

New York Supreme Court Justice Deems New York's Red Flag Laws Are Unconstitutional

GunPoliticsNY.com - 123022

A New York State Supreme Court Justice ruled last week that New York's Extreme Risk Protection Order laws, often called Red Flag laws are unconstitutional and declined to issue an Extreme Risk Protection Order (ERPO). As we have written in the past, extreme risk protections have become very popular in anti-gun states and are a way for government officials to take away the Second Amendment rights of individuals who have not committed any crime. Yet, New York's Red Flag laws were expanded in July of 2022. Justice Thomas E. Moran, of the Rochester based Monroe County Supreme Court struck down these laws in a 10 page decision, in a case entitled *G.W. v. C.N.*, 2022 NY Slip Op 22392 (Monroe County Sup. Ct. 2022).

This particular case highlights everything wrong with Red Flag laws. The Petitioner who filed for the Extreme Risk Protection Order was the estranged boy friend of the Respondent who was a licensed gun owner in New York State. He alleged that his ex-girlfriend was a danger to herself and others and obtained a Temporary Extreme Risk Protection Order. Justice Moran pointed out that the Petition cited a variety of statements that the Respondent allegedly made threatening to harm herself with a gun which the Petition falsely claimed were made within 6 months before the Petition was filed but in fact dated back to 2020 and 2021. The Court also pointed out that there was a Family Court case also going on in which The Petitioner had an Order of Protection against him which among other things barred him from the home that they had shared.

Turning to the Constitutionality of the Article 63-A, which lays out New York's Red Flag laws and procedures, the Court cited the United States Supreme Court decisions in *Heller*, *McDonald* and most recently *Bruen* and applied the *Bruen* Standard that when the 2nd Amendment's text covers a person's conduct, a law which regulates that conduct is presumptively unconstitutional unless the State can demonstrate that the regulation is consistent with the country's historical tradition of firearms regulations.

The Court also noted that many safeguards of due process that the State had in other analogous situations did not exist in New York's red flag laws. For example, the Court noted that Red Flag laws and the New York Mental Hygiene Law use the same definition for "likely to result in serious harm". However, under the New York Mental Hygiene Law, those determinations are made by a Doctor, a person licensed trained and experienced in making such determinations. However, in the case of New York Red Flag laws, most of the authorized Petitioners are not Doctors and are not licensed, trained or experienced in making that determination. Under the Mental Hygiene Law, two doctors are required to make the determination if a person's liberty is to be taken away for more than 48 hours. No such safeguard is required, not even one doctor is required, before a person loses their gun rights for one year.

Another example cited by the Court is under Article 10 of the Mental Hygiene Law which permits civil detention of certain dangerous sex offenders after they have served their sentence. However, before a Judge can civilly detain someone under this statute, the convicted sex offender is entitled to a Court appointed, free attorney, a state-funded psychiatrist to assist in the defense, a probable cause hearing within 30 days and ultimately a full jury trial before the convicted sex offender's liberty can be taken away. The Court pointed out that none of those protections exist in New York's Extreme Risk Protection order Laws.

The Court pointed out that where mental health issues have formed the basis for a loss of fundamental Constitutional rights in the past in New York, the laws have always provided a number of substantive and procedural due process protections none of which are afforded under New York ERPO laws. The Court reiterated a statement from the Supreme Court that Second Amendment rights are not a second class constitutional right.

We should note that this decision, and the Courts reasoning, may form the basis of also striking down many of the Safe Act provisions as they relate to people with past psychiatric issues being prohibited from purchasing or owning guns.

Note: This decision came from NYS Supreme Court, not the Court of Appeals (state's highest court).