



**Brady Statute Data:  
Persons who are Unlawful Users of  
or Addicted to Any Controlled Substance**

Report submitted to the  
Bureau of Justice Statistics  
and the  
Alaska Department of Public Safety

by

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Alaska Justice Statistical Analysis Unit  
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JC 9615.03

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This project was supported by Grant No. 96-RU-RX-K026 awarded by the Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice. Points of view in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

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# Brady Statute Data: Individuals Who are Unlawful Users of or Addicted to Any Controlled Substance

## Introduction

This project is a component of the National Criminal History Improvement Program (NCHIP). It is funded by the United States Department of Justice, Office of Justice Planning, Bureau of Justice Statistics, federal grant number 96-RU-RX-K026.

The purpose of this Advanced State Awards program (ASAP) project is to determine the feasibility of identifying and assembling information on persons other than felons who are prohibited from purchasing firearms under 18 U.S.C. 922 (g) and (n), as amended by the Violent Crime Control Act of 1994. The information on the non-felons covered by the act would be added to the Alaska Public Safety Information Network (APSIN) used by the Alaska Department of Public Safety for background checks prior to the purchase or sale of handguns. The APSIN system was created in the early 1980s as a computerized criminal history database for law enforcement agencies.

Currently, state law enforcement agencies do not obtain data on the four non-criminal categories prohibited by the above federal law from obtaining guns: adjudicated mental defectives and involuntary mental commitments; individuals subject to any court order restraining them from threatening or committing acts of domestic violence or abuse; aliens illegally in the United States; and **those who are unlawful users of, or addicted to, any controlled substance.**

This is the third in a series of Alaska Statistical Analysis Unit reports describing how each category can be defined within an Alaska context and discussing the possible procedures, problems and solutions associated with data collection. At the conclusion of this project, a summary report will be written that will review the four components of the project.

The first and second reports focused on adjudicated mental defectives and involuntary mental commitments and those subjects with domestic violence restraining orders. The third of these four non-criminal classifications to be examined is that of **persons who are unlawful users of or addicted to any controlled substance.**

First, this report will examine the statutory provisions pertaining to persons who are addicted to or are abusers of controlled substances; thus it will look at the identification and tracking of drug addicts and unlawful users. The next component will present proposed procedures for collecting data on non-adjudicated addicts and substance abusers from criminal agencies and discuss how their data could be contributed to the currently existing criminal history repository. The next section will address proposed reporting procedures from public non-justice-related agencies. The last section

of the report will look at how addicts and controlled substance abusers could be tracked in the private sector.

## **Persons who are Users of or Addicted to Any Controlled Substance**

### *Definitions*

Federal statute, 18 U.S.C. 922 (g), as amended by the Violent Crime Control Act, lists the provisions which prohibit the purchase, sale or transport of firearms by some individuals. Among the groups to whom a sale is prohibited is anyone:

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the controlled Substances Act (21 U.S.C. 802);

Controlled substances include, but are not limited to: marijuana, depressants, stimulants, and narcotic drugs. They do not include distilled spirits, wine, malt beverages, or tobacco as defined or used in Subtitle E of the Internal Revenue Code of 1986, as amended.

It is unlawful to use any illegal controlled substance (such as PCP), or to use any other controlled substance (such as morphine) in a manner other than as prescribed by a licensed physician. A person who is addicted to a controlled substance is any individual who is found to (1) habitually use a controlled substance so as to endanger the health, safety, welfare, or morals of the public, or (2) to have lost the power of self-control with reference to the addiction.

To be prohibited from purchasing a firearm, there must be evidence that a person is a current unlawful user of, or addicted to, a controlled substance. Such unlawful use or addiction may be demonstrated by evidence of: (1) the recent use of a controlled substance, which is part of a pattern of unlawful use or addiction; or (2) the current unlawful use of, or addiction to, a controlled substance.

Evidence of unlawful use or addiction includes, but is not limited to, any of the following: a criminal record, self-admission of use, diagnoses or other records at a drug treatment or rehabilitation center or other medical facility, testimony or a statement by a psychiatrist or other licensed physician who diagnosed the symptoms or treated the person, needle marks on the person, a failed (that is, “positive”) drug test, or testimony of a social acquaintance who observed the unlawful use of a controlled substance by the person.

Concerning drug tests, failing a single drug test would give reasonable cause for disqualifying a person from purchasing a firearm. Federal agencies may exercise discretion in determining when to report the “positive” results of a drug test for controlled substances. For example, agencies are not required to report such results prior to giving the person an opportunity to contest the results of the “test” through a proceeding that provides due process. The potential disqualifications with possible procedures, are further discussed in the definition section below.

The definitions for “addict” and “controlled substance” found in Food and Drugs, Drug Abuse Prevention and Control, 21 U.S.C.A. section 802, approved May 11, 1998 read:

(1) the term “addict” means any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self control with reference to his addiction....

(6) The term “controlled substance” means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco as those terms are defined or used in Subtitle E of the Internal Revenue Code of 1986, as amended.

The Bureau of Alcohol, Tobacco and Firearms (ATF) proposed to amend the “Definitions for the Categories of Persons Prohibited From Receiving Firearms (95R-051P)” 62 *Federal Register* 34634-02. ATF felt that the amendments would facilitate the implementation of the national instant criminal background check system (NICs) required under the Brady Handgun Violence Prevention Act.

On September 6, 1996, ATF published in the *Federal Register* a notice proposing to amend the regulations to provide for the various categories of persons who are prohibited from receiving or possessing firearms (Notice Number 839; 61 FR 47095):

An unlawful user of or addicted to any controlled substance. A person who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance. A person who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct.

A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receive or possess a firearm. An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possessions that reasonably covers the present time, e.g., a conviction for the use or possession of a controlled substance within the past year, or multiple arrests for such offenses within the past five years if the most recent arrest occurred within the past year.

The Department of Justice Office of Policy Development inquired whether the proposed definition includes persons found through a drug test to use a controlled substance unlawfully, provided the test was administered within the last year. In response, ATF agrees that this information would give rise to an inference of unlawful drug use. Accordingly, the final regulations are being amended to identify these persons in the definition.

The Department of Defense (DOD) noted that the examples should be expanded to include illegal drug use as evidenced by nonjudicial or administrative proceedings. DOD believes that it would be helpful to add the following to the proposed definitions:

For a recruit or former member of the Armed Forces, an inference of current use may be drawn from recent disciplinary or other administrative action based on confirmed drug use, e.g., court-martial conviction, nonjudicial punishment, or an administrative discharge based on drug use or drug rehabilitation failure.

ATF commented that the Defense Department's proposed language helps to clarify the definition with respect to the military, and ATF is adopting the proposed amendments into the regulations.

### **Identification and Tracking of Drug Addicts and Unlawful Users**

The main aim of the Brady legislation is prevent ineligible persons from purchasing handguns from federally licensed dealers. Tracking drug addicts and unlawful users is problematic in that substance abuse and/or addiction is an attribute of the person and not the crime. There are two classifications of individuals that the legislation hoped to capture in regards to their abuse and or addiction:

1. Those who have been identified by the criminal justice system as addicts or abusers; and
2. Those who are addicted to or abuse controlled substances that have yet to be identified by the criminal justice system.

Those who have been identified by the criminal justice system as addicts or abusers should not present an identification problem in regards to a Brady handgun check. A background check through the criminal history records should immediately identify those individuals who are deemed ineligible for a handgun purchase. For example, if a records check reveals that the individual has any kind of misdemeanor or felony arrest or is on probation for a controlled substance violation, a check with the court system, law enforcement agency and/or the probation department will reveal such disqualifying information. If the arrest is recent, if there is any evidence of court-ordered drug counseling the application could be denied. If the check indicated that there is court-ordered urine analysis and any of the results have been "hot" within the last twelve months, the application could be denied.

Identifying and denying the handgun applications of those addicts/abusers who have been identified by the justice system should not be problematic. However, identifying those individuals who have not been formally charged with a controlled substance violation will be much more challenging. As noted above, evidence of unlawful use or addiction includes criminal records, self-admission, diagnoses or records of drug treatment, medical testimony by a psychiatrist or other licensed physician who diagnosed the symptoms or treated the person, needle marks on the person,

a failed (that is, “positive”) drug test, or testimony of a social acquaintance who observed the unlawful use of a controlled substance by the person.

Identification of addiction and/or controlled substance abuse often comes to light during the course of a criminal investigation. However, even though an addiction and/or controlled substance abuse identification is made during the course of such an investigation there is no record kept of such identification unless there is an appropriate charge made that is directly related to such addiction and or abuse.

### **Contributing Data to the Criminal History Repository**

What is needed to facilitate the identification of substance abusers and addicts pursuant to a Brady handgun check is a document that is **a contributor to the criminal history repository** of the Alaska Criminal History Record Information program (ACHIP.) Such a document currently exists and is maintained by the Alaska Public Safety Information Network (APSIN). (See Arrest Disposition Form.)

APSIN is the automated depository for Alaska criminal history information. APSIN is an on-line criminal justice information system which supports over 2000 users statewide, including state, federal and municipal agencies. In addition, APSIN interfaces with the National Crime Information Center (NCIC) and the National Law Enforcement Telecommunications System (NLETS) to enable Alaska to routinely exchange criminal history information with criminal justice agencies in other states for law enforcement purposes. An additional law enforcement purpose, that of facilitating Brady checks should not be problematic.

Currently if a defendant is arrested for a controlled substance violation(s), the charges are translated into the appropriate NCIC codes. These codes are used for a myriad of purposes, one of which is to identify/indicate relevant classifications for Brady disqualifications. An example of this procedure is provided in the following section using a **Felony Indicator** as an example.

### **APSIN Screens with Felony/Felon Indicators**

This section provides a potential APSIN user with a visual display of existing APSIN screens which include a **Felony Indicator**. Each of the following hypothetical screens shows the Felony Indicator. On each of these screens the felony indicator has been highlighted to indicate the location and provide a replica of the indicator. The letter “Y” indicates that a felony conviction has been recorded and the letter “N” indicates that one has not been recorded. The highlighted boxes indicating the location of the felony indicator used here are for illustrative purposes only. The APSIN screens displayed are:

Figure 1. Arrest Disposition Form

Defendant of		Citation		<b>Criminal Case Intake and Disposition</b>				Page of					
D. A. File Number		<b>ATN SAMPLE</b>				Court Number							
		Print this number in the "State Usage" block of the fingerprint card(s).											
Defendant's Name	Last	First	M.I.	Birth Date	Birth Country	AK ID / Lic.	Report Attached	<input type="checkbox"/>					
Defendant Note							Rule 45 Date						
Reporting Officer's Name		Agency		Report Number(s)		Date Case Submitted							
Date of Offense		Date of Arrest		Place of Offense		Victim's Name		Victim's Phone					
Charge(s) Referred for Prosecution			Statute		Class of Offense	Screening Disposition (100-330)	Reason if not Accepted as Referred						
1													
2													
3													
Case Received By		Date Case Received		Case Screened By		Date Case Screened							
Decisions to prosecute are often subject to dispute and investigating officers sometimes feel that inadequate weight has been given to a particular aspect of a case. If you feel that the decision made in this case was improper, please notify the screening prosecutor to discuss why a different result should occur.													
Instructions and Comments (Include information on concurrent/consecutive sentences):													
						<b>Booking/Fingerprinting Ordered by the Court</b>							
						Date Ordered		Judge					
						<b>Booking Information</b>							
						Date		Time		Institution		Agency	
Please notify the screening prosecutor of the progress of any further investigation no later than:						<b>Committing Officer</b>							
Charge(s) Accepted for Prosecution If different from than Referred			Statute		Class of Offense	Final Disposition (100-430)	Reason if not Prosecuted as Accepted						
1													
2													
3													
Case Note													
Charge(s) Disposed of if different than Accepted			Term Total suspended	Fine Total suspended	Duration of Suspension	Duration of S.U.S.							
1			/	/									
2			/	/									
3			/	/									
Assigned Prosecutor's Signature			Evidence may be disposed of: Yes <input type="checkbox"/> No <input type="checkbox"/>		Sentencing Judge		Date						

- Maintain Criminal History
- Update Person Information
- Record Criminal History
- Basic Person Record
- Full Criminal History
- Secondary Criminal History
- Criminal History Convictions

By using the Criminal Case Intake and Disposition Form in conjunction with the APSIN screens, identification and tracking of drug addicts and unlawful users could be facilitated. What would be required would be the addition of a field that would identify drug addicts and unlawful users who have been identified by the criminal justice system but not necessarily through an arrest.

Figure 2. APSIN Screen: Maintain Criminal History

PS00110P TERMID: TRSO NAST75TH CRIMINAL HISTORY 04/15/91 17:26:34.9									
PERSON NAME: EFFIE LONGACRE									
AST NUM:		FBI NUM:			SEX: ?				
(MORE) DOB: 9/12/1961		(MORE) SSN: 345-62-3466							
S#	COURT DOCKET	ARREST AGENCY	ARREST DATE	ORIG CHC	CONV COURT	CONV DATE	-CONV CHG	DISP	FELONY FLAG
1	91-001	ANC	03/15/1991	1313	DAN	03/15/1991	1399	S	N
2	K91001	INFO	03/15/1991	2202	SAN	03/15/1991	2202	G	Y
3	K91-002	INFO	02/15/1991	5404	SAN	02/15/1991	5404	G	N

ENTER SEQUENCE NUMBER OF SELECTION: \_\_\_\_ AND ACTION (A, U, D, OR E): \_\_\_\_ \* AT END \*

Figure 3. APSIN Screen: Update Person Information

```

PS00100P  TERMID: TESO      UPDATE PERSON INFORMATION      04/15/91  17:27:08.9
PERSON NAME: EFFIE LONGACRE
DOB: 09/12/1961  10 15 1960  10 15 1960  10 15 1960  10 15 1960
SSN: 345-62-3466  345 62 3466  642 56 4566  396 64 5656
SEX: F          WEIGHT: 120          HEIGHT: 5 05          HAIR: BLK
EYE COLOR: GRN          RACE: W          SKIN:          MEDICAL:
TEMPERAMENT:
BIRTH CITY: PORTLAND          STATE: ME          COUNTRY:
AST NUMBER:          FELLOW: Y          FBI NUMBER:
CITIZEN:          PF ON FILE: Y
STREET/EXTRA LINE          CITY/COUNTRY          STATE ZIP CODE
MAILING ADDR: 1883 CLINTON WAY          ANCHORAGE          AK 99504
RES ADDR: 1883 CLINTON WAY          ANCHORAGE          AK 99504
OCCUPATION:          EMPLOYED:
ID/LIC NUM: 6274070          UPDATED:
CRIMINAL HISTORIES MAY BE LIST IN:
PF2 MULT PERSON          PF12 UPDATE ALIAS
    
```

Figure 4. APSIN Screen: Record Criminal History

```

PS00120P  TERMID: TESO      RECORD CRIMINAL HISTORY      04/15/91  17:27:30.9
PERSON NAME: EFFIE LONGACRE
AST NUMBER:          PF ON FILE: Y          FBI NUMBER:
ARREST AGENCY: AKC          ARREST DATE: 03 03 1991          ORIGINAL CHARGE: 1313
CONV COURT: DAN          CONV DATE: 03 15 1991          CONV CHARGE: 1399
COURT SOCKET: 91-001          POS ID: W          FELONY: M          DISPOSITION: G
CONDITION:
SENTENCE  YEARS  DAYS  AMOUNT  CONF  DATE
S          --   --   --       Y    03 20 1991
J          --   180  --       --   --
--         --   --   --       --   --
--         --   --   --       --   --
--         --   --   --       --   --
--         --   --   --       --   --
--         --   --   --       --   --
--         --   --   --       --   --
--         --   --   --       --   --
--         --   --   --       --   --
--         --   --   --       --   --
PF11 QUIT/SELECT  PF12 UPDATE/SELECT
    
```

Figure 5. APSIN Screen: Basic Person Record

```

PST0300P  TERMID: PAXQ      BASIC PERSON RECORD      04/22/91  08:46:42.2
PERSON NAME: EFFIE LONGACRE
(MORE) DOB: 09/12/1961  10 15 1960  (MORE) SSN: 345-62-3466  PDM ID:
SEX: F  HGT: 5 05  WGT: 120  HAIR: BLK          EYE COLOR: GRN
BIRTH PLACE CITY: PORTLAND          STATE: ME          RACE: W
MEDICAL CODE:          PF ON FILE: Y          FELLOW: Y
STREET/EXTRA LINE          CITY/COUNTRY          ST LAST CHG
MAILING ADDR: 1883 CLINTON WAY          ANCHORAGE          AK 10/23/1990
RES ADDR: 1883 CLINTON WAY          ANCHORAGE          AK 10/23/1990
ID/LIC NUM: 6274070          STATUS:
CLASS EXPIRES          CLASS EXPIRES
D
RESTRICTIONS:
PF2 MULT PER  PF3 FWP RST  PF9 CITH UPD  PF10 NCIC W/W  PF12 DIS N/W
PF7 DRIV RST  PF8 CRIM RST
    
```

Figure 6. APSIN Screen: Full Criminal History

```

PSTD400P  TERMID: TESO          CRIMINAL HISTORY          04/15/91  17:14:07.9
PERSON NAME: EFFIE LONGACHE
DOB: 09/12/1961  10/15/1960  10/15/1960  10/15/1960  10/15/1960
SSN: 395-62-3466  395-62-3466  642-56-4566  356-64-5656
SEX: F          HEIGHT: 120  HEIGHT: 5 05  HAIR: BLK
EYE COLOR: GRN  RACE: W      SKIN:      MEDICAL:
TEMPERAMENT:    MARKS:
BIRTH CITY: PORTLAND  STATE: ME  COUNTRY:
AST NUMBER:     FBI NUMBER:      PP ON FILE: Y
CITIZEN:                               FELON: Y
STREET/EXTRA LIME  CITY/COUNTRY  STATE LAST CHGD
MAILING ADDR: 1883 CLINTON WAY  ANCHORAGE    AK  10/23/1990
RES ADDR: 1883 CLINTON WAY  ANCHORAGE    AK  10/23/1990
OCCUPATION:       EMPLOYMT:
ID/LIC NUM: 6274070  UPDATED:
CRIMINAL HISTORIES MAY EXIST IN:
PP2 MULT PERSON  PFS CONVICTIONS  MORE...
    
```

```

PSTD410P  TERMID: TESO          CRIMINAL HISTORY          04/15/91  17:14:22.5
PERSON NAME: EFFIE LONGACHE
AST NUMBER:       ID/LIC NUMBER: 6274070  FBI NUMBER:
ARRESTING AGENCY: ANC  DATE: 03 03 1991  CHARGE: 1313  ASLT/NOW AGGRAVATED
CONVICTING COURT: DAN  DATE: 03 15 1991  CHARGE: 1399  ASSAULT
COURT DOCKET: 91-001  POS ID: W  FELONY: M  DISP: SIS/DIS
CONDITION:
SENTENCE  YEARS  DAYS  AMOUNT  DATE TO COMPLETE
SIS      JAIL      180
    
```

PFB CONVICTIONS

Figure 7. APSIN Screen: Secondary Criminal History

```

PST0420P  TERMID: TESO      SECONDARY CRIM HIST      04/15/91  17:22:59.5
PERSON NAME: EFFIE LONGACRE
DOB: 09/12/1961  10/15/1960  10/15/1960  10/15/1960  10/15/1960
SSN: 345-62-3466  345-62-3466  642-56-4566  356-64-5656
SEX: F
EYE COLOR: GRN  WEIGHT: 120  HEIGHT: 5 05  HAIR: BLK
TEMPERAMENT:    RACE: W      SKIN:    MEDICAL:
BIRTH CITY: PORTLAND  STATE: ME  COUNTRY:
AST NUMBER:      FBI NUMBER:      FELLOW: Y
CITIZEN:
STREET/EXTRA LINE  CITY/COUNTRY  STATE  LAST CHG
MAILING ADDR: 1883 CLINTON WAY  ANCHORAGE  AK  10/23/1990
RES ADDR: 1883 CLINTON WAY  ANCHORAGE  AK  10/23/1990
OCCUPATION:      EMPLOYMT:
ID/LIC NUM: 6274070  UPDATED:
CRIMINAL HISTORIES MAY EXIST IN:
PF2 MULT PERSON                                     MORE...
    
```

```

PST0430P  TERMID: TESO      SECONDARY CRIM HIS      04/15/91  17:24:18.7
PERSON NAME: EFFIE LONGACRE
AST NUMBER:      ID/LIC NUMBER: 6274070  FBI NUMBER:
ARRESTING AGENCY: INFO  DATE: 02/02/1991  CHARGE: 5404 DWI - ALCOHOL
CONVICTING COURT: DAN  DATE: 02/02/1991  CHARGE: 5404 DWI - ALCOHOL
COURT DOCKET: K91-002  POS ID: Y  FELLOW: N  DISP: GUILTY
CONDITION:
SENTENCE  YEARS  DAYS  AMOUNT  DATE TO COMPLETE
JAIL      30
    
```

Figure 8. APSIN Screen: Criminal History Convictions

```

PST0800P  TERMID: TESO      CRIMINAL CONVICTIONS  04/15/91  17:40:00.6
PERSON NAME: EFFIE LONGACRE
UPDATED:      AST NUM:      ID/LIC NUM: 6274070  FBI NUM:
CRIMINAL HISTORIES MAY EXIST IN:
CONV  CONVICTION  CONVICTING  COURT  POS  DISPOSITION  FELLOW
COURT  DATE  CHARGE  DOCKET  ID
DAN  03/15/1991  ASSAULT  91-001  N  S15/B15  Y
SAN  02/15/1991  DWI - ALCOHOL  K91-002  Y  GUILTY  N
* NOT ALL CRIMINAL RECORD MEET OCH DISSEMINATION CRITERIA *
* CONTACT BSI FOR FULL INFORMATION *
PF2 MULT PERSON      PF8 FULL HIST      * AT END*
    
```

## **Law Enforcement**

During the course of an arrest/investigation the law enforcement agency is apt to encounter evidence of drug addiction and/or substance abuse that would not be evidentially sufficient to sustain a prosecution for a controlled substance violation but would be sufficient as a disqualifier for a handgun purchase pursuant to the Brady statute. For example, the officers may observe needle marks, there may be statements about the individual or testimony made by a social acquaintance who observed the unlawful use of a controlled substance by the person. If there is evidence of Brady disqualifiers, the arresting officer would include the relevant information in the police report and the reporting agency could make an appropriate notation on the Criminal Case Intake and Disposition Form. This information would be entered into the criminal history record in a special field much like the felony indicator is.

If the investigation revealed that a subject, who was the focus of the investigation, was an addict or controlled substance abuser but was not arrested, a Brady flag could still be created by using the Criminal Case Intake and Disposition Form. This information could be entered into APSIN creating a Brady flag albeit no criminal charge had been filed against the individual. This procedure could also be used to identify individuals encountered by the police during their investigations or routine activities to create a Brady flag identifying known addicts and/or substance abusers.

If the subject attempted to purchase a hand gun, the agency conducting the Brady check would identify a potential disqualifier and deny the application. In the event of an appeal, the official reports could be checked to ascertain if there was, in fact, sufficient evidence in the records to support the denial. This would require additional training of law enforcement personnel and a modification of both the Criminal Case Intake and Disposition Form and the Alaska Public Safety Information Network (APSIN). However, the relevant information could be captured by investigators in a relatively easy and cost effective fashion and the criminal history records could be updated, thus facilitating a Brady check of addicts/substance abusers who were not arrested or charged.

## **Prosecution Information**

The prosecutor's office is a rich source of information that frequently does not give rise to a specific charge. Defendant's addictions or drug abuse patterns are known but not relevant to a particular prosecution so they are not noted or tracked. With administrative or statutory amendments these data could be captured and electronically stored, providing the Department of Public Safety with a record of non-criminal activity that would identify addicts and/or controlled substance abusers who are ineligible to purchase handguns.

The Criminal Case Intake and Disposition Form as noted above is a document that follows a subject through the criminal justice process. The prosecutor and/or one of their investigators may discover information or facts that would also be a disqualifier under the Brady legislation. While information may not be sufficient to support a charge, if the prosecutor discovered such information a Brady flag on the Criminal Case Intake and Disposition Form could be created which would subsequently be entered into APSIN. Likewise if a complaint is filed as a result of the prosecutor's investigation, the prosecutor would indicate the addiction and/or controlled substance abuse on the Criminal Case Intake and Disposition Form. The prosecutor should also ensure that the defendant is booked and fingerprinted prior to the final court proceedings in order to ensure that there is a criminal record of the event in APSIN. If the prosecutor adds charges or amends them the appropriate criminal history record notifications should also be made.

### **Courts (District and Superior Court)**

Currently the lower and superior courts are responsible for obtaining and reporting applicable court information on the Criminal Case Intake and Disposition Form. As with the police and the prosecutor's office, the courts may also become aware of an individual's addiction or substance abuse problems. This information often comes to light during the course of trial testimony. If such information is discovered during the course of trial the court would create a Brady flag on the Criminal Case Intake and Disposition Form. These data would subsequently be entered into APSIN. The trial transcript would provide support/documentation of the disqualifier flag.

The court could also initiate a Criminal Case Intake and Disposition Form for a witness who reveals addiction or abuse during the course of a trial. Even though the witness was not charged with a crime, the Criminal Case Intake and Disposition Form would be used to identify the subject as being ineligible to purchase a handgun. Since what is needed to facilitate the identification of substance abusers and addicts pursuant to a Brady handgun check is a document that is **a contributor to the criminal history repository**, the Criminal Case Intake and Disposition Form is the logical document to use. This disqualifying information would be stored in APSIN to be used only for Brady checks.

In addition, addiction/substance abuse often comes to light during the course of civil court actions, e.g., domestic relations, divorce, child custody and numerous torts. If Brady disqualifying information comes to light during the course of these proceedings, the court would also make the proper APSIN notifications by initiating a Criminal Case Intake and Disposition form.

The suspended imposition of sentence (SIS) in conjunction with probation poses a problem in flagging felonies/felons as well as addicts/substance abusers. The successful completion of a suspended imposition of sentence results in the setting aside of a conviction. [AS 12.55.085(d) and

(e)] The APSIN update field contains a specific column for the notation of such a successful completion. If the suspended imposition of sentence is revoked because of a failure to satisfy the terms of the suspended imposition, then the subsequent sentence is entered accordingly. Someone who successfully completes an SIS should not be designated as a felon and should be removed from the felony list. It is unclear if this classification of individual would be ineligible to purchase a firearm.

For some clearly categorized felonies the conviction will be flagged regardless of whether the offender receives an SIS. However, the trigger of the completion date of the SIS will suffice to remove the offense from the felony flag list. Moreover, the state does not permit SIS sentences for sexual offenses (including some misdemeanors), nor for any offense in which a gun is used [AS 12.55.085 (f)], thus alleviating some of the ambiguous areas (attempted assaults with the use of a gun and attempted sexual assaults).

However, for the ambiguous categories of offenses, the one-year-or-more incarceration factor will not differentiate a felony from a misdemeanor if no sentence has been imposed. For these cases involving an SIS, the system utilizes the conviction court (superior or district) as an indicator of felony or misdemeanor. Consequently the third tier of the felony indicator process will address those ambiguous cases where SIS occurs and there is no jail sentence. The conviction court will be used as the last means for assigning felony/felon status. (Thus, someone with an SIS for a designated or ambiguous felony will appropriately appear as a felon for the duration of the probationary period, but will be taken off the list as soon as he or she is discharged and the conviction is set aside.)

The SIS needs to be addressed as to felonies in general: are individuals who complete an SIS still to be considered as ineligible to purchase a firearm? Should records be expunged upon successful completion of an SIS or should all felons and substance abusers continue to carry a Brady flag in APSIN even though their conviction (SIS) will be taken off the list?

### **Department of Corrections**

As a general rule those subjects who have been remanded to the Department of Corrections (DOC) would be disqualified from purchasing a hand gun as a result of their felony conviction. (However, some individuals who have been subject to the supervision of DOC may not be flagged as felons, e.g. those individual who have been diverted and/or received and successfully completed a SIS.)

These individuals may be mandated to submit to urine analysis to determine if there is a controlled substance in their system. Additionally there are frequently "Treatment Conditions" imposed by the court that must be met if these individuals are to successfully complete their SIS. Even though a subject may have a "hot" urinalysis it may not be sufficient cause for the probation

officer to generate a “Petition to Revoke” (PTR) which would bring the subject back before the court to show cause why the SIS should not be revoked. If there is not PTR filed, and the subjects meets the other conditions of their SIS then there will be no record of either the conviction or the substance abuse. A subsequent Brady check would not reveal any disqualifying information.

If the probation officer files a PTR, the individual would be brought back before the court. As a matter of course the courts are generally disposed to reinstate the “Treatment Conditions” and not revoke the SIS. If this is the case the subject could successfully complete the SIS and not be disqualified from purchasing a handgun even though the court and the probation officer are aware of a substance abuse problem. Probation officers often encounter other individuals who are associated with their clients who are abusers of controlled substances but have no criminal history that would disqualify them from purchasing a handgun. In such cases what is need is some way in which this controlled substance abuse problem could be flagged and the appropriate APSIN notification made.

The Department of Corrections is not currently a contributor to the “criminal history repository,” nor does DOC utilize the Criminal Case Intake and Disposition form. Moreover, DOC has its own computerized system, Offender Based State Correctional Information System (OBSCIS).

OBSCIS currently does not interface with APSIN. There is nothing to preclude the additional distribution of the Criminal Case Intake and Disposition form to DOC personnel. In the event that DOC became aware of a disqualifying Brady event, the department could make the proper notification to DPS for entering the information/event into APSIN. DOC records would server as the supporting documentation for a Brady denial. It is anticipated that OBSCIS will eventually interface with APSIN. When this interface occurs, then the use of the Criminal Case Intake and Disposition form would no longer be required. DOC could make a direct electronic entry that would be accessible to anyone running a Brady background check.

### **Non-Law-Enforcement Reporting of Addiction/Controlled Substance Abuse Contacts**

Currently a data base exists that would contain the above types of Brady disqualifying information on some subjects. Department of Health and Social Services (DHSS) records contain information on individuals who are addicted to or abuse controlled substances whom law enforcement may not be aware of. DHSS comes into contact with these individuals as a result of psychiatric/ medical treatment, referrals to drug treatment or rehabilitation centers and the department may frequently provide benefits provided to these subjects. Data on these individuals are frequently captured by DHSS, Division of Alcoholism and Drug Abuse, and maintained electronically. See Private Sector Reporting below.

The Division of Family and Youth Services encounters situations where children may be placed at risk because of a controlled substance abuse problem by a parent, family member, a

guardian, foster parent(s) or the like. The addiction/substance abuse comes to light during the course of their intervention. Currently the pragmatic problem with capturing this type of information from DHSS is that DHSS employs an encrypted identifier rather than a name. As the data base currently exists there is no way that DHSS could capture this type of information and report it. With some difficulty, modifications could be made to the data base that would enable the capturing of such information. Currently, some of this information may be made available to law enforcement agencies.

The real problem with capturing this data is not so much a technological issue but rather a statutory one. The statutory issues here are quite similar to the ones discussed with capturing and reporting information on mental detectives - issues which involve the right to privacy, which is protected by both state and federal privacy laws. Numerous federal statutory provisions limit access to an individual's records. The federal government limits access to individual information that is not of a criminal nature even to law enforcement agencies without a court order. Major statutory revisions to numerous privacy laws would have to be made at the federal level for such access to be allowed. As to addicts/substance abusers, Alaska statutes Chapter 37, Uniform Alcoholism and Intoxication Treatment Act, states:

**Section 47.37.219 Records of alcoholics, drug abusers, and intoxicated persons.**

- (a) Except as required by AS 28.35.030(d), the registration and other records of treatment facilities shall remain confidential and are privileged to the patient.
  
- (b) Notwithstanding (a) of this section, the director may make available information from patients' records for purposes of research into the causes and treatment of alcoholism or drug abuse. Information may not disclose a patient's name.

Additionally, the Alaska Constitution (Art. I, §22) guarantees Alaskans' personal privacy, further limiting access to information on any individual. To change this provision would require a two-thirds vote in each house of the state legislature and a simple majority vote in the general election.

Alaska statutes also limit access to information about individuals except for very specific purposes. Alaska Statute 47.30.845 states:

Information and records obtained in the course of a screening investigation, evaluation, examination, or treatment are confidential and are not public records, except as the requirements of a hearing under AS 47.30.660 - 47.30.915 may necessitate a different procedure. Information and records may be copied and disclosed under regulations established by the department only to

- (1) a physician or a provider of health, mental health, or social and welfare services involved in caring for, treating, or rehabilitating the patient;
- (2) the patient or an individual to whom the patient has given written consent to have information disclosed;

- (3) a person authorized by a court order;
- (4) a person doing research or maintaining health statistics, if the anonymity of the patient is assured, and the facility recognizes the project as a bona fide research or statistical undertaking;
- (5) the Department of Corrections in a case in which a prisoner confined to the state prison is a patient in the state hospital on authorized transfer either by voluntary admission or by court order;
- (6) a governmental or law enforcement agency when necessary to secure the return of a patient who is on unauthorized absence from a facility where the patient was undergoing evaluation or treatment;
- (7) a law enforcement agency when there is substantiated concern over *imminent* danger to the community by a presumed mentally ill person. (Emphasis added)

## Treatment Providers and the Private Sector

### Public-Funded Treatment Providers

As noted above there is a data base maintained by DHSS, Division of Alcoholism and Drug Abuse. The data base captures diagnoses and other records at a drug treatment or rehabilitation centers and/or other medical facilities. It also contains records, testimony and/or statements by a psychiatrist(s) or other licensed physician(s) who diagnosed the symptoms or admitted such person into a treatment facility. Data are also maintained on those individuals who have voluntarily committed themselves.

The Division of Alcoholism and Drug Abuse (DADA) is mandated to maintain records on state, federal, state or federally funded and/or non-profit agencies within the state that provide drug treatment services. However, the agency currently does not maintain records on individuals treated at “for profit” agencies. Alaska Statutes Title 47, Chapter 37, provides for the Uniform Alcoholism and Intoxication Treatment Act. Under Alaska Statutes 47.37.030 the powers of the division are to:

- (6) keep records and engage in research and gathering relevant statistics:....

The duties of the division are to:

- (8) Sponsor and encourage research into the causes and nature of alcoholism, drug abuse, and inhalant abuse, and the treatment of alcoholics, intoxicated persons, drug abusers, and inhalant abusers, and serve as a clearinghouse for information relating to alcoholism, drug abuse and inhalant abuse;
- (9) Specify uniform methods for keeping statistical information by public and private agencies, organizations, and individuals, and collect and make available relevant statistical information, including number of persons treated, frequency of admission and readmission, and frequency and duration of treatment; . . .

Alaska Statue 47.37.210 (Records of alcoholics, drug abusers, and intoxicated persons states):

- (a) Except as required by AS 28.35.030(d), the registration and other records of treatment facilities shall remain confidential and are privileged to the patient.

(b) Notwithstanding (a) of this section, the director may make available information from patients' records for purpose of research into the causes and treatment of alcoholism or drug abuse. Information may not disclose a patient's name.

In addition, federal statutes prohibit the disclosure of the patient's names to external organizations such as the ADAD. For example, the Code of Federal Regulations (3CFR) 42 CFR §290 ee-3 (Confidentiality of Patient Records) states:

(a) Disclosure authorization. Records of the identity, diagnoses, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under circumstances expressly authorized under subsection (b) of this section.

(b) Purposes and circumstances of disclosure affecting consenting patient and patient regardless of consent

(1) The content of any record referred to in subsection (a) of this section may be disclosed in accordance with the prior written consent of the patient with respect to whom such record is maintained, but only to such extent, under such circumstances, and for such purposes as may be allowed under regulations prescribed pursuant to subsection(g) of this regulation.

Each agency within the state, at the program level, which provides publicly funded drug treatment service reports to DADA on each individual that they see and each abuse event that they deal with. (DADA itself does not provide treatment services so their data bases are precluded from containing the names of the substance abusers.) Each substance abuser in the data base is tracked by an identification number assigned by the treatment provider when the provider forwards the data to DADA.

The Division of Alcoholism and Drug Abuse can identify the treatment provider by the identification number submitted but not the individual abuser. DADA indicates that it has a 95% accuracy rate in tracking individual treatment cases/events. Their data base contains, along with demographic information on the abuser, the abuser's drug(s) of choice for that particular treatment event. The data base also contains information on whether the individual's abuse pattern is one of dependency, episodic abuse or if the abuse is dysfunctional. The records contain information on each and every treatment, indicating whether it was successful or if there was a relapse; they provide information on whether the individual completed treatment or left without medical consent and/or completing the program. DADA enters approximately 10,000 events/records annually and the data base contains records dating back to 1983.

In order to capture the individual addict's/abuser's name for the purposes of a Brady handgun check it would be necessary to establish a data base that would be accessible to the Department of Public Safety (DPS). Currently each entry into the DADA data base is predicated on an individual treatment event and not the individual being treated. In other words, an individual receiving treatment

through two different treatment facilities/programs would have two different identification numbers assigned. However, the treatment provider could be identified and the treatment provider would then be able to identify the addict/abuser by name.

Given the lack of identifiers (names) in the DADA data base, the data base, as it currently exists, is of no value to DPS for the purposes of a Brady handgun check. The creation of a identification procedure unique to DPS/Brady needs to be developed. In essence, a separate data file containing a linkage between the treatment provider and DPS needs to be established that would allow DPS to capture the name of the addict/abuser and the date of the treatment event. This identification would be unique to DPS and would still preclude DADA from being able to identify individuals by name. DADA would still receive the data that they currently do in the same format.

The only time that DPS could access this data base would be during a Brady record check. Names of individuals in the data base would only be available on a search-by-search basis. The entire list of names as a whole would not be available to DPS personnel. Each examination by DPS in this data base could be flagged. This flagging would enable auditors and/or investigators to see if DPS was abusing its access to the sensitive information. These data would be highly confidential but they would allow law enforcement to obtain information on addicts/substance abusers whom they may not have identified and who have no criminal/substance abuse record(s).

The creation of such a linkage would require extensive legislative changes at both the federal and state levels. Since DPS would not be providing treatment they are precluded from obtaining addict's/substance abuser's names under current statutory provisions. The technological protocol for creating and accessing the data base would be considerably less problematic to develop than the legislation that would be required in order to create and enable the access.

## **The Private Sector**

There are no specific data bases in the private sector that track addicts and substance abusers. There are records of these individuals contained in the files of physicians, psychiatrists, psychologists and insurance companies. However, these files and records are so amorphous that the addiction/abuse information relevant to a Brady check could never be obtained as things currently exist. The data are scattered. Also, gathering this information would give rise to numerous confidentiality issues as well. What appears to be needed is a required statutory reporting procedure in the private sector for addiction and substance abuse.

Legislation predicated upon "Child Protection" legislation could be enacted that would require that treatment and care providers in the private sector be required to report addicts and controlled substance abusers just like they currently are required to do in instances of suspected child abuse and/or neglect. This information could be reported to the Department of Public Safety solely for

the purposes of Brady handguns checks. Every state in the union currently has some statutory provisions for reporting child abuse. In Alaska the relevant legislation is contained in Alaska Statutes (AS) §47.17.010 to .290.

A reporting procedure, similar to the child abuse statute, could be enacted and, coupled with some evidentiary standard, could be employed to capture the identification of drug addicts and controlled substance abusers. Such a procedure would be quite costly and rather draconian but in theory it would work.

### **Summary**

At this time there is no clear or cost-effective way to create and maintain a database for either addicts or controlled substance abusers with any accuracy. Records are not kept on addicts or controlled substance abusers, and even if they were, because of the right to privacy, access would be denied. However the Criminal Case Intake and Disposition form is currently used statewide by law enforcement personnel. It could be modified with little effort to capture information on some addiction/controlled substance abuse events for the purpose of Brady handgun checks.