

Supplement to Testimony on H.230

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Safe Storage

The Department of State's Attorneys and Sheriffs does not take a specific stance on the specified standards for safe storage, as the expertise on the means and methods of safe storage is more appropriately reserved to law enforcement or public health professionals.

Notwithstanding this, **the Department believes clear guidance from the legislature is needed** to fully inform potential charging decisions when there is an intersection between criminal negligence or recklessness and firearm induced serious bodily injury or death.

Presently, limited case law and jury instructions addressing reckless endangerment and involuntary manslaughter do not directly articulate a standard for "safe storage" and, thus, do not provide clarity on what might constitute either a "gross deviation" from the standard of conduct, or care, that a law-abiding person would have exercised in the same situation.¹ Without considering the new criminal offenses proposed, **establishing a "safe storage" standard would inform charging decisions for these offenses and provide a basis upon which to measure conduct, acts or omissions by a potential offender.**

While not taking a specific stance of the propriety of the proposed safe storage standards, one concern is the potential ambiguity in Section 3, specifically, proposed 13 V.S.A. § 4024(a)(2) which provides that:

- (2) Exceptions. This subsection shall not apply if:
 - (A) the firearm is carried by or under the control of the owner or another lawfully authorized user;

¹ Vermont Jury Instruction, CR24-251, dated 10/21/16: "Criminal negligence means something more than ordinary carelessness. It means that the defendant disregarded a risk of death to such a degree that [his] [her] failure to perceive it, given the circumstances, involved a gross deviation from the standard of care that a reasonable person would have exercised in the same situation."

"Defendant acted recklessly if [he] [she] consciously disregarded a substantial and unjustifiable risk that [his] [her] conduct would cause death. This means that, in considering the nature and purpose of defendant's conduct, [his] [her] disregard of the risk of death must have involved a gross deviation from the standard of conduct that a law-abiding person would have exercised in the same situation."

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Here, ambiguity in terms of “control” should be clarified – does this mean direct physical control (e.g. in a holster) or some form of constructive possession or control based on proximity or attendant circumstances? Further, is there a distinction between a loaded or unloaded firearm – the overall proposal contemplates storage separate from ammunition, but this leaves open other scenarios (e.g. recent return indoors to a hunting camp where a magazine remains in a firearm, but no round is chambered). In sum, detail and specificity in the standard will be helpful in providing notice and in the application of the standard to potential criminal charges.

Section 3 also proposes to create a set of new criminal offenses and penalties, ranging from a fine only offense to a 5-year felony. Ultimately, these are policy choices for the legislature to consider – however, several State’s Attorneys expressed concern about the proposals.

First, the proposed 13 V.S.A. § 4024(b)(3) creates a rare situation of a **strict-liability felony**. Put another way, this section, if passed, would create felony liability for individuals whose actions were not the direct cause of the harm triggering criminal liability and who acted without criminal intent. Simple negligence could be sufficient to create felony liability under this scenario (i.e. involuntary manslaughter requires “criminal negligence” which is defined as “something more than ordinary carelessness.”

Second, as drafted this **language could expose parents of children who commit suicide to criminal liability** – likely an unintended consequence given the purpose of this bill. Modification of the language from “...and use it to cause death or injury to any person” to “...and use it to cause death or injury to any other person.” would eliminate this risk and excuse criminal liability in circumstances where a child or prohibited person utilize a firearm for purposes of self-harm.

Third, 13 V.S.A. § 4024(b)(2) proposes a misdemeanor offense in circumstances where “a child or prohibited person gains access to the firearm and uses it in the commission of a crime or displays it in a threatening manner...” This also serves to create a strict-liability offense. The language “or displays it in a threatening manner” is not tied to other statutory language and, ultimately, Vermont does not have a simple brandishing crime – rather, criminal liability must be tied to theories of reckless endangerment, disorderly conduct, or criminal threatening – where a firearm may be part of the offense conduct. Striking the surplus language may be preferable, unless the legislature desires a distinct form of criminal liability under these circumstances.

Finally, **treating 13 V.S.A. § 4024(b)(1) as a non-criminal offense may be preferable**, or not providing for criminal liability until a second offense. As a criminal offense, this could allow for search warrants or other more intrusive government actions contrary to the legislature’s recent history of reducing perceived law enforcement or prosecutorial overreach. A bi-furcated system of a first offense being subject to disposition in the Judicial Bureau, and second or subsequent offenses being subject to criminal liability may be a preferable mechanism to incentivize compliance with the law.

Multiple State’s Attorneys also expressed concern about the prescriptive nature of the proposed 13 V.S.A. § 4024(c) and believe this is unnecessary. Accordingly, the Department recommends that it be struck. The Department also recommends that the notice requirements proposed under 13 V.S.A. § 4024(d) focus on actual notice to the purchaser, e.g. a handout or form that accompanies the transaction, rather than reliance on signage. In any event, actual notice from the statute being enacted is presumed and is enforceable if the law is passed.

Extreme Risk Protection Orders

Beginning with Section 5, **the Department recommends maintaining the existing jurisdictional qualifiers, and not premising jurisdiction on where a family or household member resides**. If this is viewed as necessary, then there should be statutory provision to require transfer of venue and a final hearing to be held either where the events occurred or where the respondent resides. This is based on the view, expressed below, that family or household members should be able to seek temporary relief, but discretion and responsibility to pursue a final order or extension thereof be reserved to the appropriate State’s Attorney or the Attorney General.

Turning to Sections 4, 6 and 7, multiple State’s Attorneys expressed support for the expansion 13 V.S.A. §§ 4053 and 4054(a)(1) to include family or household members. 15 V.S.A. § 1101(2) defines “household members” as:

persons who, for any period of time, are living or have lived together, are sharing or have shared occupancy of a dwelling, are engaged in or have engaged in a sexual relationship, or minors or adults who are dating or who have dated. “Dating” means a social relationship of a romantic nature. Factors that the court may consider when determining whether a dating relationship exists or existed include:

- (A) the nature of the relationship;
- (B) the length of time the relationship has existed;

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(C) the frequency of interaction between the parties; and

(D) the length of time since the relationship was terminated, if applicable.

This can be construed as a very broad group of persons. **The legislature may want to consider limiting the scope of who may apply to family members only, or alternatively, to household members presently living with, sharing occupancy, or in a dating relationship with a respondent.** This would tend to limit the ability of former partners or other distant relationships to intercede directly (they could still seek law enforcement assistance to obtain an order).

Turning to Section 8, the Department requests that “family or household member” be struck from the list of individuals able to seek renewal of an extreme risk protection order, and moreover, that the legislature adopt **a system whereby a final order may only be secured by a state’s attorney or the Attorney General.** To effectuate such, the following changes are proposed:

Amend 13 V.S.A. § 4054(b)(1):

The court shall grant the motion and issue a temporary ex parte extreme risk protection order if it finds by a preponderance of the evidence that at the time the order is requested the respondent poses an imminent and extreme risk of causing harm to himself or herself or another person by purchasing, possessing, or receiving a dangerous weapon or by having a dangerous weapon within the respondent’s custody or control. The petitioner shall cause a copy of the order to be served on the respondent pursuant to section 4056 of this title, and the court shall deliver a copy to the holding station. When a petition has been filed and an ex parte order issued on application of a family or household member, the court shall transmit a copy of the petition or application and all supporting documents, and a notice of the initial status conference or hearing to the state’s attorney or the Attorney General.

Amend 13 V.S.A. § 4053(d):

The court shall hold a hearing within 14 days after a petition is filed under this section. Notice of the hearing shall be served pursuant to section 4056 of this title concurrently with the petition and any ex parte order issued under section 4054 of this title. When a petition has been filed or an ex parte order issued on application of a family or household member, the court shall transmit a copy of the petition or application and all supporting documents, and a notice of the initial

status conference or hearing to the state’s attorney or the Attorney General.

Amend 13 V.S.A. § 4053(b) for conformity:

Except as provided in section 4054 of this title, the court shall grant relief only after notice to the respondent and a hearing. The petitioner shall have the burden of proof by clear and convincing evidence.² When a petition has been filed by a family or household member, the state’s attorney or Attorney General shall be substituted as the plaintiff in the action upon issuance of an ex-parte order or at least 7 days prior to the hearing. Upon substitution, the family or household member shall lose party status.

The language and concept borrows from mental health proceedings and emergency adult involuntary guardianship actions where **a third party may initiate filing, and the state, through the state’s attorney or Attorney General assumes responsibility for adjudication of the action.** See V.R.F.P. 6.2(c).

The Department believes that family or household members should be able to initiate a petition or seek emergency ex parte relief, but that **the State is best situated to adjudicate these matters** – to include assessing the evidence, corresponding with counsel if a respondent is represented, securing the participation of witnesses, and presenting evidence consistent with the rules of evidence and applicable court procedure. This also ensures a greater degree of “gatekeeping” and may assist in mitigating any risks to judicial economy.

The Department has **other proposals to enhance the effectiveness of extreme risk protection orders**, including modification of the standard for a final order – preponderance of the evidence, in lieu of the heightened clear and convincing evidence standard – as well as clarifying that the risk need not be continuing but at least present at the time of filing, to wit, by modification of 13 V.S.A. § 4053(e)(1):

The court shall grant the petition and issue an extreme risk protection order if it finds by ~~clear and convincing~~ a preponderance of the evidence that the respondent poses, or posed at the time the petition was filed, an extreme risk of causing harm to himself or herself or another person by purchasing, possessing, or receiving a dangerous weapon or by having a dangerous weapon within the respondent’s custody or control.

Other potential changes could include extending the default duration of an order from 6-months to 1-year, include express authorization for courts to permit law

² See further discussion and comments concerning the burden of proof in the discussion of 13 V.S.A. § 4053(e)(1).

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enforcement to search premises or vehicles under the control of a respondent for firearms upon issuance of an order and without a separate search warrant application, and to require automatic reports or intake to the Department for Children and Families when an extreme risk protection order is issued for a child or other individual in the custody or control of the department (e.g. 18-22 year olds subject to juvenile or youthful offender probation).

Waiting Period for Firearm Transfers

The Department **does not take a formal position on the waiting period**, but notes that several State's Attorneys expressed support for this provision.

In terms of technical analysis or changes, the Department recognizes that there is a **distinction between existing firearms owners and first-time purchasers**. The utility of a waiting period for individuals who already own firearms is limited when considering risks of self-harm or threats to third parties. The Department encourages the legislature to consider means by which firearms ownership could be verified – for example, through prior receipts, prior season hunting licenses that authorize taking of game by firearms, etc.

Other issues and complications may result from gun shows and other settings outside of traditional “brick and mortar” operations. The Department recommends solicitation of testimony of Federal Firearms License (“FFL”) holders from Vermont or other jurisdictions where waiting periods have been implemented on how to navigate these scenarios.

Finally, the Department notes that the scope of this bill is focused on suicide prevention – however, **the waiting period may have an impact on reducing the attractiveness of Vermont as a locale for the completion of “straw purchases”** wherein a prohibited person or drug trafficker without residency in the State seeks to use a Vermonter with no record to acquire and then **immediately transfer a firearm in exchange for compensation or controlled substances**. **Vermont continues to be a hot spot of the “guns for drugs” trade**, and a waiting period may have the positive impact of eliminating the near instantaneous nature of transactions that can prey upon individuals experiencing substance use disorder.