	: SUPERIOR COURT OF NEW JERSEY
IN RE J.M. PETITION FOR	: APPELLATE DIVISION
EXPUNGEMENT OF MENTAL HEALTH	: DOCKET NO. A-003713-13T2
RECORDS	:
	: CIVIL ACTION
	:
	: ON APPEAL FROM A FINAL ORDER
	: OF THE SUPERIOR COURT OF NEW
	: JERSEY, LAW DIVISION, MIDDLESEX
	: COUNTY
	:
	: SAT BELOW:
	:
	: HON. JOSEPH L. REA, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF PETITIONER-APPELLANT **JOHN MCALLISTRI**

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PRELIMINARY STATEMENT

On April 16, 2007, an individual shot and killed thirty-two persons on the campus of Virginia Polytechnic Institute and State University in Blacksburg, Virginia. He wounded seventeen others. He used two different firearms in his attacks.

The shooter had a history of mental illness. Under federal law, his name should have been in a national registry. Presence of his name would have prevented sale to him of the firearms that he used. However, gaps in reporting procedures by the States existed. Because of those gaps, the registry had no information concerning the shooter.

The Virginia Tech shooting commanded Congressional attention. Pressure mounted on Congress to plug the holes that enabled omission of the shooter's name from the registry. At the same time, influential organizations lobbied to prevent overreaction to the shooting from denying firearms to responsible citizens. Legislation resulted that accommodated the concerns of both sides.

The resulting legislation was the NICS Improvement Amendments Act of 2007 ("the Act"). The Act, on the one hand, provided financial incentives to the States to better inform the registry of mental health commitments. The NICS registry was to be updated with information concerning commitments that had occurred years or, in some cases, decades earlier. At the same time, the Act specified that obsolete and irrelevant data were to not bar acquisition of firearms.

John McAllistri was sexually abused as a child. That abuse engendered anger issues, directed at his abuser. His anger issues, in turn, led to his being voluntarily admitted in 1989 to Fair Oaks Hospital in Summit, New Jersey, with subsequent voluntary out-patient treatment at Union County Hospital. His out-patient treatment concluded in 1990.

His treatment was successful. Mr. McAllistri went on to graduate from high school. He sought and received a nursing degree at Raritan Bay Medical Center, and a Bachelor of Science Degree in Nursing from the University of Phoenix. He holds nursing

licenses in both New Jersey and Colorado, where he now lives. He has received numerous awards.

Mr. McAllistri moved from New Jersey to Colorado in January 2000. He moved for the mountains, and to hunt and to fish. Suddenly, because of his voluntary juvenile admission a quarter century earlier, his name appeared on the NICS registry. He could no longer purchase firearms.

In an effort to address that development, Mr. McAllistri sought expungement of his New Jersey mental health records. The Law Division nominally granted the expungement but, *sui sponte*, required a provision ("the Provision") that rendered the expungement ineffective with respect to firearms ownership and possession. The Provision thus defeated the purpose for which Mr. McAllistri sought the expungement.

Mr. McAllistri challenges the Provision. This appeal will demonstrate that insertion of the Provision was arbitrary and capricious and, further, that the Provision directly violates the Act that caused his history to surface in the first place.

PROCEDURAL HISTORY

John McAllistri filed a Verified Complaint on January 7, 2014 (Pa1)[1]. His complaint sought expungement of records relating to a voluntary mental health admission in 1989. Supporting his complaint was his own affidavit (Pa4). Exhibits to that affidavit documented his personal, educational, and professional activities in the ensuing quarter century (Pa13 through Pa22).

An Order entered February 4, 2014, set a hearing date of February 28, 2014 (Pa23). The Order specified particular agencies and persons to which notice was to be provided[2].

No noticed party filed responsive pleadings to their notifications, although Mr. McAllistri's parents appeared and testified (T2)[3]. The hearing proceeded on

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1 "P" stand for "Petitioner".

2 Proof of compliance with the requirement of service, although available, is not part of the record below.

3 "T" refers to proceedings on February 28, 2014. That is the only date on which hearings relevant to

(continued...)

February 28 as scheduled, the Hon. Joseph Rea, J.S.C., presiding (T1). Mr. McAllistri participated via video link (T3).

At the hearing, the judge, *sua sponte*, inquired into Mr. McAllistri's reason for seeking the expungement (T9-12). Mr. McAllistri explained that his name had suddenly appeared on a national registry, and that that precluded his obtaining firearms (T9-18 through T10-4).

Judge Rea granted the expungement. He required, however, that the order specify that the expungement not extend insofar as firearms-related activities were concerned. The order was to further specify that the expunged information must be divulged in connection with any firearms-related applications (T11-5). No party that had been previously noticed, nor the judge himself, had previously raised a firearms issue.

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3 (...continued)
this appeal occurred.

An order reflecting the court's instructions was entered on March 12, 2014 (Pa25). Mr. McAllistri filed his Notice of Appeal on April 22, 2014 (Pa27).

During this appeal, Mr. McAllistri filed two motions. His first motion was to amend the case caption, and to impound the record (Pa79). A Certification of counsel (Pa81) supported the application. His second motion was for leave to include specified judicially noticeable materials in the Statement of Facts in this brief (Pa84), again supported by the Certification of Counsel (Pa86). By way of decisions dated July 10, 2014, the Court issued the requested order impounding the record and changing the caption (Pa79), and denied the motion relating to judicial notice (Pa80).

STATEMENT OF FACTS

John McAllistri, born February 14, 1973 (Pa4), is 41 years old. He was graduated from JFK High School in Iselin, in 1991 (Pa5). Thereafter he was graduated from the Charles E. Gregory School of Nursing at

Raritan Bay Medical Center in 1996. He went on to obtain a Bachelor of Science degree in nursing from the University of Phoenix in 2005 (Pa5). He obtained his Registered Professional Nursing license in New Jersey in 1996, and in Colorado in 2005. He maintains both licenses to this day (Pa14). He is a Board Certified Emergency Nurse. He held New Jersey State EMT-B certification from May 1991 to 2001 (Pa14).

In 1999 and 2000, Mr. McAllistri was a per diem registered nurse with University Radiology, in Metuchen. His duties included pre-procedure screenings to determine if patients were appropriate for contrast dyes. He administered IV dyes, and monitored patients during procedures (Pa26). Before that, between 1994 and 1997, he was an EMT-B ambulance technician with Multi-Care Medical Transport, located in South Amboy (Pa16).

Mr. McAllistri grew up in New Jersey (T8-5, T9-8). In January 2000, at age 28 (T8-24), he moved to Colorado (Pa14). Judge Rea explored the circumstances of his relocation (T18-16):

> THE COURT: I'm curious. Why Colorado, any particular reason?
>
> MR. E. McAllistri: The mountains, the hunting, the fishing. It has everything I want.

Mr. McAllistri has had extensive activities with the AmJohnan Heart Association. Those activities have included ACLS Instructor, ACLS Course Director, PALS Instructor; and PALS Course Director. He is on the faculty of the Nationial Sedation Center. He is a BLS[4] instructor with the Rocky Mountain CPR Association (Pa14).

Mr. McAllistri has been heavily involved with the Emergency Nurses Association. He has been an instructor and course director with their Trauma Nursing Core Course for over a decade. Similarly, he has taught and directed its Emergency Nursing Pediatric Course. He is an instructor and course director for its Course for Advanced Trauma Nursing. For two years

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4 The record does not reveal what ACLS, PALS, or BLS signify.

ending in 2008, he was its Nonviolent Crises Intervention Instructor (Pa14).

Mr. McAllistri became a member of the Colorado Emergency Nurses Association in 2002. In 2007, he became a life member. He served as president in 2006 and 2007 and, again, in 2009. Among other things, he designed and implemented the cardiovascular, gastro-intestinal, medical emergencies, and OB-GYN portions of its CEN review course (Pa15).

JAM Consulting, LLC, was established in 2006. Mr. McAllistri is its owner and sole officer. Its mission has been to provide high quality and professional education courses to all levels of health care professionals. As such, the company maintains the integrity of all courses, including instruction and course direction (Pa15).

In 2001, Mr. McAllistri became an Emergency Department Clinical Nurse Educator with the Denver Health Medical Center, Denver, Colorado. In that capacity, he was responsible for planning and implementing individualized orientations for new RN's,

EMT's, paramedics, and clerks in its emergency department. He was responsible for maintaining current files on all staff, including up to date certifications and licensure. He developed and updated departmental policies as needed (Pa15). He conducted audits on narcotic and restraint documentation (Pa16).

From January 2007 to the present, Mr. McAllistri continued with that same facility as an Emergency Department Staff Nurse. His now part time duties there include directing patient care in its trauma, medicine and observation departments. At the same time, he works there as a charge nurse, triage, and radiology nurse (Pa15).

Mr. McAllistri has received numerous awards. Included have been the Outstanding First Aid Award from AmJohnan Legion Post 471 (1994), an Emergency Nurses Association Distinguished Leadership Award (2006, 2007, and 2009), and a Preceptor of the year (2009) award from the Denver Health Medical Center (Pa16). Between 2004 and 2013, he attended numerous professional conferences throughout the country (Pa17). He

participated in Gun Safety Lock education and distribution for Denver Health Medical Center Community Awareness Day in 2005 and 2007 (Pa17). He has made numerous presentations to professional groups in Colorado and Iowa (Pa17, Pa18).

Mr. McAllistri has no criminal record. He has never been arrested (Pa5, Pa19). He has an excellent reputation in both his personal and professional community (Pa20, Pa21, Pa22). Indeed, Mike Pistono writes (among other things)(Pa20):

> On a personal note, John is selfless with this time. He has dressed up as Santa Claus for numerous families over the course of the last 10 years. John has also volunteered his time at Christmas visiting sick children in hospitals in his Santa suit. In the thirteen years I have known John, I have seen him demonstrate his generosity, kindness, and thoughtfulness toward not only my family but toward many by offering to move furniture, paint, drywall, and babysit.
>
> No more can be said other than on a personal and professional level John's reputation is of the highest quality.

John McAllistri was sexually abused as a child (T5-3 to T5-7, Pa2). That abuse engendered anger issues, directed at his abuser. His anger issues, in turn, led to his being voluntarily admitted in 1989 to Fair Oaks Hospital in Summit, New Jersey (Pa10), with subsequent voluntary out-patient treatment at Union County Hospital (Pa1). His out-patient treatment concluded in 1990 (Pa1). He has had no treatment since (Pa2).

His treatment was successful. His achievements are indicated above. Those achievements show Mr. McAllistri to be a solid, well-respected, contributing member of both his community in particular, and society in general (Pa13 through Pa22).

As indicated above, Mr. McAllistri moved to Colorado for the mountains, to fish, and to hunt (T18-18). Suddenly, because of his voluntary admission to Fair Oaks a quarter century earlier, his name appeared in a national registry (T9-18 to T9-23). He could no longer purchase firearms (T10-1). A primary reason for his relocating so far from his home, and so far from his parents, was thus frustrated.

In an effort to regain that which was taken from him, Mr. McAllistri sought (Pa1) and nominally obtained expungement of his mental health records. The expungement court, however, *sui sponte*, required a provision in the final order that rendered the expungement ineffective with respect to firearms ownership and possession (Pa25). The court explained that requirement thusly (T10-20 to T12-17):

> [T]he Order would be tempered, Mr. McAllistri, because there's a decision by Judge Natal. Judge Natal is a judge in my counterpart in Camden County.
> .
> .
> .
> He wrote a reported decision in the matter of the application of J.D. And in this -- when -- when it comes to -- when it comes to firearms applications Judge Natal his opinion takes the position that an expungement is analogous a privilege, a legal privilege which is waiveable. So, in other words, you can't assert an expungement and not reveal certain information provided, however, and in the context of firearms that if you apply for a firearms identification card or any permits to purchase, possess, or -- or -- or carry firearms that that the expungement, that

privilege is deemed to be waived and you would have to reveal that.

In other words, when it comes to firearms this expungement is not going to help you. It would help you -- I've had people come in who are school teachers and they want to apply for different positions and then they have a history, you know, years prior of a, you know, a certain licensing thing where they -- they don't want to have to write down where it asks that question. Fine. But any Order that goes out on this would contain the language that it doesn't apply in the context of firearms. And -- and that and, in fact, we had a meeting and I specifically discussed this with Judge Natal. Every county has a judge that handles these issues. At the Judicial College we all got together. This is a reported Opinion. It's at 407 N.J. Super 317, decided in February of 2009, and, in other words, this isn't going to help you get a gun or a permit to purchase a gun.

Now, if it's up that Colorado is looking to New Jersey that's their business. I mean I have no jurisdiction over what Colorado does, but I can tell you that the Order -- the Expungement Order would state that they would contain language, and I would tell Mr. Lange this Expungement Order shall not apply to applications for firearms, identification card, and/or permits to purchase, possess, and/or carry firearms. As such John McAllistri must divulge his civil

> commitment on any application for a firearm, identification card, and/or permits to possess, purchase, or carry a firearm.
>
> So I don't know where we're going with this.

The Provision thus thwarted the purpose for which Mr. McAllistri had sought the expungement in the first place.

STATEMENT OF LAW

STANDARD OF REVIEW

A trial court's interpretation of the law, and the consequences that follow from established facts, are not entitled to any special deference upon appellate review, Manalapan Realty v. Manalapan Township Committee, 140 N.J. 366, 378 (1995). This New Jersey standard is reinforced and, indeed, even mandated by

the Act[5]. The Act goes further. Section 105(a)(3) of the Act provides:

> A relief from disabilities program is implemented by a State in accordance with this section if the program...permits a person whose application for the relief is denied to file a petition with the State court of appropriate jurisdiction for a de novo judicial review of the denial.

Thus, at least with respect to Point Two of this Brief, beyond denying special deference to the court below, the applicable standard of review in this Court is to afford no deference to the court below. Rather, this Court is to consider the matter *de novo*, disregarding the findings and conclusions below.

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5 As indicated in the Preliminary Statement, "the Act" refers to the NICS Improvement Amendments Act of 2007. This Act is also designated P.L. 110-180. It lacks its own designation in the United States Code. Its text is included as a note to 18 U.S.C. Section 922. This brief discusses the Act extensively in Point Two.

POINT ONE

THE FIREARMS LIMITATION IS ARBITRARY AND CAPRICIOUS, AND CONSTITUTES AN ABUSE OF DISCRETION

The statute that governs expungement of mental health records is N.J.S. 30:4-80.11. That statute provides in its entirety:

> If an order expunging such commitment is granted, the commitment shall be deemed not to have occurred and the petitioner may answer accordingly any question relating to its occurrence.

N.J.S. 30:4-80.11 is unqualified. Nothing in N.J.S. 30:4-80.11 authorizes the court to require the Provision here ordered. In requiring the provision, the motion court relied on In re J.D., 407 N.J. Super. 317 (Law Div., 2009). Beyond disregarding the mandate of N.J.S. 30:4-80.11, that reliance was misplaced.

It is first important to understand the context in which J.D. arose. J.D. obtained an expungement of mental health records in 1984. It was not until twenty-four years later, in 2008, that he sought a firearms purchaser identification card and a permit to purchase a handgun. Question 22 on the application

form asked, "Have you ever been confined or committed to a mental institution or hospital for treatment or observation of a mental or psychiatric condition on a temporary, interim or permanent basis?" Question 25 asked, "Have you ever been attended, treated or observed by any doctor or psychiatrist or at any hospital or mental institution on an in-pataient or outpatient basis for any mental or psychiatric conditions?" J.D. answered "No" to both questions.

The Voorhees Township police chief denied his applications, on two grounds. His first ground was that, since J.D. had in fact been treated, his "no" answers constituted falsifications of his application. As to that ground, J.D. observed, at 324:

> [Applicant] qualified for the remedy of expungement which would entitle him to state, even under oath, despite the looming penalty of perjury, he has never been hospitalized or committed.
>
> Given the magnitude of the remedy, this court finds under these facts, the applicant did not falsify his application when he answered questions 22 and 25 in the negative. He relied on a privilege to which he was

> entitled, just as he has relied on it in the past without repercussion.

The second ground upon which the chief relied was J.D.'s "Medical, Mental or Alcoholic Background." Here it is crucial to note that, while the J.D. court affirmed the Chief's denial, it did not hold that applicant disqualified. Quite the contrary, that court held:

> If the applicant chooses to reapply, he may do so with the Voorhees Police Department. Reapplication, however, will require the applicant to waive the privilege of expungement. Therefore, he will be required to submit to the police both a new application and a certificate from a medical doctor or psychiatrist licensed in New Jersey, or other satisfactory proof that he is no longer suffering from schizophreniform disorder or any other disorder in such a manner that would interfere with or handicap him in the handling of firearms.

Application of the J.D. requirement to Mr. McAllistri is wrong. Preliminarily, and unlike what happened here, the J.D. court had no intention of permanently stripping that applicant of his firearms

rights. That court simply required satisfactory proofs of fitness. But the Provision entered for Mr. McAllistri makes proofs irrelevant, regardless of their quantity or quality or antiquity. The Provision requires that Mr. McAllistri live in perpetuity with legal disabilities occasioned by an ancient juvenile voluntary commitment. These disabilities will surface on any and all occasions that he may choose to purchase firearms.

Secondly, Mr. McAllistri has already provided the medical proofs, or "other satisfactory proof" of no disqualifying disorder, required in J.D. Daniel S. Schoenwald, Ph.D., reported (Da13):

> At this time, Mr. McAllistri does not meet criteria for any psychological or psychiatric disorder, and has been free of symptoms for many years based on his report, which is supported by his long-term occupational stability. Mr. McAllistri has been working in the nursing field for almost 20 years and has worked for the same hospital for the last 13 years. Additionally, he is not reporting any psychological distress at this time. At the time of the clinical interview, the patient presented on time, was well dressed and groomed, alert, and intact

> conversationally. No indication of psychological symptoms was evident by observation. The mental status examination was free from deficiencies. I feel confident that these descriptions are an accurate portrayal of his current psychological functioning.

Beyond what Dr. Schoenwald specifically reported, Mr. McAllistri's accomplishments bespeak and constitute the very proofs implicated by J.D. Yet the order of the court below affords no opportunity whatsoever for removal of the Provision.

This case distinguishes itself from J.D. in yet another way. J.D. obtained his expunction and, thereafter, applied for a firearms purchase permit. The J.D. court simply held that the police chief could consider the expunged facts in determining to grant or deny the application. But nothing in J.D. required that a qualification of the expungement order itself forever bear witness to his prior commitment.

J.D. holds that application for a firearms permit waives the benefit of a prior mental health expungement. But Mr. McAllistri did not ask the Court

below for a firearms permit; what he asked for was an expungement. And whatever it is that the court below gave, and whatever it is that the court below may call it, it is less than an expungement. The Provision tells all who receive it, and tells Mr. McAllistri himself that, as far as the court is concerned, Mr. McAllistri remains mentally suspect. The Provision constitutes, in effect, a Scarlet C (for "committed"). Mr. McAllistri must forever wear this Scarlet C any time he might try to exercise one of his fundamental constitutional rights[6].

The arbitrary and capricious nature of the inserted provision is manifest. John McAllistri is law abiding. He is professionally accomplished. He excels in his

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6 The legal principles invoked by Mr. McAllistri in this appeal are abuse of discretion (Point One), and violation of applicable statutory law (Point Two). Neither of these arguments are constitutional in nature. It is nonetheless appropriate to note that the Second Amendment conferred an individual right to keep and bear arms, District of Columbia v. Heller, 554 U.S. 570, 595, 128 S.Ct. 2783, 2799, 171 L.Ed.2d 637 (2008). This right is fully applicable to the States, McDonald v. City of Chicago, 561 U.S. 742, 130 S.Ct. 3020, 3026, 177 L.Ed.2d 894 (2010).

field. Those qualities, in and of themselves, are no guaranty of sanity. Still, there has to be *some* indication of abnormality to support the limitation imposed by the court. Here the only specified reason was robotic adherence to a consensus of judges reached at the Judicial College (T11-25), and a wholly inapplicable Law Division decision.

No individualized analysis was provided. No individualized analysis was attempted. No justification for the Provision was provided. Indeed, no pretense at justification for the Provision was ever suggested. An action is arbitrary and capricious when made without consideration and in disregard of circumstances, Beattystown Community Council v. DEP, 313 N.J.Super. 236 (App. Div., 1998).

Guns are dangerous. So are cars. But when a driver's negligence causes an accident, even a fatal accident, New Jersey does not revoke his driving privileges for life. Frank Forsgate, for example, drove carelessly, causing a death. The Division of Motor Vehicles suspended his driving privileges for

only one year. This Court affirmed, Forsgate v. Strelecki, 103 N.J. Super. 435 (App. Div., 1968). And Keeno Exum caused a fatal car accident on September 18, 1982. He had a blood alcohol level determined to be 0.128 percent. The Division revoked his driving privileges for five years, Division of Motor Vehicles v. Exum, 5 N.J.A.R. 298 (1983).

John McAllistri, by way of contrast, has killed no one. He has harmed no one. He has threatened no one. Quite the contrary, he has conducted his entire life in a manner that can be cause only for praise and emulation. Yet the Provision imposes upon him a lifetime barrier to ever being able to legally possess a firearm.

The illogic of this provision is further highlighted by various New Jersey and federal statutes. N.J.S. 2C:39-7b(2) disqualifies a person convicted of a disorderly persons offense involving domestic violence from possessing firearms, even when weapons were not implicated in the offense. Similarly, N.J.S. 2C:39-7b(3) makes possession of a weapon a third degree crime

when possessed contrary to a court order issued under the Prevention of Domestic Violence Act of 1991. But each of those disabilities can be removed. The N.J.S. 2C:39-7b(2) disability is removed by expungement of the original conviction, N.J.S. 2C:52-27:

> Unless otherwise provided by law, if an order of expungement is granted, the arrest, conviction and any proceedings related thereto shall be deemed not to have occurred[.]

And the N.J.S. 2C:39-7b(3) disability disappears upon vacation of the court order, N.J.S. 2C:25-29d[7].

Similarly, it is a federal crime for a person subject to a domestic violence restraining order to possess a firearm, 18 U.S.C. Section 922(g)(8). But that disability, too, evaporates when the person becomes no longer subject to the order, Id. Surely an order is arbitrary and capricious when a person with no history of crime, violence, or threat of violence must never possess firearms while, at the same time, persons

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7 Under N.J.S. 2C:39-7b(3), vacation of the court order does not remove the disability when a firearm was previously seized and not returned.

who have perpetrated domestic violence, and persons who have been convicted of other violent crimes, including crimes involving firearms, can.

Unlike the revocation of driving privileges examples, which other states can elect to honor or disregard, the legal disability imposed by the Provision, by virtue of NICS, reaches Colorado, Alaska, and wherever in the United States he may later choose to live. It even reaches United States territories like Puerto Rico[8].

The illogic of the limitation is still more highlighted by this hypothetical: Suppose, instead of being voluntarily admitted, Mr. McAllistri, for revenge, had taken a gun and shot both kneecaps of his abuser. As a juvenile, he would have been charged with

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8 18 U.S.C. Section 922(g)(4) makes it unlawful for a person who has been committed to a mental institution to receive any firearm that has been shipped or transported in interstate commerce. Under 18 U.S.C. Section 921(a)(2), interstate commerce includes commerce between any place in a State and any place outside of that State. The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States, but not including the Canal Zone.

delinquent acts that, as an adult, would have constituted second degree aggravated assault, illegal possession of a weapon, and possession of a weapon for an unlawful purpose. Had he been adjudicated delinquent on all three charges, five years after completion of whatever sentence the court imposed, he could have had his entire juvenile record expunged, N.J.S. 2C:52-4.1b.

Had Mr. McAllistri deferred his revenge until after reaching his majority, he still could have had his entire adult criminal record expunged, N.J.S. 2C:52-2. This Court has observed in dictum that a conviction thus expunged would be unable to support a subsequent charge of N.J.S. 2C:39-7(b), possession of a weapon by one previously convicted of a crime, State v. King, 340 N.J. Super. 390, 395 (App. Div., 2001)(noting a previous unpublished opinion).

Under federal law, the New Jersey criminal record expungement results in the complete removal of federal firearms disabilities. While 18 U.S.C. Section 922(g)(1) prohibits any person convicted in any court

of a crime punishable by imprisonment for a term exceeding one year to possess any firearm shipped in interstate commerce, 18 U.S.C. 921(a)(2) specifically defines "crime punishable by imprisonment for a term exceeding one year" to not include:

> Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

It is a bizarre provision of a New Jersey mental health expungement order where voluntary prophylactic juvenile hospital admissions are to be permanently reported and disabling but, under both State and federal law, actual criminal violent acting out is, for firearms purposes, erased.

POINT TWO

THE FIREARMS LIMITATION VIOLATES THE NICS IMPROVEMENT ACT OF 2007 (Not Raised Below)[9]

Under the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968, felons, fugitives, and persons under indictment were rendered ineligible to legally receive firearms. Over time, further amendments increased the classes of persons who could not legally acquire or possess firearms[10].

As relevant to this appeal, 18 U.S.C. Section 922(g)(4) came to provide in pertinent part:

> It shall be unlawful for any person...who has been adjudicated as a mental defective or who has been committed to a mental institution...to ...possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition

9 Mr. McAllistri had no opportunity to raise this point below inasmuch as that court had provided no prior notice of its intention to require a firearms limitation.

10 The present list of ineligible classes is contained in 18 U.S.C. Section 922.

> which has been shipped or transported in interstate or foreign commerce.

And 18 U.S.C. Section 922(d)(4) provides:

> It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person...has been adjudicated as a mental defective or has been committed to any mental institution[.]

The Bureau of Alcohol, Tobacco, and Firearms has adopted implementing regulations. 27 C.F.R. 478.11 was in force in 2007. That regulation defines "adjudicated as a mental defective." That definition provides in pertinent part:

> (a) 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 to others[.]

Additional federal legislation arrived in 1993 in the form of the Brady Handgun Violence Protection Act

("the Brady Act")[11]. Section 103 of the Brady Act created the National Instant Criminal Background Check System (NICS). Subsection 103(b) provided:

> ESTABLISHMENT OF SYSTEM.—Not later than 60 months after the date of the enactment of this Act, the Attorney General shall establish a national instant criminal background check system that any licensee may contact, by telephone or by other electronic means in addition to the telephone, for information, to be supplied immediately, on whether receipt of a firearm by a prospective transferee would violate section 922 of title 18, United States Code, or State law.

The Brady Act had a major weakness. Its efficacy was dependent upon the States submitting qualifying events to the registry. Inconsistent or inadequate reporting procedures by the various States caused many such events to be not submitted. These reporting gaps

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11 The Brady Act is the popular name of P.L. 103-159. It is named after Presidential Press Secretary James Brady, shot in the head by a mentally ill individual, John Hinckley, on March 30, 1981. The setting for this shooting was an assassination attempt on President Reagan. For additional background, see Gun Control: the Brady Handgun Violence Prevention Act, 16 Seton Hall Legis. J. 245 (1992).

were implicated in subsequent mass shootings. One of these shootings was the Virginia Tech massacre, detailed in Congressional findings incorporated in Section 2 of the NICS Improvements Act of 2007:

> (9) On April 16, 2007, a student with a history of mental illness at the Virginia Polytechnic Institute and State University shot to death 32 students and faculty members, wounded 17 more, and then took his own life. The shooting, the deadliest campus shooting in United States history, renewed the need to improve information-sharing that would enable Federal and State law enforcement agencies to conduct complete background checks on potential firearms purchasers. In spite of a proven history of mental illness, the shooter was able to purchase the two firearms used in the shooting. Improved coordination between State and Federal authorities could have ensured that the shooter's disqualifying mental health information was available to NICS.

As a result of his proven history of mental illness, the shooter was a person who, within the meaning of 27 C.F.R. 478.11, had been "adjudicated as a mental defective." As such, his name should have been

in the Section 103(b) NICS registry. Because of the gaps just mentioned, the registry had no such record.

Under 18 U.S.C. Section 922(d)(4), the sale of the two firearms to the shooter was illegal. Under 18 U.S.C. Section 922(g)(4), the shooter's purchase of those firearms was also illegal. Had his name been in the registry, he would have been unable to obtain the firearms as he did.

The Virginia Tech shootings commanded Congressional attention. Public response over gun violence in the United States is what prompted Congress to pass, and the President to sign, the Act.

The subject matter of the Act touched upon different interests. Congress recognized a need to carefully balance the public's legitimate safety concerns on the one hand, against the rights of responsible owners and users of firearms, on the other. Influential organizations, most notably the National Rifle Association, lobbied to prevent overreaction to the shooting from denying firearms to responsible

citizens. The resulting legislation reflected the concerns of both sides.

The basic paradigm of the Act was to offer financial incentives to the States to better inform the registry of mental health commitments. The registry was to be updated with information concerning commitments that had occurred years, or even decades, earlier. At the same time, the Act specified that obsolete and irrelevant data were to not prevent acquisition or possession of firearms. This delicate balance resulted from prodigious efforts by all interests.

These efforts were memorialized in House debates. Thus on June 13, 2007, debate included the following excerpts, 153 Cong. Rec. H6339 (Pa29, Pa39, Pa41)(emphasis added):

> In order to move the legislation to the floor, it was necessary to make some accommodations to incorporate the concerns of gun owners. The dean of the Congress, among other things, led this effort. Among the things that were changed is section 105 of **the bill**, which **requires all States to adopt a procedure allowing those**

individuals who have been determined to suffer from a mental illness with an opportunity to purchase or possess a firearm at some point later in life. That's a pretty serious matter.

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I commend Congresswoman McCarthy and Congressman Dingell and the other cosponsors for their commitment to addressing this issue in a way that protects every AmJohnan's constitutional right to bear arms. The NICS Improvement Act will ensure that the NICS background check system really is instantaneous and accurate. The act will require Federal agencies to provide relevant criminal mental health and military records for using NICS, create financial incentives for States to provide relevant records for using NICS, improve the accuracy of NICS **by requiring** Federal agencies and **participating States to** provide relevant records, [and] **require removal of expired, incorrect or otherwise irrelevant records**[.]

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This legislation represents a true compromise, a public safety measure that will prevent gun violence and protect the second amendment rights of law abiding citizens.

I think it's very important to note that **we have two diverse groups coming together, the NRA and the Brady Group,**

> **coming together to help work out this legislation,** and both had some benefits from it.
> .
> .
> .
> Improving the National Instant Check System is a matter of important national business, and **I would urge my colleagues to take a look at the rather curious alliance which brings this matter forward. Not only is the NRA, but the gun control folks are in support of it. Members on both sides of the aisle, both here and in the Senate, are strongly supporting it.**
>
> The bill will require the National Instant Check System to work. It will provide incentives to the States and penalties for those who do not cooperate in terms of making the system work.
>
> **This system has the capability of seeing to it that criminals are denied firearms while, at the same time, assuring that we protect the rights of law abiding citizens.**

And the following remarks occurred on the occasion of final House passage, after the bill had returned from the Senate with modifications, 153 Cong. Rec. H16923 (December 19, 2001, Pa49)(emphasis added):

Mr. BOUCHER.

Madam Speaker, I rise in support of the measure which I am pleased to cosponsor with the gentlelady from New York, Mrs. McCarthy, and the gentleman from Michigan, Mr. Dingell. I want to thank both of my colleagues for their careful and constructive work on the legislation.

The bill before us today is a well-tailored response to the tragedy that occurred earlier this year in my Congressional District at Virginia Tech University.

It also meets a nationwide need for better reporting of mental health records to the National Instant Criminal Background Check System, against which prospective gun purchases are checked to determine whether they are eligible to purchase firearms.

Under existing federal law, which was also in effect at the time of the Virginia Tech tragedy, persons who have been adjudicated to be a risk to others or to themselves because of a mental condition are barred from purchasing firearms.

The perpetrator of the Virginia Tech tragedy had been adjudicated to be a risk to himself and committed for outpatient mental evaluation.

Accordingly, under federal law in effect at the time, he should have

been barred from purchasing the firearms he used.

However, at the time the purchases were made, Virginia did not submit to the National Instant Background Check System mental health records of persons who were committed for outpatient as opposed to inpatient mental evaluation.

Therefore, the disqualifying adjudication that the perpetrator was a risk to himself was not submitted to the background check system, and he was able to purchase firearms.

Ironically, at the time Virginia had the best record among the States for submitting mental health records to the national system.

Since the tragedy, Virginia's mental health record submissions have been made much more thorough by an executive order signed by Tim Kaine, the Commonwealth's Governor.

Nationwide, the number of mental health records submitted by the States to the federal database has doubled since the tragic events of April. I am pleased by this progress, but there are further improvements to be made, as 18 states currently do not submit names to the federal database.

The bill we will pass today will further improve the submission of mental health records nationwide by providing grants to States which

> undertake projects to make more thorough record submissions.
>
> **I also support the changes made by the Senate which strengthen the appeal process provided by the bill for individuals to have their names removed from the database if their mental health records are inaccurate or outdated. These changes will further ensure the accuracy of the National Instant Background Check System.**
>
> I commend Mrs. McCarthy for her longstanding effort to take these necessary and constructive steps, and I urge passage of the bill.

New Jersey applied for grants made available by the Act. Initially, the United States Attorney General denied the application. As explained in a Statement accompanying New Jersey Assembly No. 4301, 213th Legislature (2009)(Pa67, emphasis added):

> On June 22, 2009, the Administrative Office of the Courts applied for a federal grant to improve the recording, automation, and transmittal of State mental health adjudications. The program design would provide this mental health information to both the New Jersey State Police and NICS.

> **New Jersey's grant application was denied by the U.S. Attorney General on October 14, 2009 because State law: (1) does not adequately afford individuals adjudicated as mental defectives the right to apply for an expungement;** (2) does not require State courts to hear any of the evidence expressly required by federal law in such expungement cases; (3) contains directive language and phraseology concerning the factors to be considered by the court in reviewing petitions for expungement that are too vague to comply with the new federal law; and (4) does not grant the federal government access to State mental health records.
>
> The provisions of this bill amend the appropriate sections of State law to address the concerns raised by the U.S. Attorney General. With their adoption, New Jersey will become compliant with the provisions of the NICS Improvement Act of 2007 and be qualified to receive federal grant moneys to assist in the implementation of those changes.

Two of the statutes at issue in A-4301 were those that provided for expungement of mental health records, N.J.S. 30:4-80.8 and N.J.S. 30:4-80.9 (Pa65). For the specific purpose of obtaining the federal grants, A-4301 became law. N.J.S. 30:4-80.8 now provides:

> Any person who has been, or shall be, committed to any institution or facility providing mental health services, or has been determined to be a danger to himself, others, or property, or determined to be an incapacitated individual as defined in N.J.S. 3B:1-2, by order of any court or by voluntary commitment and who was, or shall be, discharged from such institution or facility as recovered, or whose illness upon discharge, or subsequent to discharge or determination, is substantially improved or in substantial remission, may apply to the court by which such commitment was made, or to the Superior Court by verified petition setting forth the facts and praying for the relief provided for in this act.

And N.J.S. 30:4-80.9 now provides (emphasis added):

> Upon reading and filing such petition, the court shall by order fix a time, not less than 10 nor more than 30 days thereafter, for the hearing of such matter, a copy of which order shall be served by the petitioner upon the county adjuster of the county and upon the medical director of the institution or facility to which such person was committed or upon the party or parties who applied for the determination that the person be found to be a danger to himself, others, or property, or determined to be an incapacitated individual as defined in N.J.S.3B: 1-2, and at the time so appointed, or to which it may be

> adjourned, the court shall hear evidence as to: the circumstances of why the commitment or determination was imposed upon the petitioner, the petitioner's mental health record and criminal history, and the petitioner's reputation in the community. **If the court finds that the petitioner will not likely act in a manner dangerous to the public safety and finds that the grant of relief is not contrary to the public interest, the court shall grant such relief for which the petitioner has applied** and, an order directing the clerk of the court to expunge such commitment from the records of the court.

Upon conforming those statutes to the Attorney General's requirements, New Jersey applied for and received grants in federal fiscal years 2010 and 2011. Those grants totaled $3,632,891, Senate Budget and Appropriations Committee, Statement to A3737, May 9, 2013 (Pa62); Bureau of Justice Statistics (BJS) - State profiles, http://www.bjs.gov/index.cfm?ty=tp&tid=491 (Pa68).

In Section 1(b)(2) of the Firearms Owners' Protection Act, Pub.L. 99-308, Congress reaffirmed federal gun policy[12]:

> The Congress finds that...(2) additional legislation is required to reaffirm the intent of the Congress as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap-shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes."

While Section 1(b) defines federal policy, the Tenth Amendment allows New Jersey to define its own[13].

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12 Congressional findings in 99-308 appear under Historical and Statutory Notes to 18 U.S.C. Section 921.

13 The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

And New Jersey does. New Jersey declares that its commitment to firearms safety is unrivaled anywhere in the nation, N.J.S. 2C:58-2.2.

While New Jersey can establish and enforce its own policies, in applying for and accepting federal grant moneys under the Act, it agreed to accept attached conditions. So here. Section 105(b) of the Act provides (emphasis added):

> Authority to provide relief from certain disabilities with respect to firearms.--If, under a State relief from disabilities program implemented in accordance with this section, an application for relief referred to in subsection (a)(1) of this section is granted with respect to an adjudication or a commitment to a mental institution or based upon a removal of a record under section 102(c)(1)(B), **the adjudication or commitment, as the case may be, is deemed not to have occurred for purposes of subsections (d)(4) and (g)(4) of section 922 of title 18, United States Code.**

Once the commitment is deemed not to have occurred, the Act imposes specific duties upon participating

States. Those specific duties are set forth in Section 102(c)(1)(B):

> (B) NICS updates.--The State, on being made aware that the basis under which a record was made available under subparagraph (A) does not apply, or no longer applies, shall, as soon as practicable--
>
> (i) update, correct, modify, or remove the record from any database that the Federal or State government maintains and makes available to the National Instant Criminal Background Check System, consistent with the rules pertaining to that database; and
>
> (ii) 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.

But far from notifying the Attorney General that the basis no longer applies, the Provision requires the exact opposite. The actual effect, and the intended effect, of the Provision is that the adjudication or commitment, contrary to Section 101(c)(1)(B), be perpetuated and republished in the order itself. This provision is irreconcilable with the Act.

A significant objective of the Act was to improve mental health record reporting from the States to the national database. Congress contemplated that the Act would cause entry into the database of many previously unreported records. At the same time, Congress recognized that, in many instances, some of these previously unreported records would be either inaccurate or outdated. The Act was meticulously tailored to address precisely that concern.

New Jersey was never compelled to seek or accept federal grant moneys. It elected to do so. New Jersey enacted Assembly 4301 for the specific purpose of meeting grant conditions. Towards that end, the accompanying statement recites that the purpose of Assembly 4301 was to enable persons previously adjudicated as mental defectives to apply for expungement (Pa17). Yet now the consensus of the Judicial College (T11-25) recites a statewide policy that New Jersey judges attach provisions that make those expungements wholly ineffective to accomplish the purposes for which Assembly 4301 was passed. Put

starkly, the consensus of the Judicial College is to do completely that which the New Jersey Legislature and the New Jersey governor specifically agreed to not do. And the Provision wrongly reflects that misinformed consensus[14].

The injustice of the Provision is further heightened by a related federal provision. 27 C.F.R. 478.11 defines "Committed to a mental institution" as (emphasis added):

> 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.**

Mr. McAllistri's admission was voluntary (Pa10). Under 27 C.F.R. 478.11, in effect at the hearing (and

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14 In fairness to the court below and, for that matter, to the Judicial College itself, no indication exists that either was aware of the Act.

in effect to this day), the voluntary nature of Mr. McAllistri's admission should have caused his name to never have been reported to the NICS registry in the first place[15]. But as a consequence of seeking to expunge records of his voluntary commitment, relief that N.J.S. 30:4-80.9 explicitly allows, Mr. McAllistri is ordered to divulge his commitment to New Jersey, to Colorado, or to wherever else he may seek to exercise his Second Amendment rights.

The court below failed to honor the conditions that New Jersey accepted, and failed to follow the legislation that qualified New Jersey to receive federal grants. When the State, through its Executive and Legislative Branches, accepts moneys, conditions attached to those acceptances should be honored by the Judiciary.

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15 To prevent recurrences of such reporting, all county counsel, and the Administrative Office of the Courts, should be instructed to not report voluntary admissions. Mr. McAllistri makes no such formal application here, as consideration of such action exceeds the scope of relief that Mr. McAllistri can seek on this appeal.

CONCLUSION

The limitation required by the Law Division judge constituted an abuse of discretion. At the same time, it expressly violated federal statutory conditions that New Jersey accepted when it applied for and accepted federal grants.

This matter should be remanded to the Law Division. On remand, the Law Division judge should enter a Order striking the Provision. In its place, the Order should state that Petitioner is granted relief from the federal firearms disability, and that the county adjuster shall, within fourteen days of entry, take all steps to remove information regarding Mr. McAllistri's civil commitment record from inclusion in the federal NICS database.

Respectfully submitted,

Law Offices of Allan Marain

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