a conviction on this charge must be considered as their second conviction for the crime. If he or she is ever charged a fourth time for the offense, the offender - must also be charged as an habitual offender a felony offense which, if convicted, makes him or her ineligible for gun ownership or possession.

Until recently, some courts did not report arrest and disposition information pertaining to deferred adjudication cases unless the offender was actually convicted, that is, arrested and convicted of the same offense while on probation. Thus, VFTP officials were **not** being notified when a person was arrested for these types of offenses and, thus, were often unsure when an arrest placed the offender under indictment for being an habitual offender or whether a reported conviction on one of these charges was the second, third, or fourth such conviction.

To correct this problem, the 1993 General Assembly passed a law requiring the courts to notify CCRE anytime a judge makes a finding sufficient for guilt on a charge that allows deferred adjudications.⁸ This has removed the ambiguity surrounding the disposition of deferred adjudication cases.

Recommendations:

The study group concluded that no recommendation is warranted at this time.

⁶Va. Code Ann. §18.2-251

⁷Va. Code Ann. §19.2-303.2

⁸Va. Code Ann. §18.2-251

PROHIBITION 2:

Juveniles Adjudicated Guilty of Felony-Type Offenses.

Enforcement Capability:

Good, but limited. Pursuant to the law passed by the 1993 General Assembly establishing this prohibition,⁹ only juveniles adjudicated after June 30, 1993, are affected by the law, it will be several years before such persons are old enough to legally purchase a firearm, and thus, several years before VFTP will be called upon to deny such persons from purchasing firearms.

Implementation of the law has been proceeding in an efficient manner. Officials at DSP have sent juvenile arrest and juvenile fingerprint forms to local police departments for use when a juvenile is arrested for a crime that would be a felony if he or she was over 17 years of age. Because of the confidentiality with which juvenile records must be accorded, however, VFTP is notified of an arrest only after the juvenile has been adjudicated guilty of the charge. As of September 30, 1993, the names of 26 juveniles adjudicated guilty of adult felonies have been entered in the confidential CCRE file created for these names.¹⁰

Problems/Issues:

The study group noted that the statute's provision automatically expunging the conviction for an adult felony on the offender's 29th birthday (unless the offender has been convicted for another offense since the conviction) creates some unfairness. The possibility exists that a juvenile adjudicated delinquent for a murder occurring on the day prior to his/her 18th birthday, and committing no other offenses will have his/her record expunged automatically at age 29, while a person convicted of a grand larceny occurring on his/her 18th birthday will have to petition the Governor to restore his right to possess firearms. However unfair, the study group concluded that it had no authority to deal with this disparity.

Recommendations:

The study group concluded that no recommendation regarding this prohibition is warranted at this time.

PROHIBITION 3:

Persons under Indictment for a Felony Offense.

⁹Va. Code Ann. §18.2-308.1

¹⁰Department of State Police, Records Management Division (1993)

Enforcement Capability:

Good. Persons who have been formally charged with a felony offense but who have not, as yet, been convicted, are regularly denied the purchase of firearms. VFTP's capacity to screen out person is dependent upon the speed and accuracy with which the courts notify CCRE of the indictment.

Problems/Issues:

None at this time.

Recommendation:

The study group concluded that no recommendation is warranted at this time.

PROHIBITION 4:

Persons who are Fugitives from Justice.

Enforcement Capability:

Good/Improving. Recent legislation helps to ensure that all arrest warrant information is forwarded to VCIN and to NCIC.

Problems/Issues:

To some extent, HJR 711 was passed because local authorities were failing to notify VCIN personnel each time they issued a warrant, *capias*, or summons. Of particular concern was the failure to report the felony warrants issued by local grand juries. Information from some of these warrants was never entered into VCIN, and consequently, never to NCIC. This restricted VFTP's ability to screen out all persons wanted in connection with "VCIN" felonies.

To correct this problem, the 1993 General Assembly passed legislation requiring law enforcement agencies to enter all warrants into an information system- "VCIN", maintained by DSP. Unfortunately, the legislation directed the clerks of court to forward information concerning unserved warrants to CCRE, when in fact, the law enforcement agency that originally entered the warrant information into VCIN, should also remove all served and unserved warrants from VCIN.¹¹ Despite this technicality, law enforcement agencies are now reporting all warrant information to VCIN.

A second concern relates to the fact that a person's name is placed on NCIC's wanted file anytime he or she is wanted for an extraditable offense. VFTP and local law enforcement

¹¹Va. Code Ann. §19.2-390

officials, however, must deal with the fact that some states do not have the resources to extradite all of their fugitives. As a consequence, police officials are reluctant to enforce out of state warrants especially for lesser crimes. If the police encounter persons named on such warrants, they detain these persons or take them into custody and notify the appropriate state authorities. It is then up to these authorities to send officers to extradite such persons. If authorities from other states are unable to extradite these persons, they are supposed to remove the names of these persons from the NCIC "wanted" file.¹² Of course, there is nothing the Virginia General Assembly can or should do to insure that this is done.

Recommendation 1:

The study group recommends that the 1994 General Assembly change the language of §19.2-390 of the *Code of Virginia* so that VCIN is specified as the unit within DSP to which warrant information must be forwarded. [DSP has submitted proposed legislation that will correct this situation.]

DRUG INVOLVEMENT

PROHIBITION 5:

Any Persons who is an Unlawful User of Controlled Substances.

PROHIBITION 6:

Any Persons who is addicted to Controlled Substances.

Enforcement Capability:

VFTP has no means of detecting prospective firearm purchasers who are unlawful drug users or person who are addicted to controlled substances.

Problems/Issues:

According to a study ordered by the Congress and contracted by the U. S. Department of Justice:

This prohibition or disability "is the most difficult to define." The problem stems from use of the present tense "is" in the wording of the prohibition." The Gun Control Act does not specify how recently the unlawful use must have taken place -- is it within the past 24 hours? The past week? The past month? We have not found any court decisions to help clarify this issue. While BATF is not aware of any court case addressing this issue, they

¹²*NCIC Operations Manual, Part 7, Section 6.4.1*

did indicate that to prosecute someone for this disability there would need to be "evidence of current use."¹³

Given the probability, however slight, that persons can stop their use of, or addiction to controlled substances, a person's status relative to the disability could change on short notice. Persons denied firearms based on drug involvement could, therefore, contest these denials by maintaining that their problem with drugs was in the past. The burden would then be on VFTP officials to prove that they were unlawfully using or were addicted to controlled substances at the time they attempted to purchase firearms. VFTP has no means of providing such evidence at this time.

In addition, federal regulations have been established that safeguard the identity of persons who undergo or have undergone treatment for drug abuse.¹⁴ These regulations prevent the use of substance abuse treatment records as a means by which VFTP could identify drug users. The study group was unable to identify any other legitimate records by which a person's illegal drug use could be verified.

Recommendation 2:

No attempt should be made to utilize the two drug involvement criteria for screening potential firearm purchasers at this time. If the federal statutory language is modified to allow the use of drug convictions or drug treatment commitments as evidence of unlawful use or drug addiction, or if new technology becomes available that tests for these conditions in a quick, reliable, inexpensive, and non-intrusive manner, then the possibility of applying these criteria should be considered at that time.

MENTAL IMPAIRMENT

PROHIBITION 7:

Persons Acquitted by Reason of Insanity and Committed to the Custody of the Commissioner of Mental Health, Mental Retardation, and Substance Abuse Services (MHMRSAS).

Enforcement Capability:

Very Good. This type of disposition is reported to CCRE via court order and entered into the criminal history record file. Only about 30 persons are acquitted by reason of insanity annually, and according to VFTP statistics, only about one of each 66,000 transaction requests involve persons who have been so adjudicated.

¹³*Identifying Persons, Other Than Felons, Ineligible to Purchase Firearms: A Feasibility Study*, U. S. Department of Justice, May 1990, Pg. 16.

¹⁴*Federal Guidelines for Confidentiality in Drug Abuse Programs*, 42 CFR 2.6 et seq (Part 2).

Problems/Issues:

There are no problems or issues related to the enforcement of this prohibition at this time. Most of these people spend long periods confined to state treatment facilities and when released, rarely attempt to purchase firearms.

Recommendation:

The study group concluded that no recommendation is warranted with regard to this prohibition.

PROHIBITION 8:

Adjudicated Mentally Defective.

Enforcement Capability:

None at present.

Problems/Issues:

Unlike the federal government, Virginia does not permit its judges to find persons "mentally defective." The *Code* does permit judges to find persons "legally incompetent," however, and this is usually the finding when a person's mental condition renders him incapable of taking care of his person or handling and managing his estate."¹⁵ Such a ruling involves a full due process hearing in the Circuit Court, a specific finding of "incompetence" after all other remedies have been explored and exhausted, and the imposition of specific disabilities.

The exact number of persons found "legally incompetent" is not known. The minimum number, however, is approximately 700 per year. This estimate, obtained from the Virginia State Board of Elections, is based on the number of persons who annually lose their voting rights on the basis of this prohibition. Since a person has to be registered to vote before this registration can be canceled, the 700 figure is a very conservative estimate. Most persons in this category are unlikely to vote and, therefore, unlikely to register to vote. The 700 figure is also dependent on the reliability of the courts to report these findings to the Board of Elections. In any event, the total number of persons found "legally incompetent" each year is much larger than 700.

The court also has authority to find persons "legally incapacitated."¹⁶ This finding results when a person's mental or physical condition renders them unable to responsibly perform a specific (or a set of specific) tasks, functions, or behaviors. Such a finding may be

¹⁵Va. Code Ann. §37.1-128.02

¹⁶Va. Code Ann. §37.1-128.1

rendered, for example, when someone is unable to handle their financial affairs, drive a car, or handle a firearm. Judges are required to find such persons mentally incapable of performing specific behaviors and describe these behaviors in the court order.

Because a ruling of mental incapacitation is less intrusive or restrictive than a ruling of mental incompetence, judges prefer to render the former whenever possible.

The study group decided that, to comply with federal law, a *Code* section should be added that makes it illegal for any person found by the court to be mentally incompetent, or mentally incapacitated in terms of their ability to handle firearms, to purchase, possess, or transport firearms. No state-imposed penalty should be mandated for violating of this section, however, for it would serve to establish mentally ill persons as criminals. Federal law already specifies fines and prison terms for violation of federal prohibitions, and the study group did not want to perpetuate a penalty system that might further stigmatize persons suffering from mental illness.

Since findings of mental incompetence or incapacitation are issued via court orders, the study group also decided that the courts should be instructed to forward all such orders to CCRE.

Two record-keeping concerns quickly arose. First, DSP does not currently have authority to retain confidential mental health records, and second, any mental health records sent to CCRE would not be verifiable through the use of fingerprint identification techniques. Since the court findings are not findings of criminality, persons subject to these findings are not to be treated as such. They are not fingerprinted nor are they asked to supply the full range of identifier information required of convicted offenders.

In lieu of the above, the study group decided that the identity of persons found incompetent or incapacitated in terms of gun possession should be placed in a separate, confidential file at CCRE. This file would be accessed only by VFTP staff conducting record checks pursuant to firearm transactions. [DSP expressed reservations in maintaining non-verifiable data within CCRE.]

Recommendation 3:

§18.2-303.1:2 should be added to the *Code of Virginia* that reads as follows:

- A. It shall be unlawful for any person who has been adjudicated incompetent to §37.1-128.01, or found to be incapacitated with respect to firearms possession pursuant to §37.1-128.04, to knowingly or intentionally purchase, possess, or transport any firearm.
- B. Any firearm possessed or transported in violation of this section shall be forfeited to the Commonwealth and disposed of as provided in §18.2-310.

- C. Any person whose competence or capacity has been restored pursuant to §37.1-134.1 may petition the circuit court in the county or city in which he resides for a permit to possess or carry a firearm. The court may, in its discretion and for good cause shown, grant the petition and issue a permit, in which event the provision of this section shall not apply.

[See Attachment 1 for a complete version of the proposed section.]

§37.1-129 should be amended by adding a second paragraph (B.) that reads as follows:

- B. The Clerk shall forward to the Central Criminal Records Exchange, on forms provided by the exchange for purposes of implementing §18.2-308.2:2, an abstract of findings of incompetence under §37.1-128.02, a specific finding of incapacity to possess a firearm under §37.1-128.1, or a restoration of competency or capacity under §37.1-134.1, to include date of entry of order and identifying information on the individual, which information shall be kept confidential in a separate file and used only for purposes of such record check.

[See Attachment 2 for a complete version of the proposed section.]

PROHIBITION 9:

Persons committed to Mental Institutions.

Enforcement Capability:

None at this time.

Problems/Issues:

Study group members expressed the following concerns about this prohibition.

1. That any policy screening out persons committed for the treatment of mental illness would unduly label all persons with mental problems as incapable of owning firearms.
2. That such a policy would dissuade some persons who need inpatient care from seeking such care. Some persons are already resistant to mental hospitalization because of its' stigma.
3. That such a policy would deny state firearm rights to persons who, unlike those who are found mentally incompetent, are rarely, if ever, deprived of state-based civil rights. Persons "committed" to mental hospitals do not

lose their civil rights by virtue of being committed,¹⁷ nor does the act of commitment by itself raise a presumption of their mental incapacity.¹⁸ These facts raise two questions: (1) Why should commitment result in a denial of state firearm rights when no other state rights are denied on this basis?, and (2) if committed persons are denied their firearm rights, on what basis could or should these rights be restored?

This raises a question concerning the procedures and criteria used to restore the firearm rights of released persons. Restoration of such rights is complicated by the fact that persons released from commitment are not declared "cured of mental illness," but are simply found "no longer in need of hospitalization." Thus, they have no obvious grounds on which to seek restoration of their rights. The study group decided, therefore, that if a prohibition based on "commitment" is created, a mechanism for the restoration of firearm rights must also be created - one that treats persons denied firearm rights under this prohibition in similar fashion to persons who have had these rights denied on the basis of other prohibitions.

One means to accomplish this would be through a "sunset" clause in the legislation that provides for automatic restoration if the person, during a specified period following release, does not violate the law or act out in a way that suggests a possible need for further commitment. Any criteria for determining the latter would be left to mental health professionals. It also might be set up such that, after such a period, the person would simply be granted the right to petition the court for restoration.

Recommendation 4:

§18.2-308.1.3 should be enacted into the *Code of Virginia*, as follows:

- A. It shall be unlawful for any person who, pursuant to §37.1-67.3, is ordered by the court to undergo involuntary treatment at a mental hospital to knowingly or intentionally purchase, possess or transport a firearm.
- B. Any firearm possessed or transported in violation of this section shall be forfeited to the Commonwealth and disposed of as provided in §18.2-310.
- C. Any person prohibited from purchasing, possessing or transporting firearms under this subsection, and who has for a specified period following release, behaved in a manner that neither violates the law, nor poses a threat to themselves or others, may petition the circuit court in the county or city in which he resides for a permit to possess or carry a firearm. The court may, in its discretion and for good cause shown, grant the petition and issue a permit, in which event the provision of this section shall not apply.

¹⁷Va. Code Ann. §37.1-84.1

¹⁸Va. Code Ann. §37.1-87

[See Attachment 3 for a complete version of the proposed section.]

A fourth concern about this prohibition concerns its' vagueness with respect to who is doing the committing. States vary in terms of who can commit persons for mental treatment and what procedures must be followed, and thus, it is not clear who or who is not subject to this prohibition. The researchers who conducted the feasibility study cited earlier (page 16) examined this question and concluded that, operationally, "...BATF has interpreted the language of the prohibition such that only persons committed to a mental institution by a court, authority, commission, or board are ineligible to purchase firearms."

Given this interpretation, the study group concluded that the only Virginia "commitments" that would be recognized as such by federal law would be those issued by the various district and circuit courts in instances when the commitment is clearly involuntary. Such commitments, referred to as commitments to the public health system, number approximately 5,000 per year, and are authorized under the *Code of Virginia*.¹⁹

In order to comply with federal law, therefore, the study group decided that all persons involuntarily committed to a mental hospital by the court should be prohibited from purchasing, possessing, or transporting firearms. This would be the least restrictive means of applying this prohibition at this time.

Since involuntary commitments are issued via court orders, the study group also decided that the courts should be instructed to forward all such orders to CCRE.

Two record-keeping concerns quickly arose. First, DSP does not currently have authority to retain confidential mental health records, and second, any mental health records sent to CCRE would not be verifiable through the use of fingerprint identification techniques. Since the court findings are not findings of criminality, persons subject to these findings are not to be treated as such. They are not fingerprinted nor are they asked to supply the full range of identifier information required of convicted offenders.

In lieu of the above, the study group decided that the identity of persons committed by the court for the treatment of mental illness should be placed in a separate, confidential file at CCRE. This file would be accessed only by VFTP staff conducting record checks pursuant to firearm transactions.

Recommendation 5:

Additionally, the following language be added as the second sentence of the ninth paragraph of §37.1-67.3 of the *Code of Virginia*:

The clerk shall certify to the Central Criminal Records Exchange, on forms provided by the exchange, a copy of any order for involuntary commitment at a hospital for purposes relating to the firearms transaction record check authorized

¹⁹Va. Code Ann. §37.1-67.3

by §18.2-308.2:2., which information shall be kept confidential and used only for purposes of such record check.

[See Attachment 4 for a complete version of the amended section.]

PROHIBITION 10:

Persons who have been Dishonorably Discharged.

Enforcement Capability:

Very good. VFTP staff currently screen out all persons listed by NCIC as being dishonorably discharged. Their capability, therefore, is dependent upon the accuracy and completeness of NCIC data - data that is considered good.

Problems/Issues:

The military is currently implementing a new policy that classifies discharges based on lesser violation of the Uniform Code of Military Justice (e.g. homosexual behavior, conviction on charges of petit larceny, chronic drunkenness, being consistently AWOL, etc.), as "less-than-honorable" discharges or as "uncharacterized" discharges. Historically, most of these were classified as "dishonorable." The policy should improve the effectiveness of this prohibition, because it increases the likelihood that a persons prohibited from purchasing firearms because of it, actually constitute a threat to public safety.

Recommendation:

None are warranted at this time.

PROHIBITION 11:

Illegal Alien Status

Enforcement Capability:

Limited. Only those aliens convicted of a felony are screened out at the present time. There is no means of identifying aliens who have overstayed their visa, been found in violation of Immigration and Naturalization Service (INS) rules and are awaiting deportation, or have entered the country illegally.

Problems/Issues:

This is an area over which the General Assembly has little or no control. Improvement depends primarily on INS or FBI initiatives that increase knowledge about the location and identity of aliens who are in violation of some provision of their visas.

Some improvement may result from two recent administrative orders issued by the Department of Corrections and the Supreme Court of Virginia. These orders require probation and parole officers as well as the clerks of district courts to notify INS of the identity of any convicted person whom they suspect as being an alien. It is unclear if these reports will increase the number of illegal aliens listed on the NCIC file. This depends on whether INS is able to verify these persons as "illegal" aliens.

The legal status of an alien can change from time to time. For example, an alien who has overstayed his/her visa may obtain a visa that grants an extension of their stay. Or, an alien who has entered the U.S. clandestinely can change his/her legal status by marrying a U. S. citizens. Furthermore, because aliens are accorded all "due process" granted by the Constitution, verification of their legal status is often difficult and time consuming.

Recommendation:

None is warranted at this time.

PROHIBITION 12:

Renunciation of U.S.Citizenship.

Enforcement Capability:

Good.

Problems/Issues:

Renunciation is valid only when it is conveyed voluntarily and directly to a U. S. diplomat or consular officer in a foreign state, or, when it is conveyed, in the U.S. during wartime, to an officer designated by the Attorney General. Renunciations are very rare. To date, no one has been prohibited from purchasing a firearm based on their renunciation of citizenship.

The names of persons who have renounced U.S. citizenship are forwarded by the U.S. Department of State to NCIC, and NCIC makes this information readily available to the staff of VFTP.

ADDITIONAL CONCERNS

It is suggested that a task force should be formed to investigate the costs and benefits of adding more populations to those currently prohibited from purchasing, possessing, or transporting firearms. This task force should be composed of representatives from the law enforcement, judicial, mental health, and drug treatment fields. The group should also address the disparity between federal and state prohibitions and communicate their conclusions on these matters to BATF. The recommendations of the task force may increase the effectiveness of VFTP and all "instant record check" systems that will be established in the future.

APPENDIX A

GENERAL ASSEMBLY OF VIRGINIA--1993 SESSION

HOUSE JOINT RESOLUTION NO. 711

Requesting the Virginia State Police, in coordination with the Executive Director of the Supreme Court of Virginia and the Department of Criminal Justice Services, to study improvements to the system of background checks required for the sale of firearms.

Agreed to by the House of Delegates, February 18, 1993

Agreed to by the Senate, February 16, 1993

WHEREAS, in 1989 the Commonwealth of Virginia established procedures to run a background check on persons seeking to purchase certain firearms; and

WHEREAS, the background check, as currently employed, will identify only those potential purchasers who have a criminal record or who have been acquitted of a criminal charge by reason of insanity; and

WHEREAS, other persons, such as illegal aliens, fugitives, persons discharged from the Armed Forces with a dishonorable discharge, persons who have renounced their citizenship, drug addicts and mental incompetents, are prohibited by federal law from possessing a firearm; and

WHEREAS, the current background check program has been effective, but the availability of additional information could increase the program's effectiveness; and

WHEREAS, a more thorough screening of potential firearms purchasers could result in a reduction of the number of guns that are purchased in Virginia for illicit transport to and trade in other states; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Virginia State Police, in coordination with the Executive Director of the Supreme Court of Virginia and the Department of Criminal Justice Services (DCJS), be hereby requested to study ways to increase the effectiveness of the background check system and identify a greater percentage of persons who are prohibited by federal or state law or regulation from possessing a firearm.

The State Police, the Supreme Court and DCJS shall complete their work in time to submit their findings and recommendations to the Governor and the 1994 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

ATTACHMENT 1

PROPOSED BILL DRAFT

A bill to enact §18.2-303.1:2 of the *Code of Virginia*, relating to persons who have been adjudicated incompetent to knowingly or intentionally purchase, possess, or transport any firearm.

Be it enacted by the General Assembly of Virginia that §18.2-303. of the *Code of Virginia* be enacted as follows:

§18.2-303.1:2 Possession of Firearm by Persons Adjudicated Incompetent.

A. It shall be unlawful for any person who has been adjudicated incompetent to §37.1-128.01, or found to be incapacitated with respect to firearms possession pursuant to §37.1-128.04, to knowingly or intentionally purchase, possess, or transport any firearm.

B. Any firearm possessed or transported in violation of this section shall be forfeited to the Commonwealth and disposed of as provided in §18.2-310.

C. Any person whose competence or capacity has been restored pursuant to §37.1-134.1 may petition the circuit court in the county or city in which he resides for a permit to possess or carry a firearm. The court may, in its discretion and for good cause shown, grant the petition and issue a permit, in which event the provision of this section shall not apply.

ATTACHMENT 2

PROPOSED BILL DRAFT

A bill to amend and reenact §37.1-129 of the *Code of Virginia*, relating persons who have been adjudicated incompetent and notification of the fact to the Central Criminal Records Exchange.

Be it enacted by the General Assembly of Virginia that §37.1-129 of the *Code of Virginia* be amended and reenacted as follows:

§37.1.-129 Clerk to index findings of legal incompetency or restoration of competency; notice to commissioner and Secretary of Board of Elections. - A copy of the findings of the court, if the person be found to be legally incompetent, or restored to competency, shall be filed by the judge with the clerk of the court of the county or city in which deeds are admitted to record. The clerk shall properly index the same in the index to deed books by reference to the order book and page whereon such order is spread and shall immediately notify the Commissioner in accordance with §37.1-147, and the Secretary of the State Board of Elections with such information as required by §24.1-26.1 of this Code. (Code 1950, §37.1-136.2; 1954, c. 668; 1968, c. 477; 1976, c. 671.)

B. The Clerk shall forward to the Central Criminal Records Exchange, on forms provided by the exchange for purposes of implementing §18.2-308.2:2, an abstract of findings of incompetence under §37.1-128.02, a specific finding of incapacity to possess a firearm under §37.1-128.1, or a restoration of competency or capacity under §37.1-134.1, to include date of entry of order and identifying information on the individual, which information shall be kept confidential in a separate file and used only for purposes of such record check.

ATTACHMENT 3

PROPOSED BILL DRAFT

A bill to enact §18.2-308.1.3 of the *Code of Virginia*, relating to persons who have been involuntarily treated at a mental hospital from knowingly or intentionally purchasing, possessing, or transporting a firearm.

Be it enacted by the General Assembly of Virginia that §18.2.-308.1:3 of the *Code of Virginia* be enacted as follows:

§ 18.2-308.1:3. Denial of Firearms for persons who have been Involuntarily Treated at a Mental Hospital. A. It shall be unlawful for any person who, pursuant to §37.1.-67.3, is ordered by the court to undergo involuntary treatment at a mental hospital to knowingly or intentionally purchase, possess or transport a firearm.

B. Any firearm possessed or transported in violation of this section shall be forfeited to the Commonwealth and disposed of as provided in §18.2-310.

C. Any person prohibited from purchasing, possessing or transporting firearms under this subsection, and who has for a specified period following release, behaved in a manner that neither violates the law, nor poses a threat to themselves or others, may petition the circuit court in the county or city in which he resides for a permit to possess or carry a firearm. The court may, in its discretion and for good cause shown, grant the petition and issue a permit, in which event the provision of this section shall not apply.

ATTACHMENT 4

PROPOSED BILL DRAFT

A bill to amend and reenact §37.1.-67.3 of the *Code Of Virginia*, relating to courts providing the Central Criminal Record Exchange, copies of involuntary commitments.

Be it enacted by the General Assembly of Virginia that §37.1- 67.3 of the *Code of Virginia* to amended and reenacted as follows:

§37.1.-67.3. Same; involuntary admission and treatment. - If a person is incapable of accepting or unwilling to accept voluntary admission and treatment, the judge shall inform such person of his right to a commitment hearing and right to counsel. The judge shall ascertain if a person whose admission is sought is represented by counsel, and if he is not represented by counsel, the judge shall appoint an attorney-at-law to represent him. However, if such person requests an opportunity to employ counsel, the court shall give him a reasonable opportunity to employ counsel at his own expense. The commitment hearing shall be held within forty-eight hours of the execution of the detention order as provided for in §37.1-67.1; however, if the forty-eight hour period herein specified terminates on a Saturday, Sunday or a legal holiday, such person may be detained, as herein provided, until the next day which is not a Saturday, Sunday or legal holiday, but in no event may he be detained for a period longer than seventy-two hours or ninety-six hours when such legal holiday occurs on a Monday or Friday. A Saturday, Sunday, or legal holiday shall be deemed to include the time period up to 8:00 a.m., of the next day which is not a Saturday, Sunday, or legal holiday. Prior to such hearing, the judge shall fully inform such person of the basis for this detention, the standard upon which he may be detained, the right of appeal from such hearing to the circuit court, the right to jury trial on appeal, and the place, date, and time of such hearing.

If such person is incapable of accepting or unwilling to accept voluntary admission and treatment as provided for in §37.1-67.2, a commitment hearing shall be scheduled as soon as possible, allowing the person who is the subject of the hearing an opportunity to prepare any defenses which he may have, obtain independent evaluation and expert opinion at his own expense, and summons other witnesses.

To the extent possible, during the commitment hearing, the attorney for the person whose admission is sought shall interview his client, the petitioner, the examiner described below, and any other material witnesses. He shall also examine all relevant diagnostic and other reports, present evidence and witnesses, if any on his client's behalf, and otherwise actively represent his client in the proceedings.

The petitioner shall be given adequate notice of the place, date, and time of the commitment hearing. The petitioner shall be entitled to retain counsel at his own expense, to be present during the hearing, and to testify and present evidence.

Notwithstanding the above, the judge shall require a examination of such person by a psychiatrist who is licensed in Virginia or a clinical psychologist who is licensed in Virginia or, if such a psychiatrist or clinical psychologist is not available, a physician or psychologist who is licensed in Virginia and who is qualified in the diagnosis of mental illness. All such examinations shall be conducted in private. The judge shall summons the examiner who shall certify that he has personally examined the individual and has probable cause to believe that he is or is not mentally ill, that such person does or does not present an imminent danger to himself or others, and requires or does not require involuntary hospitalization. The judge, in his discretion, may accept written certification of the examiner's findings if the examination has been personally made within the preceding five days and if there is no objection to the acceptance of such written certification by the person or his attorney. The judge shall not render any decision on the petition until such examiner has presented his report either orally or in writing.

Except as otherwise provided in this section, prior to making any adjudication that such person is mentally ill and shall be confined to an institution pursuant to this section, the judge shall request from the community services board which serves the political subdivision where the person resides a prescreening report, and the board or clinic shall provide such a person resides a prescreening report, and the board or clinic shall provide such a report within forty-eight hours or within seventy-two hours if the forty-eight period terminates on a Saturday, Sunday or legal holiday. The report shall state whether the person is deemed to be mentally ill, an imminent danger to himself or others and in need of involuntary hospitalization, whether there is no less restrictive alternative to institutional confinement and what the recommendations are for that person's care and treatment. If the prescreening report is not received by the judge within the specified period, the judge shall proceed to dispose of the case without the board's or clinic's recommendation. In the case of a person sentenced and committed to the Department of Corrections and who has been examined by a psychiatrist or clinical psychologist, the judge may proceed to adjudicate whether the person is mentally ill and should be confined pursuant to this section without requesting a prescreening report from the community services board.

After observing the person and obtaining the necessary positive certification and other relevant evidence, if the judge finds specifically that the person (i) presents an imminent danger to himself or others as a result of mental illness, or (ii) has been proven to be so seriously mentally ill as to be substantially unable to care for himself, and (iii) that alternatives to involuntary confinement and treatment have been investigated and deemed unsuitable and there is no less restrictive alternative to institutional confinement and treatment, the judge shall by written order and specific finding so certify and order that the person be placed in a hospital or other facility for a period of treatment not to exceed 180 days from the date of the court order. Such placement shall be in a hospital or other facility designated by the community services board which serves the political subdivision in which the person was examined as provided in this section. If the community services board does not provide a placement recommendation at the commitment hearing, the person shall be placed in a hospital or other facility designated by the Commissioner.

After observing the person and obtaining the necessary positive certification and other relevant evidence, if the judge finds specifically that the person (i) presents an imminent danger to himself or others as a result of mental illness, or (ii) has been proven to be so seriously mentally ill as to be substantially unable to care for himself, and (iii) that less restrictive alternatives to institutional confinement and treatment have been investigated and are deemed suitable, the judge shall order outpatient treatment, day treatment in a hospital, night treatment in a hospital, outpatient involuntary treatment with anti-psychotic medication pursuant to §37.1-134.5, or such other appropriate course of treatment as may be necessary to meet the needs of the individual. Upon failure of the patient to adhere to the terms of the outpatient treatment, the judge may revoke the same and, upon notice to the patient and after a commitment hearing, order involuntary commitment for treatment at a hospital. The community services board which serves the political subdivision in which the person resides shall recommend a specific course of treatment and programs for provision of such treatment. The community services board shall monitor the person's compliance with such treatment as may be ordered by the court under this section, and the person's failure to comply with involuntary outpatient treatment as ordered by the court may be admitted into evidence in subsequent hearings held pursuant to §37.1-67.2 or this section.

The judge shall also order that the relevant medical records of such person be released to the facility or program in which he is placed upon request of the treating physician or director of the facility or program. Except as provided in this section, the relevant medical records, reports and court documents pertaining to the hearings provided for in this section and §37.1-67.2 shall be kept confidential by the court if so requested by such person, or his counsel, with access provided only upon court order for good cause shown. Such records, reports, and documents shall not be subject to the Virginia Freedom of Information Act (§2.1-340 et seq.). Such person shall be released at the expiration of 180 days unless involuntarily committed by further petition and order of a court as provided herein or such person makes application for treatment on a voluntary basis as provided for in §37.1-65.

Any person committed pursuant to this section for whom a subsequent commitment order is being sought prior to the expiration of the 180-day commitment period shall not be entitled to a separate preliminary hearing prior to such commitment hearing. The clerk shall certify to the Central Criminal Records Exchange, on forms provided by the exchange, a copy of any order for involuntary commitment at a hospital for purposes relating to the firearms transaction record check authorized by §18.2-308.2:2, which information shall be kept confidential and used only for purposes of such record check. The procedures required by §37.1-67.2 or by this section shall be followed at such commitment hearing. The judge shall render a decision on such petition after the appointed examiner has presented his report, either orally or in writing, and after the community services board which serves the political subdivision where the person resides had presented a prescreening report, either orally or in writing, with recommendations for that person's placement, care and treatment. (1976, c. 671; 1979, c.426; 1980, cc.

166,582; 1982, c. 471; 1984, c. 277; 1985, c. 261; 1986, cc. 349, 609; 1988, c. 225; 1989, c. 716; 1990, cc. 59, 60, 728, 798; 1991, c. 636; 1992, c. 752.)