

Gun seizures in New York are soaring a year after ‘extreme risk’ law broadened

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ALBANY — The number of firearms being seized by police from individuals found to be “likely” at risk of harm to themselves or others has soared so much in the past year that evidence rooms in some State Police barracks have had to be reconfigured or expanded to store the weapons.

The increase follows an executive order issued last year by Gov. Kathy Hochul that mandated troopers file court applications for “extreme risk protection orders” whenever they encounter a person who is believed to be a danger and in possession of a firearm.

The “Red Flag Law” was enacted in 2019, but last year Hochul also signed into law several measures that expanded who may file an “ERPO” petition to include health care practitioners who have examined an individual within the last six months. The law change also requires police and district attorneys to file extreme risk protection orders when they have “credible information” that someone is likely to engage in conduct that could result in serious harm.

In 2020, judges issued protection orders against 255 people across New York. This year, in just over four months, the number of individuals subjected to emergency or temporary risk protection orders topped 2,120. And between 2020 and last November, State Police had seized 2,521 firearms under emergency protection orders—a figure that does not include seizures made by more than 150 other New York police agencies.

“In some troops storage for seized guns was running short, but we have managed it by reconfiguring storage spaces to accommodate for the increased seizures,” said Beau Duffy, a State Police spokesman.

The broader measures enacted under the law have faced civil rights challenges and some judges in New York have issued rulings finding the process unconstitutional. But those rulings have occurred in court cases in which neither State Police nor the state attorney general’s office are named parties in the litigation — only participants — and so the decisions have not resulted in the law being struck down.

Some of the rulings have cited a U.S. Supreme Court decision last year that struck down New York’s onerous concealed carry laws; the nation’s highest court reiterated in that case that the “constitutional right to bear arms in public for self-defense is not ‘a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.’”

The challenges of New York’s Red Flag Law have been brought by attorneys for those who were alleged to be likely to cause serious harm and faced the seizure of their firearms. Some of those attorneys have argued that the process conflicts with state Mental Health Law, which cites the same dangerousness standard but requires a physician to determine whether a person presents a “likelihood to result in serious harm.” Under the Red Flag Law, those analyses are in most of the cases being made by police officers and prosecutors.

“Why should the law not treat similarly situated people the same, with the same constitutional guarantees and protections, if both are deemed to present as having a ‘likelihood to result in serious harm,’” state Supreme Court Justice Thomas E. Moran wrote in a decision in December involving a Monroe County couple.

In that case, which involved a man filing an application for a temporary extreme risk protection order against his estranged girlfriend, Moran noted that he was “not unmindful of the dangers firearms may pose when possessed in the hands of a person suffering a mental illness, harboring a criminal intent, or both.” He sided with argument made by the woman’s attorney that the process of the Red Flag Law con-

flicted with the standards set by state Mental Health Law.

He ruled that seizing someone's lawfully possessed weapons, "without adequate constitutional safeguards, cannot be condoned by this court. While some may advocate that 'the ends justify the means' in support of (the law), where those means violate a fundamental right under our Bill of Rights to achieve their ends, then the law, on its face, cannot stand."

He said it cannot be "stated clearly enough that the Second Amendment is not a second class right, nor should it ever be treated as such."

But Moran's decision, while cited in other cases, will not change the application of the Red Flag Law. For the law to be struck down, it may require a challenge in U.S. District Court in which a person with proper standing to bring the action files a petition against the State Police or state attorney general's office, which last year began representing troopers and investigators in the civil proceedings.

"They're not binding on the state but they're certainly persuasive authority," said Daniel Strollo, a Rochester attorney who represented the woman whose guns had been subject to seizure in the Monroe County case. "I think one of the reasons you're seeing the State Police get so involved in these is many local or county-level law enforcement organizations are headed by people who agree that this is unconstitutional and refuse to enforce an unconstitutional law."

But there have been decisions by other judges upholding the constitutionality of the Red Flag Law.

In a ruling last month in Cortland County, state Supreme Court Justice Mark G. Masler issued a ruling in which he said that Moran's decision three months earlier was not "well founded." Masler asserted that the procedures to hospitalize someone or force them to take medicine involuntarily involve different standards than using a "fact-based inquiry" to determine whether a person's conduct should prompt the seizure of their firearms for safety reasons.

"(T)he extreme risk protection statute does not require findings that respondent is mentally ill, or that the likelihood of serious harm result from mental illness ... rather, it requires only a determination that the respondent is likely to engage in conduct that would result in serious harm to the respondent or others," Masler wrote. "In other words, a person who has threatened or attempted suicide, engaged in other conduct that demonstrates a danger to self, or engaged in homicidal or other violent behavior placing others in reasonable fear of serious harm satisfies the definition without the need for expert (medical) opinion."

The cases almost always involve firearms and whether a person who poses a potential public safety threat should have those weapons seized by police through a court order — either temporarily or for up to a year. The governor's order last year was issued days after a mass shooting in Buffalo in which 10 Black people were killed by an 18-year-old white man in what police said was a racially motivated attack.

The Times Union reported in the wake of that order that many of the Red Flag Law cases were being dismissed by judges because troopers and State Police investigators filing the applications were often appearing at hearings without attorneys. In the proceedings, which are similar to proceedings in which someone fights a traffic ticket, the troopers had been instructed by State Police to not make legal arguments.

After the Times Union's story, the state attorney general's office reversed course and sent an attorney to a hearing to represent a State Police investigator who had filed an application for an extreme risk protection order. That office subsequently announced it was "working with the governor's office on addressing this in the long term" and had begun assigning attorneys to assist State Police "to ensure red flag laws are executed and firearms kept away from dangerous individuals."

Since December, the attorney general's office represented State Police in 413 extreme risk protection order cases, with judges declining to issue orders in less than a dozen of those cases.

Hochul's office had acknowledged last year that since New York's law took effect in 2019, "the lack of uniform legal representation for petitioners has contributed to the dismissal of some ERPO applications, and recognizing that, we have been working with the attorney general's office, district attorneys, and the Office of Court Administration to improve these proceedings and ensure adequate support for State Police." ###