

Red Flag Laws and Their Attack on the 2nd Amendment

By Matthew D. Winchell, J.D.

On June 23, 2022, the United States' Supreme Court struck down a New York State law that placed an unsurmountable number of limitations on applicants seeking concealed carry pistol permits, the case commonly referred to as *Bruen*.¹ In a 6-3 decision, the Supreme Court ruled against New York State, marking the largest win for 2nd Amendment advocates in well over a decade.²

In response to the decision, New York State has started enforcing Extreme Risk Protection Orders, more commonly known as Red Flag Laws. Essentially, there are seven relevant factors that the Court shall consider when making their determination whether there are grounds for a temporary extreme risk protection order:

- (1) “a threat or act of violence or use of physical force directed toward self, the petitioner, or another person;
- (2) a violation or alleged violation of an order of protection;
- (3) any pending charge or conviction for an offense involving the use of a firearm;
- (4) the reckless use, display or brandishing of a firearm, rifle, or shotgun;
- (5) any history of a violation of an extreme risk protection order;
- (6) evidence of recent or ongoing abuse of controlled substances or alcohol; or
- (7) evidence of recent acquisition of a firearm, rifle, shotgun, or other deadly weapon or dangerous instrument, or any ammunition therefor.”³

This list seems expansive, but the legislature left the door open for each individual judge to add to the list as they see fit.⁴

If a Court has unilaterally found that a person is no longer capable of being in possession of weapons, a temporary extreme risk protection order will be served upon you in writing. The order will include the following:

- (1) a statement of the grounds found for the issuance of the order;
- (2) the date and time the order expires;
- (3) the address of the Court that issued the order;
- (4) a statement informing you that you may not purchase, possess, or attempt to purchase or possess any type of firearm and that the Court will hold a hearing no sooner than three business days, but no later than six business days after the service of the temporary order.⁵

If you receive a temporary extreme risk protection order, and you have been notified that there is a hearing scheduled to determine whether a final extreme risk protection order is appropriate, it is imperative that you have an attorney working with you through this process. If the Court issues a final extreme risk protection order, you will not be able to possess any firearms for a period of twelve months.⁶ Furthermore, a request can be made to extend the time frame that

¹ *New York State Rifle and Pistol Assn., Inc. v. Bruen*, 142 S.Ct. 2111 (2022).

² *Id.*

³ N.Y. C.P.L.R. § 6342 (McKinney)

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

the extreme risk protection order is in place.⁷ If this is done a hearing will be held to determine if the request will be granted based on sufficient evidence of new conduct.⁸

These laws have been scrutinized in various regions of New York State as being unconstitutional for infringing on 2nd Amendment rights.⁹

In *G.W. v. C.N.*, the Supreme Court in Monroe County held that the Extreme Risk Protection Order laws are unconstitutional and any temporary order or final order issued by the Court pursuant to this law be vacated immediately.¹⁰

Essentially, the question presented to the Court “is whether CPLR Article 63-a sufficiently protects a New York citizen’s due process rights when, as here, the state denies a fundamental right, to wit: by infringing on that citizen’s right to keep and bear arms under the Second Amendment of the United States Constitution.”¹¹

Before analyzing the question presented, the Court looked back to *Bruen* and reiterated that “the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense.”¹² The Court also repeated from *Bruen* that “when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct, and to justify a firearm regulation the government must demonstrate that the regulation is consistent with the Nation’s historical tradition of firearm regulation.”¹³ Contrary to what many people against the 2nd Amendment would have us believe, in another hallmark case, *McDonald*, the Court declared that the Second Amendment is not a second-class right.¹⁴

Turning back to the question at hand in *G.W. v. C.N.*, the Court notes in dicta that after July 6, 2022, police officers and district attorneys are mandated to file for a temporary extreme risk protection order “upon the receipt of credible information that an individual is likely to engage in conduct that would result in serious harm to himself, herself, or others” as defined by the mental hygiene law.¹⁵

The Court compared the language in the extreme risk protection order to that in the mental hygiene law, which defines likelihood to result in serious harm in the following manner:

- (1) “substantial risk of physical harm to himself as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that he is dangerous to himself; or
- (2) a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm.”¹⁶

⁷ *Id.*

⁸ *Id.*

⁹ *G.W. v. C.N.*, 181 N.Y.S.3d 432 (N.Y. Sup. Ct. 2022); See also *R.M. v. C.M.*, 189 N.Y.S.3d 425 (N.Y. Sup. Ct. 2023).

¹⁰ *Id.*

¹¹ *Id.* at 435.

¹² *Id.*

¹³ *Id.*

¹⁴ *McDonald v. City of Chicago, Ill.*, 130 S.Ct 3020 (2020).

¹⁵ *G.W.*, 181 N.Y.S.3d at 436.

¹⁶ *Id.*; See also MHL § 9.39.

Under the mental hygiene law, it is required that a physician to make the determination that a patient present a “likelihood to result in serious harm.”¹⁷

The extreme risk protection order and the mental hygiene law both require the same finding that “an individual is likely to engage in conduct that would result in serious harm.”¹⁸ The extreme risk protection order goes one step further when it specifically refers to the mental hygiene law in the definition.¹⁹ However, it does not afford the same protection of having a physician make the medical determination of a person being likely to engage in conduct that would result in serious harm.²⁰ Instead, it places that decision in the hands of the district attorney, police officers, school administrators, and various other non-professionals.²¹

This would be one of the main issues the Court found within the law for extreme risk protection orders.²² The court said that “[i]n order to pass constitutional muster, the legislature must provide that a citizen be afforded procedural guarantees, such as a physician’s determination that a respondent presents a condition ‘likely to result in serious harm,’ before a petitioner files for a TERPO or ERPO.”²³

This was not the only problem the Court found within the law. It commented in depth of the possibility that someone other than the person subject to the ERPO may have their guns taken away without procedural due process.²⁴ Specifically, “a court may be permitted to issue a search warrant to confiscate a respondent’s guns, but which also may result in certain circumstances of the confiscation of guns owned or possessed by non-respondents.”²⁵ In legal terms *possess* has a specific meaning, “a person has tangible property in his or her constructive possession when that person exercises a level of control over the area in which the property is found sufficient to give him or her the ability to use or dispose of the property.”²⁶ Therefore, if the respondent subject to the ERPO lives with a person who is not subject to an ERPO, that person would have their guns taken away without probable cause.²⁷ This would be a violation of that person’s Second and Fourth Amendment rights guaranteed by the Constitution, which is applicable to the states through the Fourteenth Amendment.²⁸

It is very likely that these Red Flag Laws will be held unconstitutional, either by New York State or by the Supreme Court of the United States. This is a very slow-moving process as it takes years for a case to make it to these levels. In the meantime, it is imperative that you seek assistance of counsel if you have been served with a temporary extreme risk protection order. If you do not seek assistance, you risk losing your 2nd Amendment rights.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 438-9.

²⁶ *Id.* at 439

²⁷ *Id.*

²⁸ *Id.*

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