

**TESTIMONY OF
KIM STOLFER**



**CHAIRMAN
FIREARMS OWNERS AGAINST CRIME**



**CHAIRMAN
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ALLEGHENY COUNTY
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**VICE-CHAIRMAN
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**PUBLIC HEARING BEFORE
THE PENNSYLVANIA HOUSE
JUDICIARY COMMITTEE**

ON

Firearm Purchase Background Checks

July 17, 2013

Mr. Chairman, Members of the Judiciary Committee, I appreciate the opportunity to appear before you today.

As you know, there is always a delicate balancing act between responsible public policy and the preservation of our individual freedoms. No one, **especially** supporters of the ‘right to bear arms’, wants to see criminals gain access to firearms. Unfortunately there are times with public policy where it is clearly evident that public policy is evolving beyond the initial mandate and, in our view; this is where we are at with the Pennsylvania Instant Check System (PICS).

The history and documentation of the conduct of the PICs system demonstrates to us that the overall mandate of preserving our constitutional right to keep and bear arms has become subservient to a bureaucratic web of regulatory infringements on a constitutional freedom. Accountability to the people, the Constitution and the law seems to be growing more and more distant with each passing year of operation.

As an example, during the last major shutdown of the PICs system in 2007, for the controversial multi-million dollar upgrade, the Pennsylvania State police filed a brief (attached) with Commonwealth Court that asserted that the court **did not have jurisdiction** over a state agency. It is deeply troubling to have any department of government take a position that a pillar of our constitution, the right to due process, supposedly does not apply. This is one more example as to why, in our opinion, the PICs system has outgrown the confines of the law.

With the vast majority of states using the FBI NICS system there is a legitimate question as to why Pennsylvania continues to maintain a state run system especially since there are records within the Pennsylvania system that cannot be accessed by other states. This limitation presents the very real possibility that a person with a firearm possession disability could be able to purchase a firearm (rifle or shotgun-not a handgun) in another state since the NICS system will be blind to pre-existing records.

As an example, Pennsylvania still does not provide individuals, who are disabled from exercising their Constitutional Right to Bear Arms because of a mental health disqualification, the ability to challenge this mental health disqualification. This flaw in the **PICS** system exists despite directives from the FBI/NICS to comply with the federal mandate, in the NICS Improvement Act, to provide this option. Pennsylvania tops the list of states with **643,167** disqualifying records of mental health disabilities. These disqualifying records **far surpass** the number of disqualifying mental health records maintained by other states between the years of 1989-2013. What has not been corrected is **PFA** data sharing with NICS even though Pennsylvania received funding from the Federal Government to improve the **PFA** system.

From a pragmatic criminal justice perspective it makes eminent sense to view this in a cost/benefit analysis as to the greater respect for citizen’s rights as well as the availability to law enforcement of critical information on those individuals with a prohibiting record.

Victimizing Law Enforcement and the Law Abiding Citizen

Perhaps the area of deepest concern is the rationale used to deny citizens who are exercising their constitutional right to purchase a firearm. The mandate to accurately and expeditiously process the investigation of a person’s record as part of firearm transfer should be done based strictly on facts. However, there are many examples of subjective interpretation where personal bias causes citizens

financial loss as well as very real consequences that far surpass compliance with statutory language and authority.

Case #1: Craig-James Fohl is a Federal Law Enforcement officer with the ICE agency (13 years at the time of this incident) and international liaison for this federal agency with Interpol. He had no misdemeanor or felonious criminal record (as one can imagine) with only one charge of 'disorderly conduct' when he was in college 19 years prior in New York State. **Agent Fohl** is fully credentialed to make arrests and carry firearms as part his daily duties.

In December 2009, **Agent Fohl**, who resides in York County, attempted to purchase a firearm and was denied by the PICS system for the 'disorderly conduct' charge as a "possible" domestic violence charge. Obviously Agent Fohl could not work for the ICE agency with a disqualifying offense on his record and the potential significant impact to his career of the actions of the PICS system cannot be overstated. **Agent Fohl** has purchased firearms in numerous other states through the NICS system and even in Florida, which is a full POC state, without any indication of a problem.

Agent Fohl challenged the denial and subsequent interaction with the PICS system revealed that it is common place to interpret charges in other states as having a connection with domestic violence where none exists.

Agent Fohl personally wrote the following statements to me in e-mail (documentation available):

- 1. **The system is radically flawed and change is needed (1/13/2010)***
- 2. **This was such a nasty experience. Yes, these laws and processes definitely need to be changed (3/19/2010)***

Case #2: Jeffrey L. Burtner Mr. Burtner tried in **May 2012** to buy a hunting rifle from a federally licensed firearms dealer in Butler. He was told he couldn't buy a gun because he was a "mental defective".

Mr. Burtner had previously bought guns with no problem, this time the Pennsylvania Instant Check System (PICS) indicated that he had been involuntarily committed to a mental institution in 1992. Mr. Burtner approached the hospital and provider listed on the PICS response. Both responded that **they had no record suggesting any such commitment.**

Mr. Burtner has been forced to sue the Pennsylvania State Police claiming there was **no basis** for the denial and that **troopers refused to correct the error.**

The attorney for the state police responded "that **the PSP has been unable to find any involuntary commitment documentation** on Mr. Burtner but **that Mr. Burtner would have to take legal action** for the PSP to remove it from PICS

Case #3: Michael Ross was stopped for a traffic citation (April 2011) and as part of the stop the officer asked if there was anything else in the vehicle and Mr. Ross informed him that he was lawfully carrying a firearm concealed. Mr. Ross, in fact, possessed two firearms in the vehicle at the time and upon examining his LTCF the officer seized the firearm(s) and informed Mr. Ross that he could pick the firearms up at the station the next day.

The next day Mr. Ross went to the station and the Chief of Police returned one firearm but would not return his other one (Glock model 19/see documentation) as the PSP/PICS Record of Sale database

showed that the firearm belonged to another individual. Mr. Ross actually purchased this firearm from a private individual 2 years ago and documentation shows that this purchase was approved through the PICS system.

Mr. Ross had to retain attorney Phil Kline, to speak with the Chief of Police in order to have his property returned as well as drive hundreds of miles back to the firearms dealer to obtain copies of his records of the lawful transfer.

This is another of the many examples of local law enforcement believing that the Record of Sale database is complete and authoritative on firearms transfers when it is the opposite that is true. There are valid concerns regarding the retention of information in circumstances of this kind.

(*These cases are but a few of the many in our files)

The Problem of Positive Identification

A major weakness of 800 number POS (Point of Sale) systems is the lack of positive identification (OTA-Office of Technology Assessments Report). Identification of firearm purchasers is based on the requirements of two forms of identification (ID), including one with a photo.

Identity theft is one of the fastest growing crimes and leads to the defeat of 'background check systems' by creating the likelihood of a "false negative" which is a record check that indicates a person does not have a criminal record and therefore is approved to purchase a firearm, when the person in fact has a disqualifying criminal record but escapes detection due to incomplete records or the use of phony or stolen ID.

Critics claim that purchasers using fake identification are likely to go undetected. The FBI has stated that about one in six persons with a criminal record may be using alias names and identification. But whether this ratio applies to firearm purchasers is unknown.

Constitutional Concerns & Errors in the Pennsylvania Instant Check System

Perhaps the most worrisome aspect of the PICS system is the position taken by the PA State Police that 'if' the system becomes inoperable **then firearms transfers cease**. In other words a constitutional freedom is at the mercy of a machine with 'no' backup protocols or bypass regulations established and ready to implement to fulfill and safeguard the most important role of government, which is to safeguard individual freedoms. This means, in essence, that the 2nd amendment and Article 1, Section 21 will cease to exist in the event of mechanical or electronic failure. This 'should' concern all of us!

PICs could also become inoperable due to sabotage or and executive decision!

PICS errors are distressingly common. These errors arise from a variety of sources. Two names can be identical, social security numbers can be transposed, very old court records can be wrong, or the sentence for a crime that was not punishable by more than a year in jail when it was committed can be later amended.

Further, if a court record or FBI report is incomplete or ambiguous, **authorities in Pennsylvania presume the worst**, and leave it to the individual to prove otherwise.

For example, if a college football fan stole the other team's mascot in California in 1978, and subsequently pled guilty to "theft," that conviction might be recorded simply as a violation of a section of the crimes code governing "theft" without specifying the nature or degree of the crime. Although the "theft" in question may actually have been a summary offense punishable by a \$50 fine, some forms of theft included under the same statute would be punishable by more than one year in prison. The Pennsylvania State Police bureau which administers PICS *does not give the benefit of the doubt*; they will disqualify such a person from possessing a firearm or ammunition **until the applicant can prove** the "theft" was not punishable by a year or more in prison.

Legal Issues & Compliance with PA Statutes

The PSP/PICS unit maintains additional examples of unfathomable interpretations of law such as their interpretation of the current PA Uniform Firearms Act, **Title 18-Section 6111 (f)(3)**, that states that the background check requirement "*shall not apply to any law enforcement officer whose current identification as a law enforcement officer shall be construed as a valid license to carry a firearm or any person who possesses a valid license to carry a firearm under section 6109*". PSP ignores this section of law and has refused previous attempts to explain the reasons why. There are numerous benefits that would result from exempting License To Carry Concealed Firearms (LTCCF) permit from redundant and unnecessary background checks to not only the firearms purchase procedure but also firearms dealers due to the high number of firearms purchased by License To Carry Concealed Firearms (LTCCF) permit holders (@40% in most instances according to PA dealers).

System Outages & Tolling Period

One of the more outrageous outcomes of the 2007 upgrade of the PICS system was the position of the Pennsylvania State police that without an operational system "no firearms sales" could be conducted legally. It is absolutely essential to understand that what they are saying is that the 2nd amendment and the 'PA Right to Bear Arms' is subject to the technological vulnerability of the PICS system. This position on a system outage was modified in the brief the Pennsylvania State police provided to Commonwealth Court by admitting that there is a firearm sales bypass procedure (similar to the federal law which is 72 hours) of 48 hours in Pennsylvania statutes. However at a subsequent firearms dealer seminar Lieut. Schuyler responded to a question from Harry Schneider wherein he stated that the tolling period (48 hours) would not begin if the PICS system did not have operational telephones or did not answer the telephone. Thus their official position was that the constitutional rights of Pennsylvania citizens could now be completely eliminated by technological issues once again.

Additionally, in many ways this system has also been co-opted by other agencies for their purposes that take precedence over firearms transfer requests further burdening the operation and availability of this system. This system is used (without cost) by state courts, the Department of Corrections, the National Crime Information Center, the U.S. Immigration and Customs Enforcement agency, the Bureau of Alcohol, Tobacco and Firearms, the Pennsylvania Megan's Law Registry and other local and state law enforcement agencies.

It is also important to point out that law enforcement still had access to the PICS system while the 2007 upgrade was being implemented but the Pennsylvania State police **denied legitimate firearms dealers' access and, by virtue of this closure of access by FFL dealers, stopped citizens from exercising a constitutional right**. We should not accept the premise that the ends justify the means!!

FFL Dealer Impact

According to Pennsylvania State Police (PSP) records from 2000 – 2011 Pennsylvania has lost thousands of federal firearms licensed dealers. We must examine the climate with which these businesses must operate here in PA. The litany of unfunded government mandates that require more and more employees to complete burdensome regulatory tasks or loss of business because politics or agency ineffectiveness must be considered as an essential element.

Example: Firearms Unlimited, in Bridgeville Pennsylvania, was shut off from selling firearms for 30 days when the PICS unit failed to record this dealer’s submission of Background Check fees. The fact that this dealer submitted these fees through the mail using ‘certified return receipt’ and had a cancelled check would not alter the position of the PICS unit. After the 30 days and the resubmission of another check for these fees it was subsequently discovered, by the PICS unit, that the dealer was correct and the fees had, ultimately, been paid on a timely basis.

In a larger constitutional context, the question must be asked as to what will happen to the 2nd Amendment and Article 1, Section 21 if firearms dealers continue to close at this alarming rate.

PICS Operational Statistics-Is this system worth the cost?

A disqualified individual attempting to purchase a firearm carries significant criminal penalties. Now either the PICS system is denying tens of thousands of law-abiding individuals for questionable reasons OR there are actually tens of thousands of criminals running around free instead of in jail. The lack of convictions in this category demonstrates our point:

Total **convictions** between 1998 & 2011 – 1,611

Total **arrests** between 1998 & 2011 – 2,401

Total **Denials** between 1998 & 2011 – **139,435**

Total identified **prohibited individuals** between 1998 & 2011 – **113,582**

(The above number (**113,582**) represents individuals that the PSP has not taken any ‘enforcement’ action against for ‘illegally’ attempting to buy a firearm as a disqualified individual provided the denials were for genuine criminals and ‘not’ technical violations of the law.)

Total **referrals** to ATF since – 198

Consider the costs to the state to administer the PA Instant Check System (itemized below):

- PICS Start Up/Maintenance (98-05) -- \$31,100,000
- Yearly Operational costs -- @ \$36,000,000 (@\$6,000,000-yearly/2006-2011)
- PICS Upgrade costs (2007) -- \$32,000,000
- Total** **\$99,000,000**

Additionally, in many ways this system **has been co-opted by other agencies** for their purposes that take precedence over firearms transfer requests further burdening the operation and availability of this system. This system is used (*without cost*) by state courts, the Department of Corrections, the National Crime Information Center, the U.S. Immigration and Customs Enforcement agency, the Bureau of Alcohol, Tobacco and Firearms, the Pennsylvania Megan’s Law Registry and other local and state law enforcement agencies.

Since the implementation of the Instant Check (1998) the statistics below reflect the PSP numbers from PICS on denials, appeals and denial reversals:

<p>1998- 4,692 Denials 2,126 <i>Challenges</i> 1,062 Denials Upheld 1,059 Denials Reversed 3,628 gun-purchasing criminals 29 Appeals <i>Reported Investigations</i>—0 <i>Reported Arrests</i>———0 <i>Reported Convictions</i>——0 <i>Referred to ATF</i>———0</p>	<p>1999- 14,183 Denials 6,301 <i>Challenges</i> 3,377 Denials Upheld 2,908 Denials Reversed 11,322 gun-purchasing criminals 188 Appeals <i>Reported Investigations</i>—87 <i>Reported Arrests</i>———28 <i>Reported Convictions</i>——10 <i>Referred to ATF</i>———18</p>	<p>2000- 10,128 Denials 4,518 <i>Challenges</i> 2,630 Denials Upheld 1,845 Denials Reversed 8,283 gun-purchasing criminals 43 Appeals <i>Reported Investigations</i>—329 <i>Reported Arrests</i>———110 <i>Reported Convictions</i>——25 <i>Referred to ATF</i>———18</p>
<p>2001- 10,589 Denials 4,332 <i>Challenges</i> 2,408 Denials Upheld 1,891 Denials Reversed 8,698 gun-purchasing criminals 73 Appeals <i>Reported Investigations</i>—598 <i>Reported Arrests</i>———222 <i>Reported Convictions</i>——102 <i>Referred to ATF</i>———8</p>	<p>2002- 11,132 Denials 4,805 <i>Challenges</i> 2,730 Denials Upheld 2,038 Denials Reversed 9,094 gun-purchasing criminals 94 Appeals <i>Reported Investigations</i>—551 <i>Reported Arrests</i>———282 <i>Reported Convictions</i>——163 <i>Referred to ATF</i>———7</p>	<p>2003- 10,406 Denials 4,184 <i>Challenges</i> 2,259 Denials Upheld 1,882 Denials Reversed 8,524 gun-purchasing criminals 61 Appeals <i>Reported Investigations</i>—498 <i>Reported Arrests</i>———280 <i>Reported Convictions</i>——225 <i>Referred to ATF</i>———5</p>
<p>2004- 9,943 Denials 3,783 <i>Challenges</i> 2,176 Denials Upheld 1,573 Denials Reversed 8,370 gun-purchasing criminals 52 Appeals <i>Reported Investigations</i>—401 <i>Reported Arrests</i>———259 <i>Reported Convictions</i>——112 <i>Referred to ATF</i>———3</p>	<p>2005- 9,451 Denials 3,841 <i>Challenges</i> 2,286 Denials Upheld 1,545 Denials Reversed 7,906 gun-purchasing criminals 37 Appeals <i>Reported Investigations</i>—342 <i>Reported Arrests</i>———153 <i>Reported Convictions</i>——143 <i>Referred to ATF</i>———0</p>	<p>2006- 9,535 Denials 4,090 <i>Challenges</i> 2,470 Denials Upheld 1,599 Denials Reversed 7,065 gun-purchasing criminals 56 Appeals <i>Reported Investigations</i>—285 <i>Reported Arrests</i>———194 <i>Reported Convictions</i>——173 <i>Referred to ATF</i>———8</p>
<p>2007- 7,420 Denials 4,017 <i>Challenges</i> 1,183 Denials Upheld 1,832 Denials Reversed 5,588 gun-purchasing criminals 58 Appeals <i>Reported Investigations</i>—440 <i>Reported Arrests</i>———252 <i>Reported Convictions</i>——181 <i>Referred to ATF</i>———1</p>	<p>2008- 10,823 Denials 4,302 <i>Challenges</i> 1,559 Denials Upheld 1,623 Denials Reversed 9,200 gun-purchasing criminals 54 Appeals <i>Reported Investigations</i>—504 <i>Reported Arrests</i>———96 <i>Reported Convictions</i>——69 <i>Referred to ATF</i>———120</p>	<p>2009- 9,449 Denials 3,721 <i>Challenges</i> 2,023 Denials Upheld 1,448 Denials Reversed 8,001 gun-purchasing criminals 63 Appeals <i>Reported Investigations</i>—440 <i>Reported Arrests</i>———215 <i>Reported Convictions</i>——151 <i>Referred to ATF</i>———10</p>

2010- 10,596 Denials 3,826 Challenges 2,262 Denials Upheld 1,382 Denials Reversed 9,032 gun-purchasing criminals 63 Appeals <i>Reported Investigations</i> —441 <i>Reported Arrests</i> —205 <i>Reported Convictions</i> —129 <i>Referred to ATF</i> —0	2011- 11,088 Denials 4,134 Challenges 2,362 Denials Upheld 1,772 Denials Reversed 9,316 gun-purchasing criminals 55 Appeals <i>Reported Investigations</i> —343 <i>Reported Arrests</i> —185 <i>Reported Convictions</i> —128 <i>Referred to ATF</i> —0	2012- 0000 Denials 0000 Challenges 0000 Denials Upheld 0000 Denials Reversed 0000 gun-purchasing criminals 00 Appeals <i>Reported Investigations</i> —000 <i>Reported Arrests</i> —000 <i>Reported Convictions</i> —000 <i>Referred to ATF</i> —000
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Closing Remarks:

The shifting legal landscape has seen thousands of gun owners trapped in a nightmare of legalities involving having ‘all’ their currently owned firearms seized. This has happened in California, New York City, New Jersey and with the Chicago Police (CAGE Unit) gun raids to name but a few of the instances.

Our Constitutional freedoms are being trampled at many levels of government both federal and state. The PICS system, which is Constitutionally, legally, and technologically outmoded, should be replaced by a more effective and financially more cost effective approach – the NICS system. It is important to point out that the vast majority of other states utilize the federal NICS system without these difficulties.

On behalf of the organizations I represent, I thank you, Mr. Chairman and the committee members, for the opportunity to testify here today.

***Firearms Owners Against Crime** is a registered political action committee representing Pennsylvania gun owners and sportsmen clubs. Founded in 1994 FOAC is dedicated to the preservation of our Constitutional Rights under Article 1, Section 21 of the Pennsylvania Constitution's "Declaration of Rights" and the Second Amendment of the U. S. Constitution. and effective public policy in the prosecution of criminals. FOAC teams with other pro-gun organizations and works to preserve the fundamental Constitutional Right to Keep and Bear Arms.*

*The **Allegheny County Sportsmen's League** is a non-profit educational organization representing 45 sportsmen clubs, and is the voice of over 100,000 sportsmen in and around Allegheny County. Founded in 1921 the ACSL is dedicated to the preservation of our natural wildlife resources through hunting and fishing. The ACSL also teams with other pro-gun organization and works to preserve the fundamental Constitutional Right to Keep and Bear Arms as protected under Article 1, Section 21 of the Pennsylvania Constitution's "Declaration of Rights" and the Second Amendment of the U. S. Constitution.*