



Firearms Hearing
Senate Judiciary Committee
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Good afternoon Chairman Baker, Chairman Farnese, and members of the Senate Judiciary Committee. I am Fran Chardo, the District Attorney of Dauphin County, and am here on behalf of the Pennsylvania District Attorneys Association. With me is Greg Rowe, Director of Legislation and Policy for the PDAA.

First, thank you for these incredibly comprehensive hearings. We are all grappling with difficult and controversial issues, and the ability to reach consensus is enhanced when we discuss these public policy issues. We greatly appreciate the work done by both of you and staff.

Unfortunately and tragically, mass shootings have become a common reality in our country. Some schools have shooter drills; bullet proof backpacks are now being sold and purchased; and as parents, we are forced to discuss unspeakable tragedies with our children. And we need no reminder of the lives lost, most recently in Odessa, El Paso, and Dayton. In Pennsylvania, we saw our own mass shooting at the Tree of Life Synagogue in Pittsburgh.

But let us also remember the daily losses of life by firearms in Pennsylvania that are not the results of mass shootings. These shootings represent a similar tragedy and crisis. According to the CDC, more than 1,600 deaths in Pennsylvania in 2017 were by firearms — these include homicides, suicides, acts of domestic violence, and accidents. And the CDC also reports that the number of deaths by firearms in Pennsylvania has increased each year since 2014.¹ There is a victim in every one of these cases, and whether a tragedy results in the death of 100 people or one person, we must respond.

I wanted first to discuss an important, narrow, and focused piece of legislation designed to close up a loophole that ties our hands at holding repeat violent offenders who carry illegal firearms accountable. Under current law, someone who has been convicted of a serious crime, such as murder, rape, aggravated assault, burglary, or drug trafficking, is statutorily barred from possessing a firearm. If he or she seeks to purchase a firearm, the Instant Check System will block the purchase. Someone who has been convicted of attempting, conspiring or soliciting another to commit these same crimes (e.g. inchoates), such as attempted murder, attempted rape, solicitation to commit aggravated assault, or conspiracy to traffic illegal narcotics, is also statutorily barred from possessing a firearm and will be blocked from lawfully purchasing a firearm.

If the person who has been convicted of the prior violent crime (e.g. murder, rape, aggravated assault, burglary, drug trafficking) possesses a firearm, he or she has committed a crime under Pennsylvania law and is subject to prosecution. But if the conviction was for an inchoate—e.g. attempt, conspiracy, or solicitation to commit any of those specifically enumerated crimes, that person has not broken Pennsylvania law and cannot be held accountable.

Why can someone who is convicted of murder, rape, or burglary be prosecuted for illegal gun possession, but someone convicted of attempted rape, conspiracy to commit murder, or solicitation to commit robbery cannot? It is simply because of an oversight in statutory drafting that never came to light until the Pennsylvania Supreme Court's 2011 ruling in *Commonwealth v. Clegg*.

¹ <https://www.cdc.gov/nchs/pressroom/states/pennsylvania/pennsylvania.htm>

As a result of this decision, our current state of the law makes no sense. It is worth noting that an attempt, solicitation, or conspiracy to commit any of these offenses carries the same penalty as the substantive crime itself. In the past, the General Assembly has recognized the significance of these crimes by including penalties for selling firearms to individuals whom the seller knows will use the firearm to commit or attempt to commit a crime.

Right now the only remedy is to hope that our United States Attorneys prosecute these crimes, because under federal law it is a crime. Of course, we should not cede our authority to the federal government for what should be a state crime. Nor should we expect that the federal government would handle each of these cases.

But the legislative fix is straightforward and simple and will not affect the rights of any law-abiding individual to possess a firearm. It does not create any new categories of prohibitions from possessing firearms. We strongly support legislation that simply adds attempt, conspiracy, and solicitation to the very same list of serious crimes that already prohibit a person from possessing a firearm under state law. In so doing, such legislation will only subject those who have a prior conviction for a serious crime and who subsequently choose to illegally carry a firearm to a criminal penalty. Closing this loophole is reasonable, straightforward, and necessary.

I also wanted to provide information on areas of intersection in current law between mental health and the possession of firearms. Mental health is an important point of discussion. It certainly plays a role in the tragedies on which we are focusing. But at the same time, the majority of those with mental illness are not violent. Indeed, violence is often caused by other factors. According to a report from the Council of State Governments Justice Center, 16.9 percent of the adults in a sample of local jails had a serious mental illness. That is three to six times the rate of the general population. Indeed, according to the Bureau of Justice Statistics, more than half of those incarcerated have mental health issues. The National Conference of State Legislatures correctly notes that without intervention, mental health conditions can linger or worsen.²

From our perspective, diversion, crisis-intervention teams, and reentry planning are three important ways of effectively addressing the intersection of mental health and criminal justice. These issues apply generally to the criminal justice system, not simply to shootings or mass shootings. More access to mental health care before an individual ever intersects with the criminal justice system is an important investment and will ultimately reduce recidivism, avoid incarceration costs, and improve public safety.

I also wanted to discuss briefly the Mental Health Procedures Act. Part of the Act provides a process for those who are a danger to themselves or others due to a mental illness to receive in-patient treatment. It also relevant to the firearms discussion because in many instances a person involuntarily committed is no longer able to possess firearms.

The provision of the MHPA that we tend to hear about most often in the firearms context is an involuntary commitment, often referred to as a "302." An involuntary 302 commitment is an

² See <https://csgjusticecenter.org/reentry/issue-areas/mental-health/>; <https://www.bjs.gov/content/pub/pdf/mhppji.pdf>; <http://www.ncsl.org/research/civil-and-criminal-justice/addressing-mental-health-in-the-justice-system.aspx>

application for emergency evaluation and treatment for persons who are a danger to themselves or others due to a mental illness.

Danger to self shall be shown by establishing that within the previous 30 days:

- the person would be unable without the care, supervision and assistance of others to satisfy his/her need for nourishment, personal or medical care, shelter or self- protection or safety and that death or serious physical debilitation would occur within 30 days unless treatment was provided;
- the person has attempted suicide or the person has made threats to commit suicide and committed acts in furtherance of the threats; or
- the person has mutilated himself/herself or the person has made threats to mutilate and committed acts in furtherance of the threats.

Danger to others shall be shown by establishing that within the previous 30 days the person has inflicted or attempted to inflict serious bodily harm on another or has threatened serious bodily harm and has committed acts in furtherance of the threat to commit harm to another. Once a 302 is authorized, the individual is taken to an emergency room by the police or ambulance for an evaluation by a physician to determine if he or she needs to be admitted for involuntary psychiatric inpatient treatment. If the individual is admitted he or she may be kept no longer than 120 hours unless a petition for a 303, Extended Emergency Involuntary Treatment, is filed by the hospital. The 303 occurs if the doctor determines that additional inpatient days are needed, for up to an additional 20 days. If still further long-term involuntary treatment is needed, a "304" or "305" can be obtained by the hospital for an additional 90 days for each. Each requires a hearing.³

There are firearms-related consequences for being involuntary committed to a mental institution for inpatient care or treatment or otherwise being found mentally incompetent. Specifically, the prohibition from possessing a firearm applies to:

a person who has been adjudicated as an incompetent or who has been involuntarily committed to a mental institution for inpatient care and treatment under section 302, 303 or 304 of the provisions of the act of July 9, 1976 (P.L. 817, No. 143), known as the Mental Health Procedures Act. This paragraph shall not apply to any proceeding under section 302 of the Mental Health Procedures Act unless the examining physician has issued a certification that inpatient care was necessary or that the person was committable.

³ Allegheny County provides a useful summary of the involuntary commitment processes under the MHPA. See <https://www.alleghenycounty.us/Human-Services/Programs-Services/Disabilities/Mental-Health/Involuntary-Commitment.aspx>

See 18 Pa. C.S. § 6105(c)(4). Section 6105(f) provides a process where such an individual's firearms rights may be restored: if the court determines, following the filing of a petition, that the applicant may possess a firearm without risk to the application or any other person.

A commitment under the Mental Health Procedures Act serves a different purpose than a petition would under the proposed legislation creating Extreme Risk Protection Orders would serve. The primary purpose of a commitment under Sections 302 to 305 is to provide treatment to an individual who needs treatment. The ERPO legislation permits but does not require treatment and provides a narrower, focused intervention. The theory behind ERPO legislation is that law enforcement officials and family members are in a unique position to recognize signs that a person is at risk of harming himself or herself or others and that there should be a process by which that person's access to firearms can be restricted for a limited and specified period of time.

The sponsors of the legislation have also attempted to build due process into the structure of the legislation. The legislation, mirroring the general structure of the PFA, requires among other things a finding that the person at issue presents a substantial risk of suicide or of causing the death of, or serious bodily injury to another person. It requires a finding that the risk is imminent and other circumstances would make it safe to proceed by ordering a hearing without issuing an interim order. And such orders will expire after a specified period of time. Following such an order, a petition for a full order may be filed. The standards for granting an order mirror those for the temporary order, and an order shall be for between 3 months and 1 year. A person against whom an order is granted may petition the court for a termination hearing. We know the concerns that have been raised regarding due process. And going forward, these are important points to further examine objectively.

From my experience as a prosecutor, I can attest that there are many instances when someone who has shot another individual has exhibited significant warning signs beforehand. Indeed, we also know that about 80% of people considering suicide give some sign of their intentions,⁴ and I am especially drawn to this bill because it can prevent suicides. Suicide accounts for nearly two-thirds of gun deaths in the United States, killing over 21,000 Americans each year.⁵ And guns are used in half of all suicides.⁶ The MHPA and the ERPO legislation have the potential to complement each other.

To be sure, I do not want to overstate the potential significance of this legislation. I cannot say that it will prevent all or most or even a significant number of mass shootings, individual shootings, or suicides. I leave that to those who have studied the issue more deeply than I have. But I know this—it will save lives. We believe the legislation creates an appropriate opportunity for the right individuals to intervene in order to prevent significant and deadly acts.

⁴ See <https://www.mhanational.org/conditions/suicide>.

⁵ See <https://theundefeated.com/features/fivethirtyeight-breaks-down-the-more-than-33000-annual-u-s-gun-deaths/>; https://everytownresearch.org/firearm-suicide/#foot_note_1.

⁶ See <https://www.nbcnews.com/news/us-news/more-20-000-people-die-gun-suicide-each-year-alarmed-n906796>

Fifteen other states have such laws and undoubtedly have important information regarding successes and challenges. We are happy to engage with their respective prosecutor's associations to provide any information you might want or need as you continue this important discussion.

Thank you for inviting us and for your consideration of these important topics.