A Look At Some 'Extreme Risk Protection Orders' Cases Caused by the 'Red Flag Law'

by Joel Abelove

On Aug. 24, 2019, New York's "Red Flag Law" took effect, much to the consternation of gun owners, Constitutionalists, and believers in due process everywhere. Article 63-A of New York's Civil Practice Law and Rules titled, "Extreme Risk Protection Orders," outlines procedures for the surrender and removal of firearms and firearms rights from a person who is likely to engage in conduct that would result in serious harm to himself, herself, or others, as defined in section 9.39 of the Mental Hygiene Law.

Enacted in response to mass shootings, the law is intended to provide a mechanism by which to intervene before a dangerous person carries out his or her lethal plan, ostensibly by removing the means by which that person can commit violence. Currently, the ERPO law permits four categories of persons who may petition Supreme Court for a Temporary Extreme Risk Protection Order: police; a family or household member; a school administrator; or various health care professionals, social workers, marriage counselors and family therapists.

While much has been written about the mechanics of the statute, and the many concerns regarding its implementation, the purpose of this article is to share the insights and observations of a practitioner who has handled a number of these matters, including conducting ERPO hearings.

When the law was first enacted, my concerns centered around its potential for abuse, or at least its negligent implementation. By abuse, I mean the potential for disgruntled family members, anti-gun health care workers, or overzealous police officers, to weaponize the statute to target individuals against whom they harbor some ulterior motive (rather than a genuine concern for the person's safety, or the safety of others, as manifested by the person's statements or conduct).

By negligent implementation, I mean the lazy, default position taken by some police officers that suggests, "when in doubt, apply for an ERPO." Not only have I witnessed this attitude that has become pervasive among law enforcement, it appears to have been adopted by many of the judges before whom TERPO applications are presented.

What it boils down to is that no one wants to be left without a seat if the music stops playing. Simply put, police and judges would rather take away your rights than risk the backlash of a tragedy on their watch. The sentiment is certainly understandable in today's hyper-sensitive environment; however, when it comes to constitutional rights, fear cannot be the principle by which we decide whether to seek their removal.

It is offensive enough that the ERPO statute permits one's Second Amendment rights to be stripped prior to receiving due process via a hearing. Worse yet is the attitude adopted by many police officers and judges to err on the side of caution—meaning they would rather deny someone's rights to avoid any potential blame should that person commit an act of violence.

The manifestation of this phenomenon is more than conspiratorial speculation. Sadly, I have witnessed firsthand the predictable consequences of a law that permits the state to punish people for their thoughts and ideas. Sound Orwellian? That is my point, and I say it without a hint of hyperbole.

I have experienced three ERPO hearings that provide a terrifying glimpse into a process that has devolved into a nightmare for law-abiding New Yorkers: First, is a client who allegedly sent very offensive writings to various politicians, attacking them based upon their race and religion. After conducting absolutely no investigation into the matter themselves, the local sheriff filed a TERPO application after being told to do so by the New York state attorney general. No one interviewed my client to even confirm whether he sent the letters, much less to ascertain whether he represented a danger to anyone. Following a hearing, the court dismissed the petition and vacated the TERPO.

Second, is a client who allegedly told a cab driver that if he ever got the chance, he would like to kill the governor; that he believed that Blacks and Jews did not deserve to live; and other offensive statements. Police never attempted to interview my client

before seeking a TERPO. Following a hearing, the court dismissed the petition and vacated the TERPO.

Aside from finding that the petitioner failed to prove by clear-and-convincing evidence that my client was likely to harm anyone, the court also based its decision on my client's free speech rights. The court held that my client's statements, while repugnant, do not fall outside the scope of protected speech. Perhaps most disturbing was the attorney general's argument that my client's statements involved "all sorts of hate speech and potential threats to protected groups of persons."

We do not take away a person's Second Amendment right simply because he or she exercises his or her First Amendment rights. Hate speech is protected speech. If no one hated it, it would not need to be protected by the Constitution. And potential threats are not actual, present threats. When the state seeks to punish you for saying offensive things, or because it believes you might be a *potential* threat based upon your statements, then we have truly crossed a dangerous threshold as a society.

Third, is a client who allegedly made a statement to a co-worker—which he stated was in jest—that they should kill another co-worker. My client also sent a meme to the same co-worker, which he explained was a joke, that appeared on its face to be threatening. After the co-worker complained to her supervisor, the New York State Police interviewed the complainant, several co-workers, and my client.

The investigating officer told my client—captured on body-worn camera—that he believed the statements were merely a poorly received joke, meant as dark humor. Nevertheless, the state police filed an application for a TERPO, withholding such evidence from the issuing judge.

As the investigator testified at the hearing, the decision to file the application was made because the complainant made the complaint, and in the current societal environment it was better to be safe than sorry. Even more shocking to me was the statement made to me by the assistant attorney general representing the petitioner, just prior to the hearing. The state's lawyer admitted that he would likely not be able to sustain his burden of proof at the hearing, but that his superiors told him to proceed with the hearing regardless. "I have my marching orders" was what I was told by this attorney. Such a phrase has been used during the darkest times in history to justify truly evil acts. Here, it was used to seek a Final Extreme Risk Protection Order against someone whom the government did not think it could prove is a danger to himself or others. Following a hearing, the court rightfully vacated the TERPO and dismissed the petition.

None of these clients had a criminal history. All three were stripped of their Second Amendment rights without notice, and prior to any being afforded opportunity to contest the evidence against them. They all had to hire an attorney—as they are not entitled to counsel under the statute. Fortunately, for these individuals, their rights were restored. Unfortunately, they are victims of a process that presumes they are guilty. The state police investigator's statement regarding erring on the side of caution reveals what many of us predicted from the outset, that fear of being wrong would prevent police and judges from doing what is right. According to statistics from the NYS Unified Court System, between Aug. 26, 2019 and April 14, 2024, nearly 98% of the time an application was filed, the court issued a TERPO. Yet, in only approximately 80% of those cases did the court issue an ERPO, meaning that in nearly 1 in 5 cases where someone's rights are taken away through a TERPO, the court finds insufficient evidence to issue a Final ERPO.

This statute may mean to prevent harm, but as the saying goes, the road to hell is paved with good intentions. The practical implementation of this law has been rife with abuse and misuse. It should be immediately fixed or repealed, before more citizens are subjected to its hideous repercussions. ■