Kansas Bureau of Investigation

Robert E. Blecha
Director

Derek Schmidt
Attorney General

TESTIMONY
Before the Senate Judiciary Committee
HB 2329
Leslie Moore
Information Services Division Manager
David Hutchings
Special Agent in Charge
Kansas Bureau of Investigation
March 9, 2011

Senator Tim Owens, Chair and Members of the Committee,

Access to Expunged Records

This bill will clarify the duties of the courts to provide to the Kansas Bureau of Investigation (KBI) Criminal Records Central Repository access to expunged arrests, dispositions and confinement information. Often, the central repository never receives the original documents pertaining to an expungement. Once the expungement is received and the record is reviewed then the central repository contacts the agencies to request the missing fingerprint card, court disposition and/or confinement information to update and complete a criminal history record. Some agencies have refused to provide the Central Repository the underlying records pertaining to an expungement order the KBI has received, because the expungement statutes did not specifically list the KBI as an agency entitled to expunged records (notwithstanding that the underlying events should have been reported to the central repository previously, but apparently were not). The Office of Judicial Administration (OJA) has requested the KBI to update the statute to make it clear that the KBI is an entitled agency.

Fees Charged to the Central Repository

There is also an issue with some agencies attempting to charge a fee for the requested documents. The central repository tries to explain to agencies that per K.S.A. 22-4701, *et seq.*, agencies are required to transmit information to the central repository when the reportable events occur, so there should not be a fee charged to the KBI when it requests records to complete criminal history due to agencies' failure to comply with the law to begin with. Often, the central repository must track down the information needed from other sources (such as county and district attorney offices) that do not charge, so it can update and ensure its records are complete.

There should be no fiscal effect to local agencies. This bill would require criminal history record information that already should have been reported to the central repository, pursuant to K.S.A. 22-4701, *et seq.*, be provided to the KBI without charge The KBI only requests records when it discovers a void in criminal history record information and is striving to update and complete the central repository's records.

The KBI believes the original intent of the legislature was to require agencies to provide criminal history to the central repository free of charge. The KBI in turn offers criminal history records to law enforcement and criminal justice agencies free of charge.

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Senate Judiciary
3-9-11
Attachment 6

The OJA has also requested the KBI to update the statute(s) to make it clear that the KBI is not to be charged a fee when a request has been made for criminal history records.

Relief from Disabilities/Restoration of Rights

The portion of the bill regarding relief of disabilities/restoration of rights is a requirement by the Bureau of Alcohol, Tobacco and Firearms (ATF) to receive certain grant funds. I submitted to the ATF legal counsel current statute regarding the restoration of rights, K.S.A. 75-7c26, and was told these statutes did not meet the minimum criteria to satisfy the requirements under the National Instant Background Check System (NICS) Improvement Act of 2008, public law 110-180. The Act requires that states have laws to provide persons who were involuntarily mentally committed due process to restore their rights to possess a firearm. I have included with my testimony a copy of the minimum criteria, the ATF check list when reviewing state laws, and the letter from the ATF representative that reviewed K.S.A 75-7c26.

Currently the NICS Act Record Improvement Program (NARIP) for States and State Court Systems Grant requires that states have pass this legislation before it can be eligible for this grant. Kansas has been ineligible for the grant for 3 years because it does not have this legislation. The NARIP grant could bring in up to $250,000 to improve criminal history records. There is also the possibility that the National Criminal History Improvement Program (NCHIP) grant may require this legislation in the future. The Information Services Division at the KBI is currently receiving $327,435 from the NCHIP grant to fund 8 positions. If the NCHIP grant makes this a requirement and we do not have this legislation, we will lose funding for those positions.

The relief from disabilities/restoration of rights portion will allow the state to be eligible for future federal grants. The NARIP grant for 2011 has not yet been announced so the amount the KBI potentially could miss out on is not known; but based on grant amounts from past years, the KBI could stand to lose up to $250,000 in grant money this year without this bill being passed.

The long-term fiscal impact if the relief from disabilities/restoration of rights portion of the bill is not passed could be significant, based on the potential ineligibility of the KBI in the future for federal grant money the KBI relies on to fund 8 positions.

Thank you for your time and consideration. I would be happy to answer your questions.

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STATE RELIEF FROM DISABILITIES PROGRAMS UNDER THE NICS IMPROVEMENT AMENDMENTS ACT OF 2007

The following *minimum* criteria must be satisfied for a State to establish a qualifying mental health relief from firearms disabilities program under the NICS Improvement Amendments Act of 2007 (NIAA), Public Law 110-180, Section 105 (enacted January 8, 2008):

1. State Law [NIAA § 105(a)(2)]: The relief program must be established by State statute, or administrative regulation or order pursuant to State law.

2. Application [NIAA § 105(a)(1)]: The relief program must allow a person who has been formally adjudicated as a mental defective[1] or committed involuntarily to a mental institution[2] to *apply or petition* for relief from Federal firearms prohibitions (disabilities) imposed under 18 U.S.C. §§ 922(d)(4) and (g)(4).

3. Lawful Authority [NIAA § 105(a)(2)]: A State court, board, commission, or other lawful authority must consider the applicant's petition for relief. The lawful authority may only consider applications for relief due to mental health adjudications or commitments that occurred in the same State.

4. Due Process [NIAA § 105(a)(2)]: The petition for relief must be considered by the lawful authority in accordance with principles of due process, as follows:

   a. The applicant must have the opportunity to submit his or her own evidence to the lawful authority considering the relief application.
   b. An independent decision maker—someone other than the individual who gathered the evidence for the lawful authority acting on the application—shall review the evidence.
   c. A record of the matter must be created and maintained for review.

5. Proper Record [NIAA § 105(a)(2)]: In determining whether to grant relief, the lawful authority must receive and consider evidence concerning the following:

   a. the *circumstances* regarding the firearms disabilities imposed by 18 U.S.C. § 922(g)(4);
   b. the applicant's *record*, which must include, *at a minimum*, the applicant's mental health *and* criminal history records; and
   c. the applicant's *reputation*, developed, *at a minimum*, through character witness statements, testimony, or other character evidence.

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[1] Federal regulations at 27 C.F.R. § 478.11 define the term "adjudicated as a mental defective" as: A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) Is a danger to himself or others; or (2) Lacks the mental capacity to contract or manage his own affairs. The term shall include—(1) A finding of insanity by a court in a criminal case; and (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

[2] Federal regulations at 27 C.F.R. § 478.11 define the term "committed to a mental institution" as: A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

6. Proper Findings [NIAA § 105(a)(2)]: In granting relief, the authority must issue findings that:

    a. the applicant will not be likely to act in a manner dangerous to **public safety**; and
    b. granting the relief will not be contrary to the **public interest**.

7. De Novo Judicial Review of a Denial [NIAA § 105(a)(3)]: The State must also provide for *de novo* judicial review of relief application denials consistent with the following principles:

    a. The applicant may petition a court of appropriate jurisdiction to review the denial, including the record of the State court, board, commission, or other lawful authority that rendered the decision.
    b. The reviewing court may, but is not required to, give deference to the decision of the lawful authority to deny the application for relief.
    c. In cases of denial by a lawful authority other than a State court, the reviewing court must have discretion to receive additional evidence necessary to conduct an adequate review.

Note: In addition to the above-mentioned requirements, NIAA § 102(c)(1)(B) requires a State, on being made aware that the basis under which the record was made available does not apply, or no longer applies, shall, as soon as practicable—

a. update, correct, modify, or remove the record from any database that the Federal or State government maintains and makes available to NICS, consistent with the rules pertaining to the database; and
b. notify the Attorney General that such basis no longer applies so that the record system in which the record is maintained is kept up to date.
c. It is recommended that the State have a written procedure (*e.g.* State law, regulation, or administrative order) to provide for these NIAA requirements.

6-4

OMB No. 1140-0094 (0 3)

U.S. D ment of Justice
Bureau of Alcohol, Tobacco, Firearms and Explosives

Certification of Qualifying State Relief from Disabilities Program

This form is to be used by a State to certify to the U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) that it has established a qualifying mental health relief from firearms disabilities program that satisfies certain *minimum* criteria (identified below) under the NICS Improvement Admendments Act of 2007, Public Law 110-180, Section 105, enacted January 8, 2008 (NIAA). This certification is required for States to be eligible for the grants authorized by the NIAA.[1] The certifying State should attach all relevant materials demonstrating compliance with its certification and criteria, which may include statutes, administrative regulations, executive orders, written policies and/or procedures, program brochures, or other items pertinent to the certification.

Certification

As the authorized State official, I hereby certify that my State has satisfied each of the following minimum criteria to establish a Relief From Disabilities Program under the NIAA:	**Check Appropriate Box**	
	Met	**Not Met**
1. **State Law:** The relief program has been established by State statute, or administrative regulation or order pursuant to State law.		
2. **Application:** The relief program allows a person who has been formally adjudicated as a mental defective[2] or committed involuntarily to a mental institution[3] to *apply or petition* for relief from Federal firearms prohibitions (disabilities) imposed under 18 U.S.C. §§ 922(d)(4) and (g)(4).		
3. **Lawful Authority:** A State court, board, commission or other lawful authority (per State law) considers the applicant's petition for relief. The lawful authority may only consider applications for relief due to mental health adjudications or commitments that occurred in the applicant State.		
4. **Due Process:** The petition for relief is considered by the lawful authority in accordance with principles of due process, as follows:		
a. The applicant has the opportunity to submit his or her own evidence to the lawful authority considering the relief application.		
b. An independent decision maker— someone other than the individual who gathered the evidence for the lawful authority acting on the application— reviews the evidence.		
c. A record of the matter is created and maintained for review.		
5. **Proper Record:** In determining whether to grant relief, the lawful authority receives evidence concerning and considers the:		
a. Circumstances regarding the firearms disabilities imposed by 18 U.S.C. § 922(g)(4);		
b. Applicant's record, which must include, *at a minimum*, the applicant's mental health *and* criminal history records; and		
c. Applicant's reputation, developed, at a minimum, through character witness statements, testimony, or other character evidence.		
6. **Proper Findings:** In granting relief, the lawful authority issues findings that:		
a. The applicant will not be likely to act in a manner dangerous to *public safety*; and		
b. Granting the relief will not be contrary to the *public interest*.		
7. **De Novo Judicial Review of a Denial:** The State provides for *de novo* judicial review of relief application denials that includes the following principles:		
a. If relief is denied, the applicant may petition the State court of appropriate jurisdiction to *review the denial*, including the record of the denying court, board, commission or other lawful authority.		
b. In cases of denial by a lawful authority other than a State court, the reviewing court has discretion to receive additional evidence necessary to conduct an adequate review.		
c. Judicial review is *de novo* in that the reviewing court may, but is not required to, give deference to the decision of the lawful authority that denied the application for relief.		
8. **Required Updates to State and Federal Records:** Pursuant to Section 102(c) of the NIAA, the State, on being made aware that the basis under which the record was made available does not apply, or no longer applies:		
a. Updates, corrects, modifies, or removes the record from any database that the Federal or State government maintains and makes available to the NICS, consistent with the rules pertaining to the database; and		
b. Notifies the Attorney General that such basis no longer applies so that the record system in which the record is maintained is kept up to date.		
9. **Recommended Procedure:** It is recommended (not required) that the State have a written procedure *(e.g., State law, regulation, or administrative order)* to address the update requirements.		

[1] For information regarding the availability of funding for such grants see: http://www.ojp.usdoj.gov/bjs/funding.htm

[2] Federal regulations at 27 C.F.R. § 478.11 define the term "adjudicated as a mental defective" as: A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) Is a danger to himself or others; or (2) Lacks the mental capacity to contract or manage his own affairs. The term shall include — (1) A finding of insanity by a court in a criminal case; and (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

[3] Federal regulations at 27 C.F.R § 478.11 define the term "committed to a mental institution" as: A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

Authorized State Official's Signature	State and Office	Certification Date
Printed Name and Title	Phone	E-mail Address

(For ATF Use Only)

The Relief Program Application Is: ☐ APPROVED

☐ DENIED, for the reasons stated below.

ATF Official's Signature	ATF Office	Decision Date
Printed Name and Title	Phone	E-mail Address

Reasons for disapproval, or additional comments:

Please Mail The Form To:

Bureau of Alcohol, Tobacco, Firearms and Explosives
Firearms Programs Division
Mailstop 6N.672
99 New York Avenue, NE
Washington, DC 20226
Contact Number: (202) 648-7090

Important Notice

Approval of a relief from disabilities program is valid only if the certifying official above has authority under State law to execute this certification, and only to the extent there have been no amendments or changes to the State's relief from disabilities program laws, regulations, directives, or procedures that were submitted in support of an initial certification. If there have been any changes to applicable State laws or procedures, a new certification form must be submitted to ATF for approval.

Privacy Act Information: Solicitation of this information is authorized by the NICS Improvement Amendments Act of 2007, Public Law 110-180.

Paperwork Reduction Act Notice

The information required on this form is in accordance with the Paperwork Reduction Act of 1995. The purpose of the information is to determine whether a State has certified, to the satisfaction of the Attorney General, that it has established a relief from disabilities program in accordance with the requirements of the NICS Improvement Amendments Act of 2007, Public Law 110-180.

The estimated average burden associated with this collection is 15 minutes per certification, depending on individual circumstances. Comments about the accuracy of this burden estimate and suggestions for reducing it should be directed to the Reports Management Officer, Document Services Section, Bureau of Alcohol, Tobacco, Firearms and Explosives, Washington, DC 20226.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Confidentially is not assured.

U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Washington, DC 20226

www.atf.gov

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Leslie Moore
Public Services Administrator
Records Management Division
Kansas Bureau of Investigation
Topeka, Kansas 66612

Re: Kansas' Relief from (Firearms) Disabilities Program

Dear Ms. Moore:

This letter responds to your request to the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") regarding the Kansas State Statutes on restoration of rights for persons involuntarily committed for mental illness. You have asked ATF to review the legislation you provided and comment on whether Kansas' relief from firearms disabilities program is in compliance with the NICS Improvement Amendments Act of 2007, Public Law 110-180 ("NIAA"). We appreciate the opportunity to provide our comments. However, for the reasons discussed below, the relief from disabilities program established in the Kansas code does not satisfy all of the requirements of the NIAA.

By way of background, the NIAA authorizes grant programs to support states in their efforts to improve the quality and completeness of criminal record information available to the National Instant Criminal Background Check System. To become eligible for grant funding, states must satisfy certain conditions including the requirement that the state certify, to the satisfaction of the Attorney General, that it has implemented a qualifying program permitting persons who were adjudicated as a "mental defective" or "committed to a mental institution" to apply for relief from the Federal firearms disabilities imposed as a result of the adjudication or commitment. *See* 18 U.S.C. §§ 922(d)(4) and (g)(4); 27 C.F.R. § 478.11. Specifically, to qualify under the NIAA (section 105), a relief from disabilities program must:

(1) Permit a person who, pursuant to State law, has been adjudicated as described in 18 U.S.C. section 922(g)(4), or has been committed to a mental institution, to apply to the State for relief from the disabilities imposed by 18 U.S.C. §§ 922(d)(4) and (g)(4), by reason of the adjudication or commitment;

(2) Provide that a State court, board, commission, or other lawful authority shall grant the above mentioned relief, pursuant to State law and in accordance with the principles of due process, 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

(3) Permit a person whose application for relief is denied to file a petition with the State court of appropriate jurisdiction for a de novo judicial review of the denial.

The Attorney General has delegated to ATF the authority to administer and enforce the relief from disabilities provisions of the NIAA. Pursuant to that authority, ATF has established *minimum* criteria that a relief program must meet to qualify under the NIAA. These minimum criteria may be met by statute, administrative regulation, or executive order. On November 21, 2008, these criteria were mailed to your State. Evaluating your State's statutory scheme for a relief from disabilities program according to the minimum criteria, we conclude that the program is deficient for the following reasons:

- [Criteria #5] The relief program must require the reviewing authority to receive and consider evidence concerning (a) the circumstances regarding the petitioner's firearms disability imposed by 18 U.S.C. §922(g)(4), (b) the petitioner's record, and (c) the petitioner's reputation. Pursuant to K.S.A. 59-2966 and 59-29b66, the lawful authority is required to make a determination based on "the evidence" but it is not expressly required to consider all of the elements of the proper record established under NIAA § 105(a)(2). In addition to the circumstances surrounding the imposition of a Federal firearms disability, the reviewing authority must consider the petitioner's record (which must include, at a minimum, the petitioner's mental health and criminal history records) and the petitioner's reputation (which must be developed, at a minimum, through character witness statements, testimony, or other character evidence). Without clearly establishing the particular types and forms of evidence to be considered in reviewing a petition for restoration of firearms rights, the Kansas relief program is insufficient to develop a proper record under the NIAA.

- [Criteria #6] The NIAA requires a finding by the lawful authority, based on the petitioner's record and reputation, that the petitioner is (a) not likely to act in a manner dangerous to public safety, and (b) that the granting of relief will not be contrary to the public interest. While K.S.A. 75-7c26 provides that the reviewing authority shall issue a certificate of restoration if it finds that a petitioner "is no longer likely to cause harm to such person's self or others," there is no requirement to make an additional determination that granting the relief will not be contrary to the public interest. Because a reviewing authority is not required under Kansas State law to make such a finding , the basis for issuing a certificate of restoration is insufficient to make a proper finding under NIAA §105(a)(2).

Leslie Moore
Public Service Administrator II

- [Criteria #7] The NIAA mandates that the applicant whose relief is denied be allowed to petition for *de novo* judicial review in a State court of appropriate jurisdiction. However, K.S.A. 75-7c26 and the other provisions of Kansas State law provided to ATF do not establish a right for a petitioner to seek review of a denial. Consequently, the Kansas State relief from disabilities program does not comply with the requirements of the NIAA.

Unfortunately, for the above reasons, Kansas' relief program does not presently qualify under the NIAA. We look forward to working with your office to ensure that Kansas' relief program can meet the minimum criteria for compliance under the NIAA. Please contact Sterling Nixon, Program Manager, Brady Operations Branch, at (304) 616-4174 or by email at Sterling.Nixon@atf.gov, and let us know if you would like us to review any amendments to Kansas law, or if we can provide any other assistance.

Sincerely Yours,

Gary L. Bangs
Acting Division Chief
Firearms Programs Division