*G.W. v. C.N.*

On December 20, 2022 the New York Supreme Court ruled that CPLR §6342 (Temporary) Extreme Risk Protection Order, "(T)ERPO" (red flag laws) were unconstitutional. Judge Thomas E. Moran gave the ruling.

In order to reach this decision the court looked at several factors.

First, they looked to *Bruen* to established the “the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense” and that "[t]he 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."

Once this was established the court decided to look at other relevant laws that are comparable to the TERPO. The court looked to mental hygiene law because a clause in the TERPO appears in both sections of law.

"Likelihood to result in serious harm." appears in both parts of their law and operate under the same definition. Because of this the court asked, "Why should the law not treat similarly situated people the same, with the same Constitutional guarantees and protections.”

Specifically, the court looked at the portion of law dealing with involuntarily hospitalize a patient for care and treatment. This law demands that a determination that a patient presents a "likelihood to result in serious harm" is to be made by a staff physician. Further, if the same patient is to be held in a facility for more than 48 hours, a second physician must confirm the first physician's findings.

The court then juxtaposed the difference between the requirement for a physician (who presumably possess a psychological or medical background to allow them to make a determination that a person possesses a condition "likely to result in serious harm") and letting (requiring) lay people; police officers, District Attorneys, school administrators (or their designees), family and household members, and even mental health professionals (not a physician or psychiatrist) who are not licensed to make a medical determination that a respondent presents a mental condition "likely to result in serious harm."

To summarize the court did not find it appropriate that similarly situated people (by legislative definition) are not afforded the same constitutional protections. Second Amendment protections need to be as vigorous as Fourth Amendment protections.

“In 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.”

The ruling does mention that police are able to make determinations on the mental state of individuals and may briefly take someone into custody if they appear to be mentally ill and is conducting himself or herself in a manner which is likely to result in serious harm to the person or others.

However, the court notes that this temporary detainment is solely for the purpose of bringing the patient to an appropriate medical facility where an assessment may be completed by a mental health professional. The final call is not the officers.

The court also addressed the issues in the law which may result in certain circumstances of the confiscation of guns owned or possessed by non-respondents. This is because the law requires all guns in the residence of the respondent to be seized, regardless of ownership.

“The non-respondent residents have become the victims of a search and seizure, conducted against them without any probable cause whatsoever, and in complete violation of the non-respondents' Second and Fourth Amendment rights.”

Further the court has issue with the process the non-respondent must undergo to retore their property and rights. “In this instance the non-respondent must then take affirmative steps in order to regain their firearms, and thereby reestablish their fundamental Second Amendment Rights.” This does not jive with “shall not be infringed.”

The court goes on to state that “*Bruen* speaks to history and permits courts to analogize when analyzing and determining the constitutionality of a present-day law, by placing that law in its historical context.” The examples then set forth only reaffirm that due process requirements are lacking regarding TERPOs and ERPOs.

Specifically representation by counsel and expert testimony are neither present, nor guaranteed.

The court rules the law, on its face, cannot stand.