

Flagging New York's "Red Flag" Law

By Sherry Levin Wallach

New York's "Red Flag" Law was enacted on August 24, 2019, and it has been codified in Article 63-A of the Civil Procedure Law and Rules (CPLR) as the Extreme Risk Protection Order. The intent behind this statute is commendable; it is meant to protect our communities against gun violence. Unfortunately, the standards set forth in the statute seemingly circumvent constitutional protections, the Criminal Procedure Law (CPL), and it changes the burdens established under the CPL for criminal prosecutions.

The Temporary Extreme Risk Protection Order (TERPO) and Extreme Risk Protection Order (ERPO) statutes are found in CPLR 6340-6347. Not only are the statutes vague and constitutionally unsound,¹ but they arguably violate U.S. Constitutional Amendments I, II, IV, V & VI and XIV as well as the New York State Constitution. The TERPO or Final Extreme Risk Protection permits and encourages arbitrary and discriminatory enforcement by failing to provide minimal guidelines to given law enforcement.²

These "civil" laws have criminal law implications. There is nothing in these statutes that alerts the unrepresented respondent of the possibility of criminal prosecution for complying with its terms or any order issued pursuant to CPLR Art. 63-A.³ In fact CPLR 6347 states that:

... no findings or determination made pursuant to this article shall be interpreted as binding, or having collateral estoppel or similar effect, in any other action or proceeding, or with respect to any other determination or finding, in any court, forum or administrative proceeding.

In practice, people are being criminally charged for the possession of weapons or other items that are recovered or surrendered pursuant to a TERPO or ERPO. The respondent then becomes a defendant in a criminal case. Consequently, these statutes have massive implications both constitutionally and procedurally for those people charged with crimes and thus for the criminal justice system.

At least 17 states and the District of Columbia have "red flag" laws, and others have had legislation for these laws drafted and/or introduced. The New York ERPO statutes provide for a civil court order based upon an *ex parte* application, which is issued by a supreme court judge sitting in a civil part. The ERPO or TERPO prohibits a respondent from purchasing, possessing, or attempting to purchase or possess a firearm.⁴

The application may be made by law enforcement and/or lay people such as school employees or family members⁵, and it can be based upon uncorroborated hearsay allegations. The basis of the application can be merely the belief of the applicant (or other reporter) that the respondent

has firearms and that there is "probable cause" to believe that the respondent is "likely to engage in conduct that would result in serious physical harm to himself, herself or others as defined in paragraph one or two of subdivision (a) of section 9.39 of the mental hygiene law."⁶

In defining "likelihood to engage in serious harm," the statute refers to the Mental Hygiene Law 9.39 (a). However, unlike that procedure, which is required under the Mental Hygiene Law, the determination pursuant to Article 63-A for a Temporary Extreme Risk Protection Order (TERPO) does not have to be made by licensed mental health professionals. Instead, the allegation can be levied by anyone, including a lay person or any member of law enforcement who believes a person has the "likelihood to engage in serious harm," regardless of prior experience or training. In essence, a judge issuing a Temporary or Final Extreme Risk Protection Order is making a finding under the Mental Hygiene Law that classifies the respondent's mental state without professional analysis or support and/or legal counsel. Indeed, CPLR Article 63-A is not clear about how such a finding can or will be used in a subsequent criminal prosecution. The law also begs the question: Can a person determined under CPLR 6343 to have mental incapacity be acting with the requisite intent to be later charged criminally for possession of said weapons? Additionally, this decreased standard opens the door for retaliatory and unsubstantiated allegations to serve as the basis for a TERPO and a search of the respondent's property and person.

The "red flag law" is a Civil Order effectively circumventing the Right to Counsel under the Sixth Amendment of the United States Constitution. There are Fourth Amendment concerns as well, because it alters the burdens required for a lawful search and seizure that exist in a criminal proceeding under the CPL. The respondent (and potential future criminal defendant) is not represented by counsel during the *ex-parte* proceeding even though the result of the issuance of the TERPO may be search warrants. Further, the law requires a respondent to sign a receipt for guns surrendered and/or anything recovered during a search admitting possession thereof, whether or not the items are lawfully possessed. For example, if an illegal gun is recovered pursuant to a search authorized pursuant to a TERPO, the unrepresented person is required to sign a receipt for the item but not advised as to the implications of doing so or of his or her constitutional right to remain silent. The respondent will then be prosecuted in criminal court for the unlawful possession of a firearm, which may be a misdemeanor or felony charge, both of which carry with them the potential for terms of incarceration.

Since this *ex parte* application can be made by law enforcement or lay people and the supporting deposition can

be based on uncorroborated double or even triple hearsay,⁷ it bypasses the Criminal Procedure Law's standard of proof required for a search warrant under CPL § 690, thereby eviscerating the established standard of proof required for the admissibility of evidence in a criminal case. Further, upon the issuance of a final extreme risk protection order, CPLR 6343(3)(d) provides that:

[a]s part of the order, the court may also direct a police officer to search for firearms, rifles and shotguns in a respondent's possession consistent with the procedures of article six hundred ninety of the criminal procedure law.

The language of CPLR 6343 permits a search to be ordered by the judge without a warrant issued pursuant to CPL § 690. The use of the word "may" in this section of Article 63-A merely permits the authorization of a search warrant that comports with the procedures of Article 690 of CPL but does not require it.

The search as it is authorized under CPLR 6342 provides no parameters as to the time frame in which the search may be executed. It does not limit the number of times searches may be conducted. Although the statute provides for an order that must be issued by the court, there are no additional directives in the black letter law that require the TERPO to set forth parameters for the execution of a search in the statute. It flouts the standard set out in the Criminal Procedure Law's for a search warrant and the myriad case law that has been developed protecting individual's Fourth Amendment Rights.⁸

Upon issuance of this Temporary Order, the unrepresented respondent is required to voluntarily surrender all of his firearms. Even upon this surrender, law enforcement is authorized to conduct a search of the respondent's person and home upon (any) reason to believe an enumerated listed weapon is still in the respondent's possession. CPLR 6342 states that the temporary order itself must include a form to be completed and executed by the unrepresented respondent which must list all the "firearms, rifles and shotguns possessed by him or her and their particular locations."⁹ As noted above, requiring a respondent to sign a receipt for items either surrendered or recovered violates a person's right to self-incrimination in that if the weapons surrendered or recovered are illegally possessed, the respondent will be prosecuted criminally. *See*, U.S. Const. Amend. V.

Article § 63-A of the Civil Procedure Law, which legislates the Extreme Risk Protection Order, fails to include the protections afforded to people under the Criminal Procedure Law, Penal Law, and the New York State and United States Constitutions. Thus, in addition to being constitutionally unsound, any evidence recovered pursuant to a TERPO or ERPO cannot be permitted to be used in any criminal proceeding.

The remedies we can use to correct the constitutional wrongs and legal inconsistencies created by the statute are: (1) repeal the statute; or (2) amend the statute to clearly provide for the same constitutional protections afforded people under the United States and New York Constitutions. U.S. Const. Amend. I, II, IV, V, & IV; N.Y.S Const. Art. I. Additionally, if this statute remains in effect, new legislation must be enacted under the Criminal Procedure Law to preclude the admissibility of anything recovered under this Order or statements made by the respondent in response to the application or the issuance of the Order.

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Endnotes

1. *See Connolly v. General Construction Co.*, 269 U.S. 385, 391 (1926); *United States v. Harriss*, 347 U.S. 612, 617 (1954); *People v. Shack*, 86 N.Y.2d 529, 538 (1995).
2. *See People v. Bright*, 71 N.Y.2d 376 (1988).
3. *See e.g., People v. Byron*, 17 N.Y.2d 64, 67 (1966); *Pomeroy v. Whalen*, 44 N.Y.2d 992, 994 (1978).
4. New York Civil Procedure Law (CPLR) Article 63-A.
5. *Id.* New York is the only state to have legislation that allows teachers and school administrators to be the applicants for a petition.
6. CPLR 6342(1).
7. *See* CPLR 6342.
8. United States Constitution Amendment IV.
9. CPLR 6342(4)(e).

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