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Editor’s Introductory Note: The Commentary and Article below provide information and guidance regarding “Red Flag” laws (also known by a variety of other descriptive names), which are part of the effort by an increasing number of states to address the continuing challenge of reducing the number of Americans who are killed with firearms each year. To date, 13 states have adopted such laws, which allow court-authorized temporary removal of firearms from individuals who show clear signs of being a danger to themselves or others. These laws are civil, not criminal, are limited in time and scope, and have been found by researchers to provide the greatest benefit to gun owners, by temporarily restricting owners’ access to their lethal weapons at a time when they are at risk of taking their own lives. (In 2017, 65% of all gun deaths in Virginia were suicides.)

Last year, the Florida legislature—a strong bastion of gun rights protection—joined other states in enacting a Red Flag law, and the Department of Education’s Federal Commission on School Safety recommended that states adopt such laws. The 2019

Virginia General Assembly, on the other hand, has rejected two bills—SB 1458 (Barker) and HB 1763 (Sullivan)—which would have provided the focused protective procedure provided by such laws. (As of this writing, the Senate Courts of Justice Committee failed to report SB 1458 to the full Senate by a 7-7 vote. Given that tie, there could be an effort to revive the bill in this session.)

The Commentary below, co-authored by Professor Richard Bonnie at UVA and Professor Jeffrey Swanson at Duke University, sets out the evidence and reasoning supporting such laws. The Article from the American Psychiatric Association provides an overview of these laws, and includes more specific guidance for mental health professionals who find themselves dealing with an individual who appears to pose a substantial risk of doing harm to self or others. These pieces may serve as guides for future legislative efforts and for better understanding the nature of and reasons for these laws and how they balance the due process and Second Amendment rights of gun owners with the authority of the larger society to protect its citizens.

For those interested in following the status of Red Flag laws and related statutes throughout the United States there are several websites that provide updated reports on these laws. Most take strong advocacy positions regarding gun safety issues. A site operated by Everytown for Gun Safety Support Fund has comprehensive coverage of past and present gun-related laws.

I. Commentary

Extreme Risk Protection Orders – Effective Tools for Keeping Guns Out of Dangerous Hands

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In the wake of each tragic mass killing at schools, worksites, houses of worship, and entertainment venues, lawmakers continue to offer divisive policy choices: either curtail access to firearms or allow more guns in more places. We believe that a new policy called “extreme risk protection orders” (also called “red flag laws”) can help break through this political paralysis.

Nearly everyone seems to agree that people at genuine risk of harming themselves or others should not have guns. Background checks alone will never fix this problem, because background checks catch only a fraction of the people who truly pose a risk. That’s why bipartisan support is growing for laws authorizing judges to issue “extreme risk protection orders” that temporarily remove firearms from those at risk of harming someone.

In gun policy debates, risky people who should not possess guns are often called “the mentally ill.” This phrase—used by all sides—is highly misleading, however. An estimated 43.6 million Americans have diagnosable mental health conditions¹ and the vast majority of them pose no danger to anyone.² Disqualifying all those people from gun ownership would be ineffective, unfair and stigmatizing. It would also ignore large numbers of people who are not mentally ill, but who do pose a danger.

Most mass shooters have no histories of treatment for mental illness.³ However, many have exhibited symptoms of psychological distress, extreme anger, suicidal thoughts, loss of control and other behaviors that worried their families, co-workers, teachers or neighbors.⁴ We need laws allowing citizens to bring concerns about a person’s dangerous behaviors to the attention of law enforcement, who can then seek a judicial order temporarily restricting the person’s access to firearms. Such laws allow orders to be issued when evidence shows a person is suicidal or has exhibited alarming behavior, signaling they are likely to hurt someone else.

By the end of 2018, thirteen states—California, Connecticut, Delaware, Florida, Illinois, Indiana, Maryland, Massachusetts, New Jersey, Oregon, Rhode Island, Vermont, and Washington—had enacted laws authorizing such pre-emptive, risk-based, time-limited gun removal orders.⁵ These innovative, public-health-driven laws fully respect the Second Amendment and the requirements of “due process”. Almost all of the statutes require that before firearms can be removed from an individual, a judge must review submitted evidence and determine that the individual poses an imminent risk of harm to self or others according to a common set of criteria and standard of proof; typically, this occurs in an *ex parte* process, with most laws requiring a full evidentiary hearing (for which the individual is given prior notice and the opportunity to participate) within fourteen days of the entry of the *ex parte* order.

The civil orders entered by the courts authorizing law enforcement officers to search for and take custody of an individual’s firearms neither require, nor produce, a criminal record. They do not authorize removal of securely stored firearms belonging to other persons in the same home, if the individual of concern does not have access to the firearms. The orders also do not require that the subject of an order have a mental illness; instead, they require evidence of specific recent actions and/or threats of violence, and allow consideration of other factors (e.g., a history of using physical force against others; illegal substance use; hospitalization for mental illness) that establish a real risk of harm to self or others.

There is some variation across states in the specific features of these statutes. For example, the range of individuals authorized to petition for an order may include a law enforcement agency or officer, prosecutor, healthcare provider, family member or intimate partner, household member, a state’s firearm licensing authority—or various combinations of these categories. (Most authorize only law enforcement agencies/officers and prosecutors to petition the court.) The standard of proof required for the evidence of risk sufficient to initially remove a firearm ranges from “reasonable grounds,” “reasonable cause,” “good cause,” and “probable cause,” to “preponderance of the evidence” and (in one state) “clear and convincing evidence.” The standard of proof required at the subsequent court hearing to retain firearms is “preponderance” in three

states and “clear and convincing” in ten states. In all of these statutes, the burden remains on the government to show that the statutory “extreme risk” criteria for taking custody of the firearms have been met.

The maximum period of time allowed between firearm seizure under an ex parte court order and the full evidentiary court hearing varies across states from two days to thirty days—and some states have two different maximum periods for short-term and longer-term removals. (Only Oregon requires the individual to request a hearing; all the other states require that a full evidentiary hearing must be held following entry of an ex parte order.) Five states require that an order of removal be reported to the federal background check system as a gun-prohibiting record; however, in one state, future purchase of a firearm is prohibited by a report to the state licensing authority. One state also requires that the record of a risk warrant for gun removal be reported to the state’s mental health and addictions department. The specified period of time for which a seized firearm can be retained under a risk protection order varies from “up to six months” to “at least 180 days” to one year. Finally, to deter false reports, these statutes make it a criminal offense to knowingly file a false petition for a risk protection order, with the penalty or severity of the crime ranging from a misdemeanor, to perjury, to a third-degree felony, to fines between \$1,000 and \$5,000 and/or imprisonment for up to 2.5 years.

Clearly, research is needed to determine which of these features of risk protection order laws is most effective while providing sufficient legal protections for lawful gun owners commensurate with their Second Amendment right; which parameters are essential to the “recipe” for a successful ERPO; and which could be altered without consequence to make the laws locally responsive and acceptable to stakeholders in certain states. A model statute with modifiable features could be developed to guide other states in their consideration of risk protection order laws. Systematic efforts to educate stakeholders about ERPOs and to implement them at the local level are also a key to ensuring that this legal tool will be appropriately and effectively used.⁶

In the meantime, we already have good empirical evidence of the effectiveness of these laws in Connecticut and Indiana—states that differ in minor features of their risk protection order laws and in larger ways relevant to firearm policy. Indiana has a more conservative state legislature, fewer gun control laws, more gun-owning households, and more baseline gun deaths in proportion to its population than Connecticut. Still, recent studies in both states have confirmed that the suicide risk for the individuals who were the subjects of gun removal is many times higher than in the general population of adults. A study of the outcomes of all gun removal cases in Connecticut between 1999 and 2013 estimated that for every 10 to 20 risk warrants issued, one life was saved by averting a suicide.⁷ Another study reported that Indiana’s firearm suicide rate declined 7.5% as a result of its gun removal law.⁸

Nationwide, about 60% of gun deaths are suicides, and the rate of firearm-related suicide in the population has increased 24% since 1999. A total of 23,854 people used a gun to end their own life in 2017.⁹ Numerous studies have shown that suicides are usually impulsive acts, and that restricting access to guns for people who are at risk of suicide reduces the likelihood of their dying by their own hand. ERPO laws provide a focused

and time-limited mechanism for restricting gun access for those who are at risk of self-harm.

Risk protection order laws can be fairly administered and will save lives. Reflecting expert consensus, the 2018 Final Report of the Federal Commission on School Safety¹⁰ included this recommendation: “States should adopt ERPO laws that incorporate an appropriate evidentiary standard to temporarily restrict firearms access by individuals found to be a danger to themselves or others.” Recent national polling shows these types of laws are supported by about two out of three gun owners and three out of four non-gun-owners.¹¹ And national and state lawmakers increasingly appear ready to sign on to risk-based, time-limited gun removal as a concept. It is heartening that this approach has finally become part of the national conversation.

States are best suited to enact and carry out such laws, using state courts to issue risk warrants and local police to serve them. Congress should create incentives for more states to do so, however. The federal government should also bar people who are subject to risk protection orders from purchasing guns under the national instant background check system.

With about 100 people dying from gunfire in the United States every day, finding common ground on gun policy has become a moral imperative. Extreme Risk Protection Orders are an important piece in the puzzle of gun violence prevention.

Resources

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II. Article

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APA Resource Document

Resource Document on Risk-Based Gun Removal Laws

Approved by the Joint Reference Committee, June 2018

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-- *APA Operations Manual*.

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Introduction

In 2014, the American Psychiatric Association (APA) published a "Resource Document on Access to Firearms by People with Mental Disorders,"¹ which addressed the complex

relationship between firearms, mental illness, suicide, and violence. The document highlighted the limitations of existing legislative strategies, such as the National Instant Criminal Background Check System (NICS), in combating the problems of gun-related suicide and violence in the United States. It noted that registries like NICS can be helpful in some situations, but they are minimally effective in identifying people at acute risk of harm to self or others. In addition, they can unfairly stigmatize individuals with mental illness. As an alternative strategy, the resource document considered a different type of law: that which temporarily restricts access to firearms during a crisis, regardless of mental health diagnosis. Such laws, which had been implemented in Indiana, Connecticut, and California at the time, are risk-based and not tied directly to mental illness or histories of adjudicated civil commitment. Preliminary data indicated that the laws were particularly effective as a suicide prevention strategy, and they deserved further study as a violence reduction measure. Since the publication of the 2014 resource document, the national dialogue on gun violence has progressed, including further consideration of risk-based firearm restriction.

The current resource document summarizes the growing body of research surrounding risk-based firearm removal laws. These laws go by several names: gun violence restraining orders (GVROs),² risk-based gun removal,³ dangerous persons firearms seizure,⁴ extreme risk protection orders,⁵ and others. They have also been loosely referenced as “Red Flag Laws” because of their ability to initiate a process for firearm removal when a “red flag” of concern about an individual’s firearm possession is raised by his or her conduct.

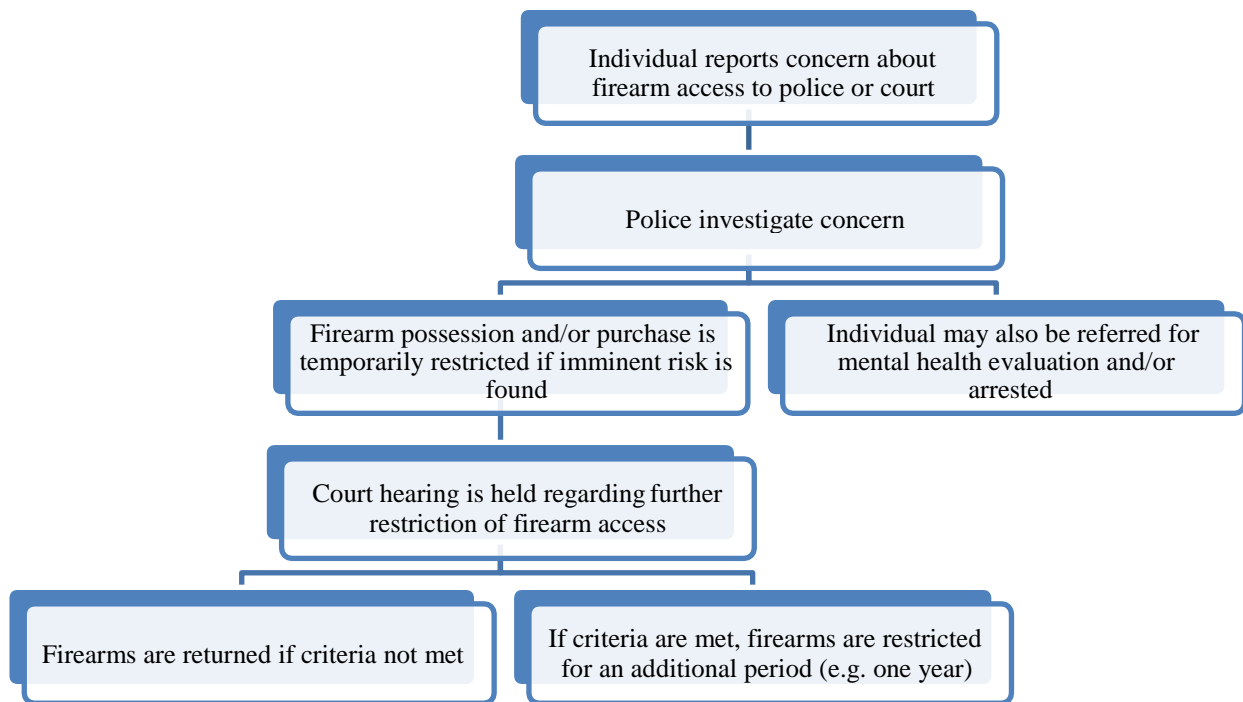
In this document, we use the term “risk-based gun removal laws” to include legislation that aims to restrict access to firearms temporarily for individuals determined to be acutely dangerous to themselves or others. At the time of this writing, four states—Connecticut,⁶ Indiana,⁴ Washington,⁵ and California,⁷—had enacted laws that allow clinicians or family members to initiate firearm removal based on dangerousness, regardless of psychiatric diagnosis. Several other states have similar laws allowing firearm removal by law enforcement officers,^{8,9,10} and still more states are actively considering implementation of risk-based gun removal programs. In addition, President Trump and the National Rifle Association recently endorsed these laws after another tragic mass shooting event. Given the rapidly shifting legislative landscape around this issue, this document limits its discussion to the Connecticut, Indiana, Washington, and California laws, which serve as illustrative examples of risk-based gun removal legislation.

How Do Risk-Based Gun Removal Laws Work?

Although procedures vary from state to state, all risk-based gun removal laws are designed to address crisis situations in which there is an acute concern about an individual’s access to firearms. For example, a person can call the police if she notices that her friend has been drinking heavily and making threats to harm himself. A spouse can ask for removal of firearms from the home based on escalating threats of violence in a marital relationship. An individual can even call the police him- or herself, asking for guns to be removed temporarily because of concern about suicide or violence.

Once the police and/or courts have been notified, an investigation must be conducted and a determination made about whether a genuine threat to self or others exists. In some states, a warrant is required, but sometimes police officers can remove firearms even without one. Officers responding to a crisis typically do more than remove firearms; they assess the person of concern and take further action as necessary, including referral for mental health evaluation or arrest. Typically, firearms can be removed for a short period before a hearing must be held and then for a longer period if the criteria are met at the hearing. The total authorized period of removal ranges from two weeks to one year, depending on the state. After the restriction period has ended, individuals whose guns have been removed can petition the court to have them returned.

Figure 1 outlines a typical framework for dangerousness-based gun removal:



Policies and practices vary significantly among states with gun removal laws regarding who can initiate the gun removal process, whether a warrant is required, what factors the court must consider before ordering firearm removal, what must be proven in court, how long the firearms are restricted, and what process is used to restore the individual's firearm access. *Appendix A* delineates the key features and differences between laws in Connecticut, Indiana, California, and Washington.

Outcomes Data

Connecticut and Indiana implemented their risk-based gun removal laws in 1999 and 2006, respectively, after tragedies involving mass shootings. To date, they are the only two states with published data about the laws' outcomes.^{3,11,12,13}

How often are risk-based gun removal laws used?

Although concerns from gun owners have been raised that these laws may lead to widespread reporting and unwarranted gun removal, data from Connecticut and Indiana indicate that risk-based gun removal laws are used infrequently. In the 14 years of the Connecticut study (1999 to 2013), 762 “risk-warrants” (Connecticut’s term for gun removal warrants based on dangerousness) were issued—an average of 51 per year.³ Connecticut has approximately 227,000 gun-owning households,^{14,15} so 51 warrants per year affect only a tiny fraction (0.02%) of gun-owners in the state. An average of 7 guns per risk-warrant were seized.³

In Marion County, Indiana, 404 petitions for gun removal were requested between 2006 and 2013—approximately 58 per year. Parker estimated that 0.04% of gun-owning households in the county were affected by gun removal laws.¹³ On average, 2.7 guns were seized per petition in Indiana (1096 total firearms, including 555 handguns and 525 long guns).¹³

Who typically initiates the firearm removal process?

In Connecticut, about half of the reports to police were made by an acquaintance of the person of concern – 41% from family members and 8% from employers or clinicians.³ The remaining 51% of reports were made by people who did not know the person of concern or did not disclose their relationship to the police.

Whose firearms are removed?

Data from Connecticut indicate that the typical subject of gun removal was a middle-aged or older married man (average age of 47)¹¹ and that 5% of the male subjects were military veterans. Most of the subjects (88%) were not known to Connecticut’s public behavioral health system at the time the risk-warrants were served, indicating that they had not received treatment for a serious mental illness in the prior year.³ Likewise, the majority of subjects were not involved with the criminal justice system; 88% had no criminal conviction in the year before or after the gun removal.³

Under what circumstances are firearms removed?

Most Connecticut cases involved a concern about self-harm (61%), with a concern about harm to others in 32% of cases. Nine percent of the subjects posed a risk of harm both to self and others. In 16% of cases, a risk of harm to self or others was not specified; these cases typically involved individuals who were too intoxicated or psychotic for that distinction to be made.³ Similarly, in Indiana, removal of a firearm was most likely to occur upon threatened or attempted suicide (68.1%), followed by circumstances such as domestic disturbance (28.5%), intoxication (25.5%), actual or threatened violence (21.0%), and psychosis (16.3%).¹³

What happens to firearms after they are removed?

In 99% of the Connecticut cases, police search led to removal of firearms. In most cases, the outcome of the mandatory court hearing following gun removal was not known. However, among the known outcomes, the seized firearms were held by police (60%),

ordered destroyed or forfeited (14%), returned directly to the subject (10%), or transferred to another individual known to the subject and legally eligible to possess them (8%).³

In Indiana, court-ordered retention of the firearm (63%) was the primary outcome, which correlated strongly with the gun owner's failure to appear at the court hearing. In cases where the owner failed to appear, the court typically ordered the destruction of the firearm five years after the initial removal petition. During the first three years of Indiana's gun removal statute, the court commonly suspended the individual's license to carry a gun. Dismissal of the case was another common outcome (29%), and this result was closely linked to the defendant appearing in court. Other less frequent outcomes included firearms destroyed with agreement of the owner (8.9%) and transfer of seized weapons to another individual (5.7%).¹³

What happens to the individual after his or her firearms are removed?

In both Connecticut and Indiana, the most common police action at time of gun removal was transport to the hospital for psychiatric evaluation (55% and 74%, respectively).^{3,13} In Indiana, 8% of individuals were arrested, and 14% were not detained at all.¹³ In Connecticut, 17% of individuals were arrested, and 27% were not detained.³ The Connecticut data indicate that, in the year following gun removal, 29% of subjects received services through the public mental health system, suggesting that gun removal served as an entry point into psychiatric treatment.³

How long is firearm access restricted?

By statute, firearms can be held for 14 days in Connecticut before a court hearing, after which the restriction can be extended for a period of up to one year.⁶ No data are available regarding how long the restriction typically lasts in that state. In Indiana, the statute indicates that firearms can be held for up to 14 days, after which a court hearing must occur, and the restriction can be extended for up to 180 days. However, Parker noted that, in practice, the time frames for gun removal in Indiana often do not meet statutory requirements. Parker's study found that it took about 140 days for the prosecutor to petition to retain guns seized by the police (rather than the required 14 days), with a significant decrease during the last three years of the study to 88 days. Resolution of the cases occurred in just over 280 days (9 months) after the time police had seized the firearm (rather than the statutory 14 days plus 180 days).¹³

Key Findings from Studies of Risk-Based Gun Removal Laws

Although the risk-based gun removal laws in Connecticut and Indiana were both enacted in the aftermath of highly publicized mass shootings, data indicate that they are most often used in response to concerns about suicide risk, not violence.^{3,13} The laws are directed toward individuals in crisis, typically without a known history of mental illness. In addition to decreasing violence and suicide risk by removing firearms, the laws provide an opportunity for treatment intervention. In fact, most individuals whose firearms were seized were also taken to a hospital for psychiatric evaluation, and approximately 30% remained in treatment one year later.

Swanson et al.³ emphasize the utility of risk-based gun removal laws as a public health strategy to prevent suicide. Although their data are relatively limited, the authors conclude that Connecticut's law may prevent one suicide for every 10 to 20 gun removals, primarily by delaying access to firearms during a period of acute crisis. In Indiana, Parker¹³ is hesitant to draw conclusions about violence or suicide prevention, but he does note the potential utility of reducing access to weapons for high-risk individuals for an average of 9 months.

The findings from Connecticut and Indiana are consistent with a larger body of research supporting “means reduction”—the removal of the means by which individuals might act harmfully to themselves or others—as a suicide prevention tool. Population-wide restriction of lethal means has been demonstrated to be effective in reducing suicide when the method is both highly lethal and common (e.g. guns in the United States), and when the restriction is supported by the community.^{16,17,18} Similarly, rates of suicide by firearm decrease when restrictions are placed on firearm access, particularly by youth. International studies have demonstrated reduced rates of firearm and overall suicide following legislation and policy changes reducing access to firearms in Australia,^{19,20} Switzerland,¹⁷ New Zealand,²¹ and Israel.²²

Restricting access to firearms has also been found effective in decreasing rates of suicide in the United States. States with more firearm restrictions and lower rates of gun ownership have lower rates of both overall suicide and firearm suicide.²³⁻²⁶ Conversely, states with fewer restrictions on firearm ownership and higher rates of gun ownership have higher rates of firearm related suicides.^{27,28} Notably, suicide attempt rates were similar in both high and low gun-ownership states, but mortality rates were twice as high in high-gun ownership states. The differences in mortality were entirely attributable to differences in firearm suicide rates.²⁹

Advantages and Limitations of Risk-Based Gun Removal

As noted in the 2014 Resource Document,¹ risk-based gun removal laws are attractive for several reasons. First, they focus on acute dangerousness rather than on psychiatric history or diagnosis, decreasing the stigma associated with mental illness and disavowing the mistaken premise that mental illness is the primary cause of acute violence risk. Second, in contrast to a registry (e.g., NICS), which primarily limits the ability to purchase firearms, risk-based gun removal laws provide a legal framework for removing firearms from individuals at a time that is closely linked to the risk of a dangerous act. Third, gun removal laws can supplement the legal options available to mental health professionals responding to a patient who poses a serious risk to self or others. Even in situations when the provisions of the laws are not formally invoked, their existence can create leverage for families and friends to persuade patients to voluntarily surrender weapons to them temporarily for safekeeping. Fourth, risk-based gun removal laws provide a way to reach individuals who do not seek psychiatric assistance and whose suicide or violence risk might otherwise go undetected.

Despite these advantages, several concerns have been raised about risk-based gun removal. The laws have been criticized for the heavy procedural burden they place on courts and police officers, straining already scarce resources.³ In addition, although the

Connecticut and Indiana statutes were implemented over a decade ago, public awareness of these laws—as well as that of mental health and other health professionals—may be limited. Finally, because the state statutes differ significantly from each other, and outcomes data are preliminary, best practices for risk-based gun removal have yet to be established.

Guidance for Mental Health Professionals

Mental health clinicians often struggle to manage patients who pose a risk of harm from firearms, even in states with well-established gun removal laws. Many clinicians are uncomfortable asking patients about access to guns, and in some cases, gun rights advocates have attempted to prevent them from doing so (thus far unsuccessfully).³⁰ When clinicians do become aware of firearm risks, they may not know of their state's risk-based firearm removal statutes or how to use them in practice.

Certainly, educating physicians generally about firearms is an important step in managing risk. To this end, some medical organizations have created educational programs aimed at enhancing physicians' ability to talk about firearms from a health and safety perspective with their patients.^{31,32} Although general knowledge about guns is helpful, specific education about risk-based gun removal is also necessary. Without this step, mental health clinicians may miss important opportunities to intervene in times of crisis to keep their patients and others safe.

When a patient tells a mental health clinician about a firearm risk—for example, saying that he has been contemplating suicide using a handgun kept at home—the clinician's first step is to perform a clinical assessment. If the clinician concludes that a serious risk exists, he or she may proceed down two paths. On the first path, the patient can be referred for emergency psychiatric assessment and/or hospitalization. On the second path, the clinician may also (or instead, depending on risk considerations) pursue removal of firearms from the patient's home. In many cases, removal can be accomplished by encouraging a friend or family member either to take temporary possession of the weapons or to contact police for removal of the firearm. However, in states with gun removal laws, the clinician may be able to use an emergency exception to confidentiality to ask the police directly to intervene, even if a patient refuses to allow contact. Both paths—providing care for the patient and limiting access to guns—may be pursued simultaneously.

It is important to understand that risk-based gun removal laws are designed primarily to enable concerned citizens to intervene when they perceive a danger related to firearms; the laws are not typically written with mental health professionals in mind. They do not delineate the exact circumstances in which mental health clinicians may breach patient confidentiality in order to make a report to the police, nor do they mandate such breaches. Furthermore, they do not include immunity protections from civil liability related to breaches of confidentiality. Given this ambiguity, clinicians are well-advised to familiarize themselves with their local laws about exceptions to confidentiality, seeking consultation from an attorney or forensic psychiatrist where possible. At a minimum, clinicians should clearly identify the factors that raise concern about a patient's gun possession and that might warrant disclosure to the police. They should also document

their reasoning and consider whether other measures, such as emergency hospitalization or voluntarily surrender of guns to a trusted person, would be sufficient to keep the patient and/or others safe. Alternatively, clinicians should consider whether the threat of harm to others would justify a disclosure to law enforcement under other applicable state laws (e.g., *Tarasoff*³³ or New York's SAFE Act¹⁰) without fear of liability. As in all clinical circumstances, careful consideration of possible actions requires analysis of the risks of disclosure versus non-disclosure.

When a disclosure is determined necessary, it is important to note that risk-based gun removal laws do not provide guidance about how much information should be disclosed to the police. The guiding principle of “disclose as little confidential information as possible to accomplish the objective at hand” may be helpful to remember in these cases. For example, the clinician will likely need to disclose the patient's name, the location of the firearms, and any information that supports the clinician's opinion that a serious risk exists (such as the patient's statements about suicide, past history of self-harm, and additional suicide risk factors). However, disclosing a full psychosocial history and other details about treatment may be unnecessary to accomplish the objective of facilitating the police's assessment of imminent risk.

If the police decide to intervene and restrict an individual's access to firearms, the clinician may be asked to testify in a subsequent hearing about whether the guns should be returned. Data from Indiana and Connecticut indicate that many individuals waive their right to a court hearing, but if one occurs, the clinician may be asked to explain the circumstances leading to the gun removal or opine on the patient's ongoing risk. Again, clinicians should seek consultation in these cases, ideally well in advance of the hearing. State laws about disclosure of medical information during court proceedings vary widely; in some states, patients may be able to invoke an evidentiary privilege under these circumstances in an effort to keep the clinical information out of court. Consultation with a forensic psychiatrist colleague and/or risk management attorney can be helpful should this circumstance arise.

Additionally, clinicians may have questions about whether to continue working with a patient after reporting a patient's firearm risk. Gun removal laws do not preclude contact between the reporting individual and the one whose guns are removed, and the decision whether to continue the treatment relationship must be made based on clinical factors against the backdrop of the clinician's obligation not to abandon the patient. Again, consultation with a mental health colleague or risk management professional can be helpful. In some cases, patients may be grateful for the clinician's care and concern during the firearm crisis, but in others they may be angry at the clinician for initiating the process that led to what they perceive to be a violation of their rights. In the latter circumstance, it may be appropriate to transfer the patient to another clinician, taking care to provide an appropriate handoff and avoid abandonment.

Finally, although only a small number of states have risk-based gun removal laws, clinicians practicing in other jurisdictions may still have options and/or mandates to manage acutely dangerous situations involving firearms. For example, if a patient makes a threat to shoot her boss, as noted above, the clinician may have a duty to protect the intended victim by hospitalizing the patient, issuing a warning to the identified victim,

and/or providing notification to law enforcement. In a different scenario, if a patient discloses that his children have access to an unlocked firearms storage cabinet, a report to child protective services may be required. Clinicians can easily lose sight of appropriate strategies to manage risk and provide care for patients during the emotionally charged clinical encounters that surround threats of harm from firearms. Risk-based firearm removal laws can be helpful under these difficult circumstances. However, it is important to remember that the laws have typically been designed to facilitate intervention by families and concerned citizens. Although they may be a helpful tool for mental health professionals, risk-based gun removal laws must be seen as just one part of a larger strategy to manage risk and provide appropriate clinical care for patients who pose a threat of suicide or violence.

Resources

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Appendix A: Selected State Statutes Regarding Preemptive Firearm Removal from Persons at Risk of Violence Towards Self or Others (Prepared by Kelly Roskam, J.D., Consortium for Risk-Based Firearm Policies)

Table 1: Connecticut and Indiana

Table 2: California

Table 3: Washington

Table 1.	Connecticut	Indiana	
Type of process	Warrant	Warrant	Warrant-less
Who initiates the process?	<ul style="list-style-type: none"> Two law enforcement officers, or A state's attorney, or An assistant state's attorney. 	Law enforcement officer.	Law enforcement officer.
What must be proven?	The entity seeking the warrant must show probable cause to believe that a person poses a risk of imminent injury to himself, herself, or another, such person possesses one or more firearms, and such firearm(s) are within or upon any place, thing or person.	The law enforcement officer must show probable cause exists to believe that the individual is dangerous and in possession of a firearm.	
Factors considered in deciding whether the burden has been met	<p>To issue a warrant, judges shall consider:</p> <ul style="list-style-type: none"> Recent threats or acts of violence directed toward himself, herself or another, and Recent acts of cruelty to animals. <p>Judges may also consider, but are not limited to:</p> <ul style="list-style-type: none"> The reckless use, display, or brandishing of a firearm, A history of the use, attempted use, or threatened use of physical force by such person against another, Prior involuntary confinement of such person in a hospital for persons with psychiatric disabilities, and The illegal use of controlled substances or abuse of alcohol. 	No factors are specified.	No factors are specified.
Court Review/Approval	Court approval is required prior to the removal of firearms.	Court approval is required prior to the removal of firearms.	Court approval is not required prior to the removal of firearms.
Length of prohibition on purchase/possession of	Removal of firearms pursuant to the warrant lasts up to 14 days until a hearing can be held.	The removal of firearms lasts up to 14 days from	The removal of firearms lasts up to 14 days after

firearms and removal of firearms		the return of an executed warrant.	written submission to the court justifying the warrant-less removal.
How are firearms removed?	Law enforcement shall execute the warrant to search for and seize firearms.	Law enforcement shall execute the warrant to search for and seize firearms.	Law enforcement shall seize the firearms.
Is a hearing automatically scheduled to provide an opportunity to challenge it, and if so, when is it held?	Yes, a hearing shall be held within 14 days of the issuance of a warrant.	Yes, a hearing shall be held within 14 days of the return of an executed warrant.	Yes, a hearing shall be held within 14 days of a written submission. ¹
What must be proven at the hearing?	The state must prove by clear and convincing evidence that the owner remains “a risk of imminent injury to self or others.”	The state must prove by clear and convincing evidence that the respondent is dangerous.	
Length of prohibition on purchase/possession of firearms and removal of firearms	Up to one year after the hearing.	180 days after the hearing, at which point the respondent may petition for return.	
Statute(s)	Conn. Gen. Stat. Ann. § 29-38c.	Ind. Code Ann. § 35-47-14.	

¹ An officer seizing a firearm from an individual without a warrant shall submit a written statement to the court describing the basis for the seizure. If the court finds probable cause to believe the individual to be dangerous, the law enforcement agency shall retain the firearm(s).

Table 2.	California		
Type of process	A civil court order called the Gun Violence Restraining Order (“GVRO”).		
Type of GVROs	Temporary Emergency GVRO	Ex Parte GVRO	Final GVRO
Who initiates the process?	Law enforcement only.	Law enforcement or an immediate family member.	Law enforcement or an immediate family member.
What must be proven?	The petitioner must show reasonable cause to believe (1) the subject of the petition poses an immediate and present danger of causing personal injury to himself, herself, or another AND (2) less restrictive alternatives have been ineffective, or are inappropriate or inadequate for the situation.	The petitioner must show a substantial likelihood (1) the subject of the petition poses a significant danger, in the near future, of personal injury to himself, herself, or another AND (2) less restrictive alternatives have been ineffective, or are inappropriate or inadequate for the situation.	The petitioner must prove by clear and convincing evidence (1) the subject of the petition, or person subject to an ex parte GVRO, poses a significant danger of personal injury to himself, herself, or another AND (2) less restrictive alternatives have been ineffective, or are inappropriate or inadequate for the situation.
Factors considered in deciding whether the burden has been met	No factors specified.	The court shall consider the following factors: <ul style="list-style-type: none">• A recent threat or act of violence directed toward himself, herself, or another,• A violation of an emergency protective order,• A recent violation of an unexpired protective order,• A conviction for an enumerated violent offense,• A pattern of violent acts or violent threats within the past 12 months. Judges may consider any other relevant evidence, including, but not limited to: <ul style="list-style-type: none">• The unlawful, reckless use, display, or brandishing of a firearm,• The history of use, attempted use, or threatened use of physical force,• Any prior arrest for a felony offense,• Any history of a violation of a protective order,• Evidence of alcohol or controlled substance abuse,• Recent acquisition of firearms, ammunition, or other deadly weapons.	
Court Review/Approval	Court review or approval is required prior to the prohibition on purchase/possession and removal of firearms taking effect.		
Length of prohibition on possession of firearms	21 days.	21 days or less (until hearing).	One year.

How are firearms removed?	Upon request of a law enforcement officer serving a GVRO, firearms and ammunition shall be surrendered immediately to the control of the officer. If no request is made by the law enforcement officer, the respondent shall surrender all firearms and ammunition, within 24 hours, to the control of the local law enforcement agency, to a licensed firearms dealer, or by selling such firearms and ammunition to a licensed firearms dealer. Law enforcement may seek a warrant to search for and seize firearms and ammunition unlawfully possessed by the subject of a GVRO.		
Is a hearing automatically scheduled to provide an opportunity to challenge it, and if so, when is it held?	No.	Yes, within 21 days of the issuance of an ex parte GVRO.	No (the hearing is held before the issuance of a final GVRO).
Statute(s)	Cal. Penal Code § 18100 <i>et seq.</i>		

Table 3.	Washington	
Type of process	A civil court order called the Extreme Risk Protection Order (“ERPO”).	
Type of ERPOs	Ex Parte ERPO	Final ERPO
Who initiates the process?	A law enforcement officer, law enforcement agency, or family or household member.	A law enforcement officer, law enforcement agency, or family or household member.
What must be proven?	Petitioners must show a reasonable cause to believe that the respondent poses a significant danger of causing personal injury to self or others in the near future by having in his or her custody or control, purchasing, possessing, or receiving a firearm.	Petitioners must prove by a preponderance of the evidence that the respondent poses a significant danger of causing personal injury to self or others by having in his or her custody or control, purchasing, possessing, or receiving a firearm.
Factors considered in deciding whether the burden has been met	<p>Court may consider any relevant evidence, including, but not limited to the following:</p> <ul style="list-style-type: none"> • Recent act or threat of violence by the respondent against self or others, • A pattern of acts or threats of violence by the respondent within the past 12 months, • Any “dangerous mental health issues, • A violation by the respondent of a protection order or no-contact order, • A previous or existing ERPO issued against the respondent; • A violation of a previous or existing ERPO issued against the respondent; • A conviction of the respondent for a crime of domestic violence; • Ownership, access to, or intent to possess firearms; • Unlawful or reckless use, display, or brandishing of a firearm by the respondent; • History of use, attempted use, or threatened use of physical force by the respondent against another person; • History of stalking another person; • Any prior arrest of the respondent for a felony offense or violent crime; • Corroborated evidence of the abuse of controlled substances or alcohol by the respondent; and • Evidence of the recent acquisition of firearms by the respondent. 	
Court Review/Approval	Court review or approval is required prior to the prohibition on purchase/possession and removal of firearms taking effect.	
Length of prohibition on possession of firearms	14 days or less (until hearing).	One year.

How are firearms removed?	A law enforcement officer serving any ERPO shall request that the respondent immediately surrender all firearms in his or her custody, control, or possession and any concealed pistol license issued to the respondent. The law enforcement officer shall take possession of all respondent's firearms that are surrendered, in plain sight, or discovered pursuant to a lawful search. If personal service by a law enforcement officer is no possible, or not necessary because the respondent was present at the ERPO hearing, the respondent shall surrender the firearms in a safe manner to the control of the local law enforcement agency within 48 hours of being served with the order by alternate service or within 48 hours of the hearing at which the respondent was present. Where the respondent fails to surrender firearms or a CPL, law enforcement may seek a search warrant.	
Is a hearing automatically scheduled to provide an opportunity to challenge it, and if so, when is it held?	Yes, a hearing shall be held within 14 days of the issuance of an ex parte ERPO.	No (the hearing is held before the issuance of a final ERPO).
Statute(s)	Wash. Rev. Code Ann. § 7.94.010 <i>et seq.</i>	

III. Case Law Developments

United States Supreme Court

Qualified Immunity; Excessive Force: Supreme Court rules in favor of law enforcement officer sued for use of excessive force for shooting a woman who was holding a knife in the vicinity of another individual and failed to comply with orders to drop the knife.

Kisela v. Hughes, 138 S.Ct. 1148 (2018)

Background: In May 2010, police officers responded to a 911 emergency call reporting a woman, Amy Hughes, acting erratically and “hacking a tree” with a kitchen knife. Officer Andrew Kisela and two other police responded to the scene to find a woman, Sharon Chadwick, later identified as Hughes’s roommate, standing in the driveway of a nearby house. The officers then saw a woman, Hughes, matching the description from the 911 call emerge from the house carrying a knife and approach Chadwick. Hughes stopped a few feet away from Chadwick and the knife remained held down at her side. The officers were separated from the women by a chain-link fence with a gate. All three officers drew their guns and at least twice commanded Hughes to drop her weapon. Hughes failed to follow these orders or acknowledge the officers’ presence. Within moments of ordering Hughes to drop the knife and less than a minute after arriving on the scene, Kisela dropped to the ground and shot Hughes four times through the fence. The officers then jumped the fence and handcuffed Hughes. The officers called paramedics, and Hughes was transported to the hospital to be treated for non-life-threatening injuries. It was later revealed that Hughes had a history of mental illness, and she and Chadwick were in a dispute over a \$20 debt. Chadwick was aware of Hughes’ occasional erratic behavior and reported never feeling threatened during the encounter in which Hughes was shot.

Hughes sued Kisela under § 1983, alleging that Kisela had used excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Kisela, but the Court of Appeals for the Ninth Circuit reversed.

Holding: The Supreme Court reversed the holding of the Ninth Circuit, holding that the officer’s use of force did not violate clearly established law. Therefore, Officer Kisela was entitled to qualified immunity.

Discussion: In evaluating excessive force claims, the court must answer two questions. First, as established by *Graham v. Connor*, 490 U.S. 386 (1989), the court must decide whether use of force was reasonable from the perspective of the officer on the scene at the time of the event. Second, under *Plumhoff v. Rickard*, 572 U.S. 134 (2014), the court must determine whether an officer acting with force would reasonably know he was violating the Fourth Amendment under clearly established law. When confronted with a woman who was reported as acting erratically, was holding a knife only a few feet from

another individual, and had ignored multiple commands to drop her weapon, Kisela had only seconds to determine whether Hughes posed a threat to Chadwick's safety. For these reasons, the Supreme Court decided that Kisela took reasonable action to protect Chadwick, and that Kisela was not in a position where a reasonable officer would know that to shoot Hughes would be a violation of her Fourth Amendment rights. Therefore, the ruling of the Ninth Circuit was reversed and Kisela was entitled to qualified immunity. Because Kisela was entitled to qualified immunity, the question of whether Hughes's Fourth Amendment rights were violated was not one the Supreme Court needed to decide.

Dissent: Justice Sotomayor, with whom Justice Ginsburg joined, filed a dissent. They argued that when evidence is viewed "in the light most favorable to Hughes," as it must be when the case is presented on summary judgment, Kisela's actions were unreasonable. The dissent argued that because Hughes stood stationary six feet away from Chadwick, held the knife at her side with the blade pointed away, appeared "composed and content," and had committed no illegal act, she was not an imminent threat to Chadwick or the officers, and therefore Kisela acted unreasonably. Though presented with the same circumstances as Kisela, the other two responding officers did not fire their weapons and later testified that they were unsure that Hughes heard or understood their commands to drop her weapon. The dissent cited these facts as further proof that Kisela acted unreasonably and unnecessarily escalated the situation by resorting to deadly force. The dissenting justices thus opined that because Kisela acted unreasonably, his use of force was excessive and clearly violated Hughes's well-established Fourth Amendment right.

Federal Circuit Courts of Appeal Decisions

Law Enforcement; "State-Created Danger": Second Circuit rules in favor of police officers, finding that there was no sustained inaction to hold the officers accountable under the theory of "state-created danger" and in violation of the Due Process Clause.

Torres v. Graeff, 700 Fed. Appx. 80 (2nd Cir., 2017)

Background: Seven officers from the Utica Police Department promptly responded to a single report that Paul Bumbolo was acting violently, and placed him under custodial arrest instead of allowing him to remain at home with the three victims. The officers complied with New York Mental Hygiene Law (NYMHL) §9.41 and brought him to the hospital to undergo an evaluation. Instead of staying at the hospital during the medical evaluation, the officers instructed hospital staff to contact them when the evaluation was completed. Plaintiffs alleged that by not remaining during the evaluation, the officers' actions constituted sustained inaction or implicit communication that encouraged Paul Bumbolo's subsequent triple-homicide and, therefore, violated the substantive due process of the three decedents. The district court denied the officers' motion to dismiss, and the circuit court reversed the judgment.

Holding: Failing to remain during a medical evaluation of a person held under NYMHL §9.41 does not transform police officers' interference with the violence to a message that the behavior is permissible and the person would not have problems with authorities.

Discussion: In evaluating the claim, the court stated that a plaintiff cannot make a claim that a state actor has violated the Due Process clause solely because the state actor failed to protect an individual against private violence. However, if the state actor engaged in conduct that "affirmatively enhanced the risk of violence," a state actor may be held liable under the theory of "state-created danger." Here, the court found that none of the police officers engaged in affirmative actions that would give Bumbolo the impression that his actions were appropriate. The officers responded immediately to the call, there was no history of previous such calls resulting in no consequences for Bumbolo, the officers handcuffed Bumbolo and removed him from the home, the officers aided hospital staff in restraining him, and the officers instructed that they be alerted when the evaluation was completed.

Ineffective Assistance; Death Penalty; Post-Conviction: Third Circuit overrules both the Pennsylvania Supreme Court and the Post-Conviction Relief Act court by holding that trial counsel provided ineffective representation by not adequately obtaining or presenting all relevant mitigating evidence during a penalty hearing.

Abdul-Salaam v. Sec'y of Pa. Dep't of Corr., 895 F.3d 254 (3d Cir. 2018)

Background: Abdul-Salaam tried to rob a store with Scott Anderson. Abdul-Salaam brandished a handgun and bound and assaulted the shop's owner. Anderson was caught by the police and was about to be handcuffed when Abdul-Salaam reappeared, ran at the police officer, and shot and killed him. Abdul-Salaam had grown up with a very emotionally and physically abusive father, which may have led to mental, emotional and behavioral issues. At the penalty phase, the defense presented Abdul-Salaam's mother and two of his sisters to testify to his childhood. Abdul-Salaam was found guilty of first-degree murder, robbery, and conspiracy, and was sentenced to death. Abdul-Salaam challenged this sentence based on trial counsel's provision of ineffective assistance of counsel by failing to investigate adequately and present sufficient mitigation evidence at sentencing. Abdul-Salaam argued that his counsel did not conduct a thorough investigation that would have presented evidence of mental health issues. Trial counsel refused to obtain a psychiatric evaluation or introduce more witness testimony. The Post-Conviction Relief Act court denied any post-conviction relief and held that trial counsel did not render ineffective assistance because counsel testified to his concerns that presenting mental health evidence could do more harm than good. The Pennsylvania Supreme Court affirmed the PCRA court's decision. Having found that counsel was not ineffective, neither court reached the prejudice prong of the analysis.

Holding: As long as there was a reasonable probability that one juror would be swayed by un-presented evidence to vote for a life imprisonment sentence instead of a death penalty, the prejudice prong of ineffective counsel was met, and a new penalty hearing must be held.

Discussion: The Third Circuit held that there was a reasonable probability that the un-presented evidence would have caused at least one juror to vote for a sentence of life imprisonment instead of death penalty. But for the counsel's errors in obtaining more information, mitigating evidence could have been introduced that could have reasonably swayed a juror not to vote for the death penalty. Therefore, the Pennsylvania Supreme Court decision was an unreasonable application of the deficient performance prong of the *Strickland* test, 466 U.S. at 609-91. Counsel is allowed to make a strategic decision to halt an avenue of investigation if he has completed a foundation of investigation to reach that decision, but decisions not to investigate certain types of evidence cannot be called "strategic" when counsel "fail[s] to seek rudimentary background information." Because counsel failed sufficiently to pursue expert testimony about Abdul-Salaam's mental health, he could not accurately state that this evidence would lead to unnecessary issues for his client. The court determined that additional family member testimony was of a totally different quality than the meager evidence presented on that issue at trial. Furthermore, under the prevailing professional norms at the time of representation, counsel had an obligation to conduct a thorough investigation of Abdul-Salaam's background, regardless of whether that evidence would be used at trial.

Mental Health; Sentencing: Appellate court vacates and remands sentence of man whose argument for a shorter sentence based on his history of mental illness was not adequately considered by district court.

United States v. Cox, 733 Fed.Appx. 688 (3d 2018).

Background: In 2013 and 2015, while serving a state prison sentence in Virginia, James Cox wrote and mailed three letters in which he threatened to rape and kill judges and prosecutors in Texas, a judge in Missouri, and judges in Virginia. The government charged Cox with three violations of Section 876(c), which prohibits communication through the postal service of threats to kidnap or injure any person. After his indictment, Cox underwent a competency evaluation and was found to have a history of self-mutilation and was diagnosed with borderline personality disorder and antisocial personality disorder. The psychologist conducting the evaluation also concluded that Cox was competent to stand trial and was criminally responsible for his behavior at the time of the charged offense. Before the case could proceed further, Cox was charged with an additional two violations of Section 876(c) for mailing two more letters, this time threatening to kill the presiding district court judge. Cox's case was then reassigned, and he entered a guilty plea, at which time Cox recounted his extensive history of mental illness and treatment for the judge. Subsequently, at his sentencing hearing, Cox moved to withdraw his guilty plea, claiming he did not remember entering the plea or committing the crimes for which he was charged. The judge allowed Cox to revoke his plea and granted Cox's request for a second competency evaluation. The results of this second evaluation were the same as the first. Cox then again pled guilty. Though Cox's letters did not involve extortion, the court relied on the Guidelines for "extortion by force or threat of injury or serious damage" to calculate Cox's base offense level. Neither the government nor Cox objected to this Guideline calculation. At his sentencing hearing,

Cox argued for a sentence fewer than 100 months, based in part on his mental illness. The court imposed the maximum ten-year sentence for each count, to be served consecutively. Cox appealed, challenging both the procedural and substantive reasonableness of his sentence.

Holding: The Fourth Circuit Court of Appeals did not rule on the district court's incorrect calculation of base offense level, finding merit in Cox's second claim that the district court failed to adequately explain its sentence in light of his non-frivolous argument that his mental health should be considered.

Discussion: To evaluate procedural reasonableness, the court "must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range," as specified in *Gall v. United States* 552 U.S. (2007). However, sentencing guidelines are not the only consideration when imposing a procedurally reasonable sentence. In addition, the court must adequately explain the chosen sentence. This explanation must make clear to the appellate court that the judge has considered the parties' arguments and has shown reason in legal decision making. Cox argued that his untreated mental illness presented ground for imposition of a lighter sentence. While the government did not dispute this, it argued that the district court adequately explained the necessity of a 50-year sentence, emphasizing Cox's criminal history and need to protect the public. The appellate court found that this was not enough. Instead, the district court must address Cox's argument and explain why it was found to be unpersuasive.

ADA and Discrimination; Excessive Force; Law Enforcement: "Sixth Circuit affirm[s] summary judgment in favor of the deputies...under 42 U.S.C. 1983, and in favor of Hamilton County...under section 1983 and the Americans with Disabilities Act."

Roell v. Hamilton Cnty. 870 F.3d 471 (6th Cir., 2017)

Background: Gary Roell had a history of mental illness, including schizoaffective disorder and paranoid delusions. In June 2013, he stopped taking his medication, and began showing signs of decompensation in August, culminating on an evening in mid-August while his wife was out of town. Roell, in a state of excited delirium, damaged their condominium, then went to his neighbor's condominium, where he threw a flower pot through a window, and yelled about the neighbor having water while he did not. The neighbor attempted to talk with him, but became fearful and had her son call 911. Deputies arrived and tried to engage Roell, who did not follow their commands. They attempted to subdue him with a taser as well as physically. The taser was used multiple times with little effect, but eventually the officers were able to handcuff Roell, who began to fall asleep or lose consciousness, then awaken and struggle alternately a few times before he stopped breathing. His death was documented by the coroner as natural, resulting from his excited delirium." Roell's wife, Nancy, brought an action against the county and deputies alleging excessive force, as well as intentional discrimination and

failure to accommodate claims under the ADA. The district court granted in part and denied in part defendants' motion for summary judgment, Roell appealed.

Holding: The Sixth Circuit affirmed the lower court, finding that the officers likely did not violate Roell's Fourth Amendment rights, that such right was not clearly established, that the county had a sufficient training program and was thus not liable, and that Nancy Roell did not present sufficient evidence of intentional discrimination.

Discussion: As to the §1983 claim against the deputies, the court addressed both prongs of the excessive force analysis and affirmed that 1) the deputies likely did not violate Roell's Fourth Amendment rights and that 2) the constitutional right alleged was not clearly established. In its analysis, the court was unpersuaded by Nancy Roell's claim that the officers escalated the encounter. The court did note the fact that the officers were aware that Roell was experiencing some sort of mental illness and therefore had an obligation to take his diminished capacity into account before using force to restrain him. Nonetheless, the court determined that the officers were not prohibited from using physical force without first attempting non-physical de-escalation techniques, and it found that the officers used reasonable force given Roell's active resistance and destruction of property. The court further concluded that relevant case law did "not clearly establish that the deputies violated Roell's Fourth Amendment rights because their actions fell in the 'hazy border between excessive and acceptable force.'" The court ruled that "[e]ven assuming that law-enforcement officers must 'adjust the application of force downward' when confronted with a conspicuously mentally unstable arrestee,..., no precedent establishes that the level of force used by the deputies in this case was excessive or that the deputies were required to use only verbal de-escalation techniques." As to Nancy Roell's section 1983 claims against the county, the court affirmed the lower court finding in favor of the county because Hamilton County had an adequate program in place to train officers regarding interactions with individuals with mental illness.

As to the ADA Title II claims, the court concluded that it did not need to decide the issue because the county was entitled to summary judgment based on the facts of the case. What is more, it noted that the proposed accommodations—using verbal de-escalation techniques, gathering information from witnesses, and calling EMS services before engaging Roell—were unreasonable in light of public safety concerns. The court also found that Nancy Roell did not present any evidence of intentional discrimination.

Dissent: Judge Karen Nelson Moore argued there were genuine questions of fact that made summary judgment inappropriate. Specifically, the judge stated there were questions as to how dangerous the situation was and thus how much the officers should be required to de-escalate a situation and adjust the application of force downward.

Ineffective Assistance, NGRI: Seventh Circuit upholds denial of post-conviction relief for ineffective assistance claim in which trial counsel's decision to retain an expert, consult with him, and then not pursue the insanity defense was consistent with researching and deciding for strategic reasons not to pursue the defense because the expert could offer no further opinion as to whether petitioner suffered

from hallucinations at the time that reportedly he shot the victim; petitioner's apparent insistence at the time of trial that he did not shoot the victim likely posed formidable obstacles to any argument counsel might have wanted to make that he shot the victim but was not culpable of it because he was insane.

Frentz v. Brown, 876 F.3d 285 (7th Cir. 2017)

Background: Frentz was convicted for the murder of his roommate Zachary Reynolds and associated drug charges. Frentz suffered from 35 years of alcoholism and took medication to treat delirium tremens (symptoms from alcohol withdrawal). Reynolds worked on Frentz's farm, and on the day of his murder had been working on a pickup truck with Frentz. Frentz had complained of hallucinations that day, and appeared agitated when speaking on the phone with his friend Brackett. The next day, Frentz called the police claiming that his house had been broken into and that Reynolds had been shot in the chest. Police arrived to find no signs of outside intrusion, but did find Frentz in the kitchen in a disoriented state, with an assault rifle lying on a chair. Frentz told the police officers that his medication gave him hallucinations and that he had reason to believe someone altered his medication with drugs. Testimony by Frentz's friends revealed that Frentz had been fighting with Reynolds over drugs the previous day and had shot him upon discovering that Reynolds was acquainted with Frentz's ex-girlfriend. Frentz pursued the insanity defense, but his counsel withdrew the expert prior to trial. Frentz was found guilty on all counts. Frentz pursued post-conviction relief in Indiana, claiming that his counsel provided deficient performance which prejudiced him by failing to introduce the insanity defense. The district court ruled that Frentz failed to provide evidence to overcome the presumption that the counsel's behavior was an exercise of reasonable professional judgment.

Holding: The Seventh Circuit, affirmed, finding that Frentz's trial counsel presented evidence seeking to negate the intent element of murder and even if an insanity defense had been presented, the outcome would have been the same.

Discussion: Information provided by the proceeding in the Indiana Court of Appeals showed that counsel's decision to not pursue an insanity defense was a permissible strategic decision. Counsel changed his strategy upon discovery that the retained expert could not offer an opinion as to whether Frentz was suffering from hallucinations at the time of the shooting. The Seventh Circuit expressed that the insanity defense would have done little to add to the layperson's sense of the events which took place the day of the murder. The evidence provided by Frentz's counsel adequately conveyed the hallucinations from which he claimed to suffer. It was determined that the added option of further medical analysis would not have made a difference given that the same jury found him guilty of a knowing or intentional killing, following expert testimony.

Competence to Stand Trial; Malingering; Sentencing: The Ninth Circuit affirms the lower court's holding that malingering incompetence for a court-ordered competence evaluation justified the application of obstruction of justice sentencing enhancement, and that such enhancement did not chill defendant's exercise of the right to obtain a competency hearing.

United States v. Bonnett, 872 F.3d 1045 (9th Cir. 2017)

Background: Daniel L. Bonnett appealed his guilty plea to receipt and distribution of child pornography and was sentenced to a below-Guidelines term of 15 years imprisonment followed by 25 years of supervised release. In sentencing Bonnett, the lower court applied a sentencing enhancement for obstruction of justice (U.S.S.G. § 3C1.1) based on a finding that he malingered incompetence during a court-ordered competence evaluation. The court's decision was based on the psychiatric evaluation report that concluded Bonnett was feigning because he behaved differently with medical staff than with other staff and patients, he refused to participate in tests to assess his mental condition and malingering tests, and he made inculpatory statements on recorded jail phone calls to his wife.

Holding: Application of obstruction of justice sentencing enhancement based on malingering did not chill defendant's exercise of the right to obtain a competency hearing.

Discussion: The Ninth Circuit agreed that there was sufficient evidence to support the district court's finding of intentional malingering. The court disagreed with Bonnett's argument that permitting an obstruction of justice enhancement on the basis of a competency evaluation performance chills exercise of the right to obtain a competency hearing by noting that this argument has been raised and rejected in four other circuits. Further, Bonnett argued that the district court failed to resolve factual disputes pursuant to Federal Rule of Criminal Procedure 32. However, because Bonnett had a full opportunity to review both the Presentence Report and the Psychiatric Evaluation, where the facts supporting the malingering enhancement were set out, and he did not dispute those facts, there was no violation of Rule 32.

Law Enforcement; Excessive Force; ADA and Discrimination: Ninth Circuit affirms in part and remands in part, finding that a jury could have found officers' use of force unreasonable but officers entitled to qualified immunity; finding that further accommodation may have been possible and that summary judgment for officers on ADA claims was inappropriate.

Vos v. City of Newport Beach (9th Cir., 2018)

Background: Gerritt Vos entered a 7-Eleven on a May evening in 2014. He became agitated, and ran around the store cursing at customers and behaving erratically, at one point briefly grabbing a store employee and declaring that he "got a hostage." Law enforcement responded to a call about a man behaving erratically and brandishing a pair of scissors at 7-Eleven. The first officer at the scene spoke with bystanders, beckoned store clerks to exit the store, and was informed that one clerk's hand had been cut while attempting to disarm Vos. The officer requested backup and asked for a less-lethal projectile weapon. Approximately 15 minutes after Vos entered the store, there were at least eight officers present along with a canine unit. Vos shut himself in a backroom, and

officers positioned their two vehicles in a v-shape at the store front, taking cover behind the vehicles. The officers were aware of Vos's agitated state and possible substance use intoxication, his possession of scissors, and his calls to the police to "just shoot me." Approximately 30 minutes from the time he first entered the store, Vos emerged from the backroom and advanced toward the front door and the officers, holding his hands above his head. About eight seconds later, the less-lethal weapon was discharged, but two other officers also fired their AR-15 rifles. Vos was shot four times and died from the wounds. He had been holding a display hook from the store. Blood work later revealed that Vos was under the influence of amphetamine and methamphetamine. He also had a diagnosis of schizophrenia. Vos's parents brought excessive force and ADA claims, among others, against two of the officers and the city.

Holding: The Ninth Circuit affirmed in part and reversed in part, finding that summary judgment was inappropriate for the excessive force claims and the ADA claims, but that the officers were entitled to qualified immunity for the excessive force claims.

Discussion: The Ninth Circuit assessed the governmental interest to determine whether it warranted the use of deadly force. As police did not report to the scene in response to a crime and no criminal activity was discussed by the officers, rather they were responding to a report of erratic behavior, there was no crime to justify the severity of response. The court also established that while Vos was locked in the backroom, there was no opportunity for him to flee and the officers had not made any attempt to communicate with him until he emerged, indicating that there was no show of resistance to police direction. Finally, an immediate threat to the safety of the officers or others was not present because Vos had not been in communication with the officers, the officers were shielded behind their vehicles and outnumbered Vos eight-to-one, and several of the officers had elected to utilize non-lethal force. The court concluded that a reasonable jury could find that the force employed was greater than reasonable. Nonetheless, the court found that the right against excessive force in such an instance was not clearly established and the officers were entitled to qualified immunity.

Regarding the claim under the ADA (which was combined with the Rehabilitation Act-based claim), the court reversed the district court ruling that the ADA did not apply because the officers did not escalate the situation. The Ninth Circuit clarified that Title VII of the ADA applies to arrests under *Sheehan v. City & Cty. of S.F.*, 743 F.3d 1211(9th Cir. 2015), which was not overturned by the Supreme Court when it heard the case ("*Sheehan II*") What is more, "*Sheehan I*" did not entail a "provocation" requirement as the district court had concluded. The Ninth Circuit held that the record did not clearly indicate whether summary judgment for the defendants was warranted as the district court had held, and reversed the holding. It declined to address whether the ADA applied in the current case, however.

Dissent: Judge Bea submitted a dissenting opinion arguing that the timeframe in which the altercation occurred was too small to expect an officer to make a judgment about using non-lethal force to subdue an attacker and that their response using deadly force was justified. Bea also disputed the use of Vos's mental illness as a factor in making this

judgment because of the implication that in all cases justification of deadly force is diminished by the presence of mental illness.

State Court Decisions

Competence (Testamentary Capacity); Mental Health: The Supreme Court of Georgia finds that insufficient evidence was presented at trial to sustain the jury verdict that the decedent lacked testamentary capacity where she experienced delusions because the delusions were not insane delusions and a total absence of mind is required to destroy testamentary capacity.

Meadows v. Beam, 302 Ga. 494, 807 S.E.2d 339 (2017)

Background: Meadows was the daughter of Dorothy Rita Beam. Near the end of her life, Beam began showing symptoms of confusion and memory loss, leading her to accuse her daughter Jayne of stealing her clothes and her son John of stealing important documents from her. As a result of her belief that her children had been stealing from her, she changed her will, including writing John out of it completely. Shortly thereafter, she passed away. Meadows filed a petition to probate her mother's will, arguing that Beam lacked testamentary capacity to execute the will. At trial, Dr. Norman, a forensic psychiatrist, testified that the decedent had a potentially weakened state of mind and was operating under a "fixed false belief" that her children were stealing from her.

Holding: The Supreme Court of Georgia found that the evidence of a lack of testamentary capacity was insufficient to sustain the jury's verdict and reversed the judgment.

Discussion: The Supreme Court of Georgia found that a total absence of mind is required to destroy testamentary capacity and there was no evidence presented at trial to support such a finding. The standard for testamentary capacity requires showing that that the testator: (1) understood that the will had the purpose of disposing her property, (2) was capable of remembering generally the property and persons at issue, and (3) could express an "intelligent scheme of disposition." The court held that a delusion alone is not sufficient to deprive testamentary capacity unless it is an insane delusion. There was no evidence presented at trial that the delusion suffered was "insane." As a result, the court reversed the judgment of the trial court.

Provider Liability; Mental Health Providers: The Supreme Court of Mississippi reverses the trial court and holds that, where a patient had been treated for psychosis for three years with Risperdal and developed tardive dyskinesia, the doctor's warning about the tardive dyskinesia risk was adequate as a matter of law and remanded for a new trial on the issue of negligent misrepresentation because of errors in the jury instructions.

Johnson & Johnson, Inc. v. Fortenberry, No. 2015-CA-01369-SCT, 2017 Miss. LEXIS 421 (Oct. 19, 2017)

Background: Taylor began seeing Dr. Rhoden after she was committed to a hospital following a severe psychotic episode. Dr. Rhoden first prescribed Seroquel as an anti-psychotic medication, but after Taylor attempted suicide Dr. Rhoden discontinued Seroquel and instead prescribed Risperdal, an “atypical” antipsychotic medication. After taking Risperdal for nearly three years, Taylor developed tardive dyskinesia. Dr. Rhoden was aware that there was an association between tardive dyskinesia and Risperdal, and had warned Taylor and Fortenberry (Taylor’s daughter) about the risk more than once. Taylor brought suit against Janssen Pharmaceuticals (the manufacturer, seller, and distributor) and its parent company Johnson & Johnson (hereafter “Janssen”) claiming failure to adequately warn about the risk and negligent misrepresentation. Taylor sought to show the warning was inadequate through Janssen’s promotional materials, internal documents, and expert evidence, arguing that the materials did not sufficiently communicate the risks. At trial, a jury found Janssen liable on both claims. Janssen appealed the judgments, and also argued that the jury instructions were inadequate with regard to the negligent misrepresentation claim.

Holding: The Supreme Court of Mississippi reversed the judgment of the trial court on the grounds that the doctor’s warning was adequate as a matter of law and remanded for a new trial on the negligent misrepresentation issue because the jury instructions were inadequate.

Discussion: The Supreme Court of Mississippi first reversed the trial court’s judgment on Taylor’s failure to warn claim. Janssen did not have a duty to warn Taylor directly because Dr. Rhoden served as a learned intermediary. The court found that Dr. Rhoden’s warning to Taylor was adequate because Dr. Rhoden specifically warned Taylor and her daughter about the risk of tardive dyskinesia multiple times. The court held that the trial court was correct to allow the question of negligent misrepresentation to go to a jury because it was not clear whether a misrepresentation existed in Risperdal marketing materials with regard to the risk of tardive dyskinesia. However, the court remanded the case for a new trial on the negligent misrepresentation issue because the jury instructions that had been provided omitted an essential element of a negligent misrepresentation claim (i.e., that the misrepresentation was material) and the claim was combined with “negligent marketing” in the instructions, which was misleading because it was not the same claim as negligent misrepresentation. Regarding three other issues raised on appeal, the court noted that, while it did not need to address them because it had reversed and remanded for a new trial, it chose to address the issues in the event they arose again in the remanded case. The court found that 1) the jury’s determination of damages was not unreasonable, 2) closing statements by Fortenberry’s counsel suggesting that Janssen’s female sales representative dressed provocatively to increase sales was unfairly calculated to arouse passion or prejudice, and 3) the trial court acted within its discretion when it chose not to proceed to a punitive damages phase.

Not Guilty by Reason of Insanity; Civil Commitment: The Supreme Court of Oklahoma determines that when the State objects to a Federal Review Board recommendation regarding a person being committed, the State bears the burden of proving that the recommendation is unnecessary, excessive, or inappropriate by a preponderance of the evidence.

Parsons v. Dist. Court Pushmataha Cty., 2017 OK 97, 408 P.3d 586

Background: Parsons pled not guilty by reason of insanity to charges of first degree murder. Dr. Floyd, the forensic psychologist, assessed Parsons and determined his symptoms were consistent with bipolar disorder. Hospitalization helped his symptoms, but he did not comply with taking his required medications. The trial court found he was a danger to the safety of others due to the non-compliance and committed him. The Oklahoma Federal Review Board (FRB) submitted a report in 2014 recommending that Parsons begin weekly supervised therapeutic visits at Grand Lake Mental Health Center in order to further his treatment. The State objected, but presented no evidence. Nonetheless, the State's objection was sustained by the trial judge. Again in 2015, the FRB made the same recommendation, and the State objected. The State presented no evidence at the hearing, but the trial court sustained its objection once again. The Oklahoma Court of Criminal Appeals transferred the case to the Supreme Court of Oklahoma to determine which court has jurisdiction over the case and to clarify the relevant procedural requirements, including which party bears the burden of proof.

Holding: The Supreme Court of Oklahoma found that the State bears the burden of proof when objecting to a FRB recommendation and that it must show that it is more likely than not that the recommendation is unnecessary or the nature and extent of it is excessive or inappropriate.

Discussion: The Supreme Court of Oklahoma determined it had jurisdiction over the case because commitment is civil in nature and no criminal issues remained in this case. The court found that although the statute is silent on which party bears the burden of proof in a challenge of a FRB recommendation, since the State is the party seeking a judicial remedy, it should bear the burden. Further, the court found that the State would need to show it is more likely than not that the recommended visits are unnecessary for Parson's treatment, or, alternatively, that the extent of the visits is excessive or inappropriate. As a result, the court remanded the case for a new hearing.

Not Guilty by Reason of Insanity; Civil Commitment: The Supreme Court of Appeals of West Virginia finds that the appeal of a commitment order that did not credit the defendant for time he was incarcerated before his psychiatric commitment was moot, and that, regardless, the lower court did not err in not allowing credit for time served.

State v. S.S., No. 16-0663, 2017 W. Va. LEXIS 850 (Oct. 23, 2017)

Background: S.S. was charged with attempted kidnapping, battery on a police officer, and obstructing an officer. He was found not competent to stand trial and committed for a total of approximately five months. He was transferred to incarceration, but was transferred back to a hospital after his condition deteriorated while incarcerated. The circuit court held that due to his mental illness, he was not guilty by reason of insanity, and committed him to a psychiatric hospital for five years, beginning to run at the time of the hearing. On appeal, S.S. argued that he should be credited with the time served before the beginning of this psychiatric commitment. The five-year term elapsed in 2016 and S.S. had since been released from commitment.

Holding: The Supreme Court of Appeals of West Virginia found that the question of whether the trial court should have credited S.S. with time served for time incarcerated before the beginning of his psychiatric commitment was moot, and that even if it was not, the trial court did not err in denying him credit for time served.

Discussion: The Supreme Court of Appeals of West Virginia reasoned that S.S. would only be entitled to credit for time served if he had been convicted of the underlying crime.

IV. Institute Programs

Please visit the Institute's website at

<http://www.ilppp.virginia.edu/OREM/TrainingAndSymposia>

The Institute is pleased to announce the program calendar for Spring 2019. Please see the roster below. Additional programs will be announced. Please visit and re-visit the Institute's website to see new and updated announcements. The Institute appreciates support for its programs. Please share this edition of *DMHL* and share announcements of programs that may interest your professional, workplace, and community colleagues.



Neuropsychology in Forensic Mental Health: Two-day conference

<http://www.ilppp.virginia.edu/OREM/AdultPrograms/Course/127>

March 19-20 2019, Charlottesville VA

This special two-day conference focuses on issues of neuropsychology in forensic mental health. A distinguished faculty will explore a variety of issues over the two days. Faculty will refine the topics and formal agenda but are currently considering issues such as cognitive impairment from serious mental illness and relevance of impairments to evaluating competence to stand trial and mental state at time of offense, neuropsychological issues in young adults, and when to request a formal neuropsychological consult. Daniel Murrie PhD, ILPPP, School of Medicine, UVA is lead faculty. Other expert faculty include Beth Arredondo PhD with the Ochsner Health System (Louisiana), Scott Bender PhD with ILPPP, Joette James PhD in private practice

in metropolitan Washington DC, Bernice Marcopulos PhD from James Madison University, and Chriscelyn Tussey PsyD from New York University.



Assessing Individuals Charged with Sexual Crimes

<http://www.ilppp.virginia.edu/OREM/SexOffenderPrograms/Course/125>

March 25-26 2019, Charlottesville VA:

This two-day program focuses on the assessment and evaluation of individuals charged with sexual crimes in Virginia. The program provides legal background relevant to assessment involving sexual offenses, overview of paraphilias and base rates of re-offending, and discussion of a well-researched sexual offender risk assessment instrument. ***This program may meet needs of providers for renewal of SOTP certification in Virginia.*** Daniel Murrie PhD, ILPPP, School of Medicine, UVA is lead faculty. Other expert faculty include Susan F. Barr Esq., Office of the Attorney, Sara Boyd PhD and Georgia Winters PhD with ILPPP, Eric Madsen with Virginia Department of Corrections, and Mario Dennis PhD with Virginia Center for Behavioral Rehabilitation.



Violence Risk Scale-Sexual Offense Version (VRS-SO): Full-day workshop

<http://www.ilppp.virginia.edu/OREM/SexOffenderPrograms/Course/130>

March 27 2019, Charlottesville VA

This one-day workshop provides an overview of the development, relevant research, administration, scoring, and interpretation of the VRS-SO (Violence Risk Scale - Sexual Offense Version). Participants will have an opportunity to code the VRS-SO on one sample case to assess risk, identify treatment targets linked to sexual violence, and evaluate treatment changes. ***This program may meet needs of providers for renewal of SOTP certification in Virginia.*** Expert faculty for the workshop will be Sharon M Kelley PsyD, with Sand Ridge Evaluation Unit, Madison Wisconsin.



Transgender Youth and System-level Reforms for Girls: Special populations in the juvenile justice system

<http://www.ilppp.virginia.edu/OREM/JuvenilePrograms/Course/128>

April 12 2019, Charlottesville VA



This one-day symposium focuses on issues of gender in forensic mental health. A distinguished faculty will provide an update on research and clinical practice standards with transgender youth, and will discuss research, foundational concepts and prospects for juvenile justice reform for justice-involved girls. Expert faculty will be Christy Oleski PhD, Director of the Yale Gender Program and Francine Sherman JD, Attorney and Clinical Associate Professor at Boston College Law School and Director of the Juvenile Rights Advocacy Program.



**Ethics in Forensic Mental Health Practice:
A day workshop with Randy Otto PhD**

April 17 2019, Charlottesville VA

This one-day workshop will provide an overview, engagement with, and discussion regarding ethical issues in forensic mental health practice. Distinguished faculty for the workshop will be Randy Otto PhD, Florida Mental Health Institute, University of South Florida.



Dr. Otto has published and presented extensively on forensic psychological assessment. His work has been recognized nationally with awards from the American Academy of Forensic Psychology, the American Psychological Association, and the Society for Personality Assessment. Dr Otto has been President of the American Psychology-Law Society (AP-LS) , President of the American Board of Forensic Psychology, and President of the American Board of Professional Psychology. A Fellow of the American Psychological Association he has chaired APA's Committee on Legal Issues and the Committee to Revise the Specialty Guidelines for Forensic Psychology, and he is an APA Council Representative (Division 41, AP-LS). Dr. Otto is a Fellow of the American Psychological Association (Division 41) and has received awards for his work from the Society for Personality Assessment, the University of California-San Francisco, and the American Academy of Forensic Psychology. In 2009, his work on adjudicative competence, with colleagues Norm Poythress,

John Monahan, Richard Bonnie, and Ken Hoge, was cited by the U. S. Supreme Court in *Indiana v. Edwards*. [Learn more about Dr Otto](#)



Evaluation Update: Applying Forensic Skills with Juveniles

<http://www.ilppp.virginia.edu/OREM/JuvenilePrograms/Course/129>

April 29, 30, May 1 2019 lectures and May 3 case exercise, Charlottesville VA

This program is especially for experienced adult forensic evaluators - who have already completed the five-day “Basic Forensic Evaluation” program (regarding evaluation of adults) and accomplished all relevant qualifications for performing adult forensic evaluation - and wish now to complete relevant qualifications to perform juvenile forensic evaluations.

Juvenile Forensic Evaluation: Principles and Practice

<http://www.ilppp.virginia.edu/OREM/JuvenilePrograms/Course/123>

April 29-May 3 2019, Charlottesville VA

This five-day program provides foundational, evidence-based training in the principles and practice of forensic evaluation with juveniles. Content includes clinical, legal, ethical, practical and other aspects of forensic evaluation with juveniles. The format combines lectures, clinical case material, and practice case examples for evaluation of juveniles. Day five incorporates a case report writing exercise.



Questions about ILPPP programs or about *DMHL*?: please contact els2e@virginia.edu

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