Restoring Federal Firearms Rights for Wisconsin Clients with a History of Involuntary Civil Commitment, by Sean L Harrington

Working draft (as of 28 February 2025)

With this Comment, I hope to provide practitioners with foundational principles and a viable strategy under Wis. Stat. § 941.29(9), *et. seq.,* § 51.20(13)(cv)(2), *et seq.,* and 18 U.S.C. § 925(c) for restoring the right to possess firearms under Federal law for Wisconsin clients who, in their past, have been involuntarily committed to a mental institution or who have been adjudicated a mental incompetent in Wisconsin or another state. The procedural mechanism for this is a Petition for Relief from Disability (RFD) under Chapter 51.

Presumably, you're reading this Comment because you have a client you believe is not likely to act in a manner dangerous to public safety and that a grant of the petition would not be contrary to the public interest, as required by a preponderance of the evidence under the statute. If your client's recent and relevant mental health history give you any doubts about meeting this low standard, perhaps this is a case to pass on for now. If, on the other hand, the cause for doubt is attributable to your particular judge's real or perceived subjectivities regarding your client's situation (or firearm rights, in general), the client should be advised of the challenges of the highly deferential abuse-of-discretion standard of review on appeal.[1]

De novo review on appeal is available if a trial court misconstrues or misapplies the law. And because of the convoluted interplay of state and Federal law, there is significant risk of an undesirable outcome with this petition type. Accordingly, this Comment discusses the procedural path, rather than what may be required to meet the burden of proof under the statute. Indeed, if you have a client in this situation, there's a high probability that the circuit court judge

[1] This may be so, notwithstanding that Wisconsin's apparent non-compliance with Section 105 of the 2007 NICS Improvement Amendments Act (NIAA, discussed in detail, below), which requires a procedure for a petitioner whose relief application is denied to "file a petition with the State court of appropriate jurisdiction for a *de novo* judicial review of the denial." Wisconsin's claim of conformity to the NIAA for receiving NARIP grants may serve as a basis to assert that the standard of review on appeal should be *de novo.*

hearing the case will have very little experience or knowledge as to how (or even whether) to proceed, and this is where you step into the delicate role of educating the court.[2]

The first place to start is by informing the court of its jurisdiction. A short jurisdictional statement prefacing the Petition will inform the court that the petitioner is a citizen of county, that the circuit court is the proper forum and venue under Wisconsin Statutes §§ 51.20 and 941.29(9), and that, pursuant to the BATF's certification of Wisconsin's Relief from Disability program under Section 105 of the NIAA (discussed below), the Wisconsin circuit court has subject matter jurisdiction to grant the relief sought under **both** state **and** Federal law.

Federal law prohibits anyone "who has been adjudicated as a mental defective or who has been committed to a mental institution" from possessing firearms. 18 U.S.C. § 922(g)(4). The Bureau of Alcohol, Tobacco, and Firearms ("ATF") has clarified through regulation that this prohibitor covers the following circumstances and categories of persons:

> A determination by a court, board, commission or other lawful authority that a person is a danger to himself or others or lacks capacity to contract or manage his affairs because of marked subnormal intelligence, or mental illness, incompetency, condition or disease.[3] The definition includes a person found to be insane by a court in a criminal case, or a person found incompetent to stand trial or found not guilty

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[2] The ABA Model Rules of Prof'l Conduct inform us that our various roles include advisor [to our client]; advocate (to zealously asserts the client's position under the rules of the adversary system); as negotiator (to seek a result advantageous to the client but consistent with requirements of honest dealings with others); and as evaluator (to examine the client's legal affairs and reporting about them to the client or to others). Premable, ABA Model Rules. The Model Rules, perhaps, don't give sufficient emphasis to the role that lawyers fulfill in educating the court on the law as it applies to the unique facts of our clients. Just as no lawyer knows every aspect of the law, no judge knows every aspect, and they depend on the skilled lawyers who appear before them to educate them in good faith —otherwise, that task falls to the judge's law clerk.

[3] *N.B.,* "Mental defective" does not include a person whose adjudication or commitment was imposed by a federal department or agency, and: the adjudication or commitment has been set aside or expunged, or the person has otherwise been fully released or discharged from all mandatory treatment, supervision or monitoring; the person has been found by a court, board, commission or other lawful authority to no longer suffer from the mental health condition that was the basis of the adjudication or commitment, or has otherwise been found to be rehabilitated through any procedure available under law; or the adjudication or commitment is based solely on a medical finding of disability, without an opportunity for a hearing by a court, board, commission or other lawful authority, and the person has not been adjudicated as a mental defective consistent with 18 U.S.C. 922(g)(4), except that nothing in this section or any other provision of law shall prevent a federal department or agency from providing to the Attorney General any record demonstrating that a person was adjudicated to be not guilty by reason of insanity, or based on lack of mental responsibility, or found incompetent to stand trial, in any criminal case or under the Uniform Code of Military Justice.

by reason of lack of mental responsibility pursuant to articles 50a and 76b of the Uniform Code of Military Justice.[4]

A formal commitment of a person to a mental institution[5] by a court, board, commission or other lawful authority with attendant due process safeguards. 27 C.F.R. § 478.11. This includes commitment to a mental institution involuntarily, commitment for mental defectiveness or mental illness or commitment for other reasons, such as for drug use, but does not include a person in a mental institution for observation or a voluntary admission to a mental institution. *N.B.,* **Federal** agencies that conduct mental health adjudications on or after February 7, 2008 must provide both oral and written notice to the individual at the commencement of the adjudication process regarding: (1) that such adjudication, when final, will prohibit the individual from purchasing, possessing, receiving, shipping or transporting a firearm or ammunition; (2) the penalties imposed for unlawful possession, receipt, shipment or transportation of a firearm; and (3) information about the availability of relief from the disabilities imposed by federal laws with respect to the acquisition, receipt, transfer, shipment, transportation or possession of firearms. 34 § 40911(c)(3).[6]

Prior to the regulatory decree, at least one court had defined the term mental defective narrowly as one who "never possessed a normal degree of intellectual capacity," excluding persons with "faculties which were originally normal [but which] have been impaired by mental disease."[7] But, now that the *Chevron* doctrine, which required Federal courts to defer to an agency interpretation of law, has been overturned under the recent Loper Bright Enters. V. Raimondo,[8] decision, perhaps the regulatory interpretation can be questioned by asserting that the

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[4] In 2014, the ATF introduced a proposed Rule amending the definition of "adjudicated as a mental defective" in 27 CFR 478.11 to clarify that persons found not guilty by reason of mental disease or defect are included in the definition of "adjudicated as a mental defective." The Rule was not made final.

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

[6] Since ignorance of the law is almost never a defense, it seems to me a violation of this provision probably can't be raised as a defense by one charged with possessing firearms. What is certain is that a violation of this provision shall not result in the person's name being removed from the National Instant Criminal Background Check System. 34 § 40911(c)(4), which makes the notice provision seemingly illusory.

[7] United States v. Hansel, 474 F.2d 1120, 1124 (8th Cir. 1973). *And see* United States v. Vertz, 102 F. Supp. 2d 787, 788 (W.D. Mich. 2000) (rejecting Hansel's definition in light of regulatory interpretation).

[8] 603 U.S. 369 (2024)

Administrative Procedure Act requires a court to exercise its independent judgment in deciding whether an agency has acted within its statutory authority to fashion such an interpretation.

But, there is a much easier path than challenging an Agency's definition of mental defective or civil commitment: a mental defective or person civilly committed as defined under 18 U.S.C. § 922(g)(4) does not include a person who has been granted relief through a qualifying federal or state relief from disability ("RFP") program as authorized by the 2007 NICS Improvement Amendments Act (NIAA). Accordingly, a Wisconsin resident can regain firearm rights if granted relief by the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATF) or under an approved state program that meets specified standards outlined in the NIAA.[9]

Unfortunately, Congress revoked funding for the BATF's statutory mandate to review and grant such petitions.[10] So that leaves us only a qualifying state RFP program. Yet, take some solace that your Wisconsin client resides in a state that has a qualifying RFP program. In some states that do not (*e.g.*, Washington), a prior civil commitment —no matter how long ago— currently operates as a **lifetime** revocation of the Second Amendment right to possess firearms. *See* Mai v. United States, 974 F.3d 1082 (9th Cir., 2020).[11]

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[9] NICS Reporting Improvement Act, S.2192, 114th Congress (2015). *And see* the federal Firearms Owners Protection Act (Pub.L.No.99-308,100 Stat. 449 (1986)), which expanded the 1968 Gun Control Act statutes to include a process allowing those prohibited from firearms ownership on the basis of mental health exclusions to regain firearms ownership rights.

[10] *See* Treasury Department Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992) ("[N]one of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 USC 925(c).").

[11] *But see* Tyler v. Hillsdale County Sheriff's Dept., 837 F. 3d 678 (2016) for a very different result in the Sixth Circuit. *See also* Keyes v. Lynch, 195 F. Supp. 3d 702 (M.D. Pa. 2016) (finding 18 U.S.C. § 922(g)(4) unconstitutional, as applied).

Under the NIAA, the Department of Justice (DOJ) provides NICS Act Record Improvement Program (NARIP) grants to improve states' infrastructure for collecting and submitting records to NICS, including the records of individuals with prohibitory mental health records. To receive a NARIP grant, a state must certify that it has implemented a program in which individuals, who have been adjudicated as having mental illness or disability or committed to a mental institution, may apply for relief from the firearms disability imposed by such adjudication or commitment. Eligibility for NARIP grants require relief-from-disability (RFD) programs to be certified by BATF as meeting the NIAA's specified restoration criteria.

A state RFD program that meets NIAA criteria must contain, at a minimum, provisions for: application for relief from the federal prohibition on the purchase and possession of firearms through a state procedure or with due process; a judicial appeal of a denial of the initial petition; and updating records by removing the person's name from state and federal firearms prohibition databases if relief is granted.[12] Section 105 of the NIAA provides that a state RFD program is considered "implemented" if the program: allows a person who has been prohibited from owning firearms pursuant to § 922(g)(4) to apply to the state for relief from such disqualification; provides that a state court or other lawful authority "shall grant the relief ... if the circumstances regarding the disabilities ... and the person's record and reputation, are such that the person will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest"; and permits a person whose relief application is denied to "file a petition with the State court of appropriate jurisdiction for a *de novo* judicial review of the denial." Section 105 further provides that if relief is granted to a person under such a state relief program, the adjudication or commitment in question is "deemed not to have occurred" for purposes of § 922(g)(4).

Wisconsin's RFD program substantially conforms to § 105(a), requiring the circuit court to determine both whether an individual is likely to act in a manner dangerous to public safety and whether a grant of the petition would not be contrary to the public interest. Wisconsin's RFD program was certified by the BATF in 2010.[13]

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[12] Bureau of Alcohol, Tobacco, Firearms, and Explosives: Certification of qualifying state relief from disabilities program. ATF E-Form 3210.12.

[13] *See* current list maintained at https://www.atf.gov/file/155981/download (last retrieved 26 August 2024), citing Wis. Stat. §§ 51.20, 51.45, 54.10, 55.12.

Up until this point in the Comment, the petitioning process may seem straightforward: if a court ordered your client under subd. 51.20 (13)(cv) 1. not to possess a firearm at some point in the past, he or she may petition that court or the court in the county where your client resides to cancel the order after making a showing that he or she is not likely to act in a manner dangerous to public safety and that the grant of the petition would not be contrary to the public interest. Depending on the circumstances, the court may require a recent psychiatric evaluation, hear testimony from persons familiar with petitioner, or other offer of proof. But what if the the client's civil commitment occurred in another state?

There is no question that a civil commitment by order of a court pursuant to state law in **any** state triggers a ban on the right to possess firearms under Federal law, regardless of whether the order specifies that the subject person may not possess firearms. But even for those states with a legislative scheme substantially similar to Wisconsin, it would **not** have been an order issued under subd. 51.20 (13)(cv) 1, for which Wisconsin's RFD statute was intended to cancel. Accordingly, a Wisconsin circuit court may conclude that it has no authority to grant the petition, because there is no eligible order to cancel. Moreover, because the effect of the Federal law is to nullify the civil commitment as if it had never happened,[14] a Wisconsin court may be reluctant to seemingly vacate or void another state court's judgment. So, what to do?

The first approach to this dilemma may be one of statutory construction, by pointing out that a Wisconsin civil commitment order and an order prohibiting firearms are indistinguishable for purposes of the petition. When a Wisconsin court orders a mental health hold with a finding of dangerousness to self or others, it is mandatory that the court also separately order that the person-in-need cannot possess firearms and must advise the person of the criminal consequences. At the time of this writing, only four other states don't have this explicit statutory-procedural prohibition when a civil commitment is ordered. Colorado, for example, is one of them, where the State Court Administrator is required only to notify NICS via the Colorado Bureau of Investigation of any person subject to a mental health commitment for purposes of triggering notification and enforcement of the firearms prohibition.[15] But the Federal inhibitor is triggered by the civil commitment, nonetheless.

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[14] *See* Section 105 of the NIAA, which specifies that, if relief is granted under a state RFD program, the commitment is "deemed not to have occurred" for purposes of Federal law.

[15] *See* Colo. Rev. Stat. § 13-5-102.

To arrive at the conclusion that a civil commitment order and an order prohibiting firearms possession should be construed together, a court must give Wisconsin's RFD statute "its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning,"[16] and that the statutory language is "interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results."[17] Using this approach, a petition under § 51.20(13)(cv)(1m), for purposes of complying with the Federal RFD program, is a petition that seeks relief from **both** § 51.20 (13)(cv) 1 **and** § 51.20 (13)(a) 3. Indeed, an order under § 51.20(13)(cv)(1) does not come into existence until triggered by a disposition under § 51.20 (13)(a) 3. One does not exist without the other. Thus, a petition for the restoration of firearms that prohibited by an order issued under § 51.20(13)(cv)(1) is really a petition that goes to the heart of the original, albeit expired, civil commitment under § 51.20 (13)(a) 3.

As this implicates Federal law, Wis. Stat. § 51.20 (13)(cv) 1m, which incorporates § 51.20 (13) 3. by reference, is the very statute regarded by the U.S. Department of Justice and the BATF (the agencies reposed by Congress with rulemaking authority) that provides relief from disability under Federal law —not just state court orders as authorized by state statute— as a condition precedent to receiving NARIP funds, and without regard to which court initiated the civil commitment or whether the commitment included language prohibiting firearms possession.[18] Indeed, Wisconsin's application for NARIP funding and its certification to BATF,[19] citing § 51.20, is prima facie evidence that state officials construed and intended the state statute to provide relief from disability under Federal law, not just state court orders as authorized by state statute. But, conflating these two Wisconsin statutes doesn't yet get us to where we need to be. What authority would a Wisconsin court have to seemingly undo a civil commitment of another state? Wouldn't a petitioner need to go back to that former state to seek relief? That's exactly the response you may get from a Wisconsin circuit court.

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[16] *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.
[17] *Id.* ¶ 46.
[18] *See* https://www.atf.gov/file/155981/download (list of compliant states maintained by BATF; last retrieved 26 August 2024), citing Wis. Stat. §§ 51.20, among other Wisconsin statutes.
[19] Bureau of Alcohol, Tobacco, Firearms, and Explosives: Certification of qualifying state relief from disabilities program. ATF E-Form 3210.12.

If you've made it this far into this Comment, this may be a good time to remind ourselves again that, even `though state law is what gives us the modality for seeking relief, it is relief under Federal law that we're ultimately seeking. In drafting the NIAA, Congress did not require that the state court to grant relief from disability must be the same court that initiated the civil commitment. In fact, the eligibility requirements under NIAA make no distinction as to to *where* the disability was originally imposed, but only which qualifying states have authority to relieve it.[20] Fortunately, there is a mechanism by which a Wisconsin circuit court, for purposes of determining subject matter jurisdiction, should construe a civil commitment in another state as if it had been initiated under Wisconsin's Chapter 51, thereby vesting it with the authority to relieve the disability under Federal law imposed by most other state courts: the Interstate Compact on Mental Health.

Wisconsin entered into this interstate compact,[21] which exists among 45 states and the District of Columbia, ratified by Congress in 1972, as Public L. No. 92-80. Once Congress approves an interstate compact, the compact is "transform[ed] . . . into a law of the United States."[22] At that point, the compact is "not just an agreement, but federal law."[23] Because the Compact brings civil commitments under Chapter 51 within its ambit, the Compact augments the state's remedy under § 51.20 (13)(cv) 1m in applying to the Federal prohibition.

The Compact's goals include setting the legal basis for higher quality and expedient responses to mental health issues in the states, and prioritizes public safety and humanitarianism as key motivations. The purpose of the Compact and enacting laws is intended to be achieved "irrespective of the legal residence and citizenship status of the person,"[24] and "shall be liberally construed so as to effectuate the purpose thereof."[25] Article III(a) of the Compact provides that, "Whenever a person physically present in any party state is in need of institutionalization by

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[20] *See* NIAA § 105(a)(2) (". . . a State court, board, commission, or other lawful authority shall grant the relief, pursuant to State law and in accordance with the principles of due process, if the circumstances regarding the disabilities referred to in paragraph (1), and the person's record and reputation, are such that the person will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest").

[21] *See* Wis. Stat. § 51.75, *et. seq.*

[22] Texas v. New Mexico, 462 U.S. 554, 564 (1983).

[23] Kansas v. Nebraska, 574 U.S. 445, 454 (2015). *See* New York v. New Jersey, 598 U. S. 218 (2023) (The interpretation of an interstate compact approved by Congress presents a federal question). (citing Cuyler v. Adams, 449 U. S. 433, 438 (1981)).

[24] Wisconsin Blue Book, 2015-16.

[25] Article XIV of the Compact.

reason of mental illness or mental deficiency, the person shall be eligible for care and treatment in an institution in that state "Irrespective of the person's residence, settlement or citizenship, qualifications."

Unlike the interstate uniform acts, such as the Uniform Child Custody Jurisdiction and Enforcement Act, which prescribe formal procedures or a triggering event for a foreign state Court to "Assume" jurisdiction (whereupon the home state is then divested of jurisdiction), the Interstate Compact on Mental Health does not. Rather, states entering into the Compact share subject matter jurisdiction over the person in need.[26] Accordingly, a civil commitment initiated in another participating state, is treated the same as one originating in Wisconsin under Chapter 51. And, for the reasons more fully discussed, *supra,* a civil commitment order from another state that is substantially similar to Wisconsin's statutes —especially one that participates in the Compact on Mental Health— should be treated as having the same Federal and state legal effect as if the two separate civil commitment and firearms prohibition orders had issued in Wisconsin.

Another exposition of this Comment is that both judicial economy and the interests of justice require that the state court where a petitioner resides is best suited to review a petitioner's record and reputation, determine credibility and demeanor, and —if the Court were to find it necessary— to require a petitioner to be re-evaluated by a mental health professional in that same community, perhaps even a mental health professional trusted by the Court. Requiring a Wisconsin resident to seek relief from the state in which a civil commitment or mental defective adjudication arose, perhaps decades ago, undermines judicial economy and is more likely to lead to an unjust and uninformed result. Consider including a statement to this effect in the petition.

Finally, the Wisconsin court almost certainly will want to review the original documents from the other state that led to the civil commitment or adjudication. Before filing the petition, be sure to have this file, and be prepared to provide it to the court upon request.

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[26] *See, e.g.,* Article V, which provides in pertinent part, " . . . any court of competent jurisdiction in the receiving state may make such supplemental or substitute [guardian] appointment and the court which appointed the previous guardian shall, upon being duly advised of the new appointment, and upon the satisfactory completion of such accounting and other acts as such court by law requires, relieve the previous guardian of power and responsibility to whatever extent is appropriate in the circumstances").