

EXTREME RISK PROTECTION ORDERS

An Unnecessary Infringement with Great Potential for Abuse

By Ian T. Masters

The WVCDL has received several questions about “Extreme Risk Protection Orders,” or “red flag laws” as they are more commonly known. These unnecessary laws – pushed heavily by anti-gun groups such as Every Town for Gun Safety – were introduced into state legislatures across the country after the shooting of a Florida high school perpetrated by a disturbed former student. In the wake of that tragedy, many states rushed headlong into red flag law schemes, including Maryland, where it has already proven to be a deadly disaster – (more on that later).

What are these laws and why does WVCDL oppose them? Red flag laws vary by state, but generally they closely resemble the process provided by domestic violence protection order statutes. A person (the petitioner) files a petition against another person (the respondent) claiming that the respondent is a danger to themselves or to others. With limited scrutiny, and upon hearing only one side of the story (the petitioner’s), a temporary protection order is issued. Police then arrive to serve the petition upon the respondent and to confiscate any and all firearms and ammunition owned by the respondent.

At this point, the respondent is “guilty until proven innocent.” A court hearing is set for some date in the future. The respondent will have an opportunity to clear his name. He will, however, likely need to hire a lawyer to navigate the complex rules of procedure and evidence. He will not be provided an attorney, as this is not a criminal proceeding. He will have to miss a day of work. Even if the petition filed against him is bogus – and ultimately dismissed – the respondent will not be reimbursed his attorney fees nor his lost wages. As the respondent waits to clear his name, his most fundamental liberties are infringed.

Having handled the defense of dozens of bogus domestic violence protection orders in West Virginia courts, I have little hope that red flag laws would not likewise be abused. In fact, I have been retained to appear on behalf of respondents only to show up in court and find that the petitioner did not even bother to show, and their claims were verifi-

ably false and spiteful. While my client will have his or her rights restored, they will not be reimbursed the costs and hassle of the situation. Further, the respondent has suffered unrecoverable days of having their fundamental rights infringed. These are days of not being able to carry a firearm for the protection of themselves and their families; days of not being able to hunt; days of not being able to attend firearm training classes or shooting competitions.

“At this point, the respondent is “guilty until proven innocent.” A court hearing is set for some date in the future. The respondent will have an opportunity to clear his name. He will, however, likely need to hire a lawyer to navigate the complex rules of procedure and evidence. He will not be provided an attorney as this is not a criminal proceeding. He will have to miss a day of work. Even if the petition filed against him is bogus – and ultimately dismissed – the respondent will not be reimbursed his attorney fees nor his lost wages.”

Additional problems arise from the lack of “gatekeeping” when it comes to the initial petition and the granting of a temporary order. In many states, the initial decision is made by a magistrate. This is currently the case in West Virginia when it applies to domestic violence protection orders. In those cases, the magistrates are supposed to filter out the insufficient or clearly bogus petitions and refuse to grant the temporary protection order. In my legal experience, the supposed gatekeeping function of the magistrates has not been stellar. For instance, the temporary order requires, by statute, that the petitioner be in imminent fear of the respondent. Unfortunately, I have been involved in cases where the petitioner clearly states in the petition itself that he or she

is not in fear of the respondent! Nonetheless, a temporary order was entered, and we had to appear in court.

I have also handled cases where evidence at the final hearing made it patently obvious that the petitioner had lied when filing the petition – even though the petition requires a signed oath or affidavit to be filed. I have spoken with prosecutors throughout the State of West Virginia and – to date – none can recall a perjury prosecution based on a petitioner abusing the current protection order system (even though such abuse is rampant).

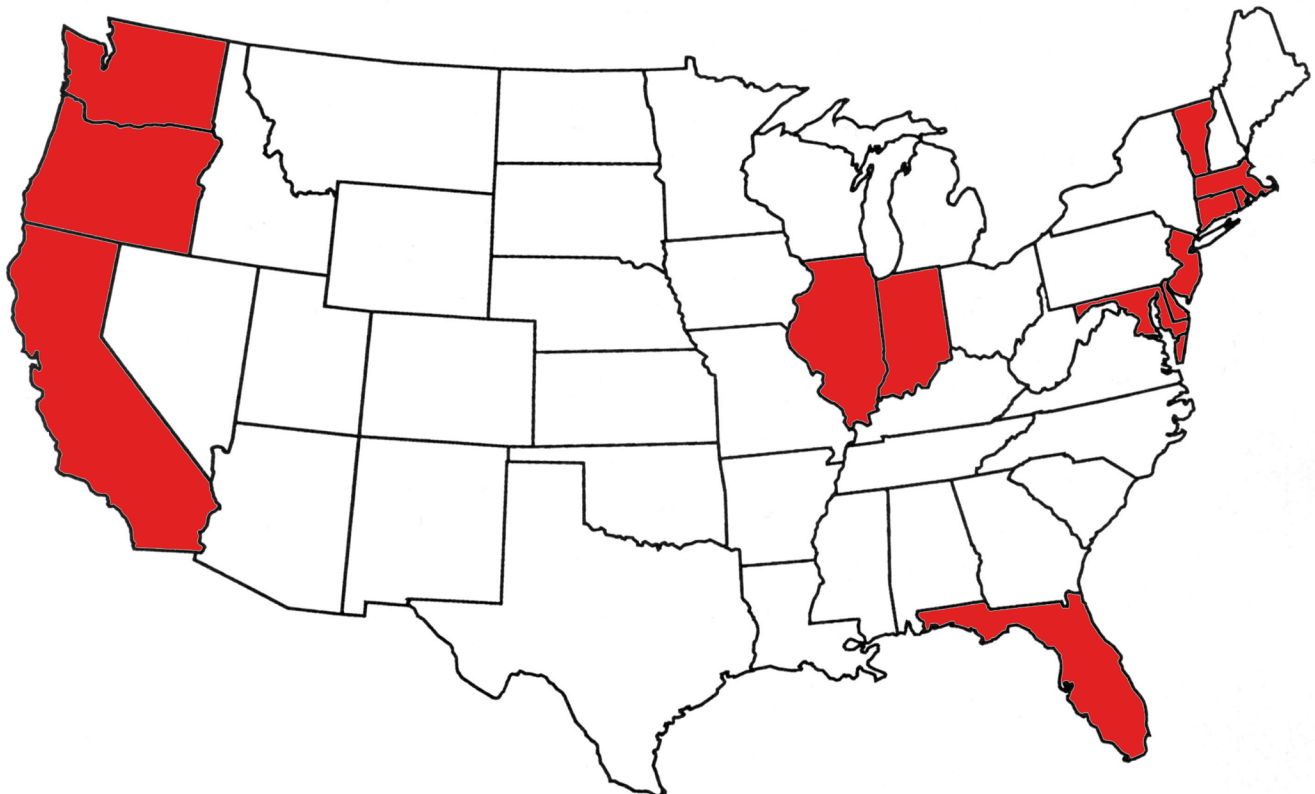
In Maryland, a state not well known for respecting the rights of its citizens, red flag laws have gone beyond injustices, hassles, and abuses and resulted in a questionable death. It is important to understand that laws, even “feel good legislation” like red flag laws, have real-world consequences – here that consequence is thrusting our law enforcement officers into combustible situations. Officers sent to confiscate fire-

arms are going to be on edge. Citizens – particularly innocent ones – are going to be irate. This is not a good equation.

The details about the situation in Maryland are still forthcoming. However, from what can be gathered at this point, it appears an extended family member filed an extreme risk protection order against a Maryland man following a family argument. Officers arrived at his home to serve the petition. Responding to the knock on his door at a strange hour, the man answered with a handgun in his hand. After the officers identified themselves and advised that they were there to serve a petition, the man set down his handgun. However, when officers informed the man that they would have to confiscate his firearms and ammunition, an altercation ensued, and the officers shot the man dead.

“It is important to understand that laws, even “feel good legislation” like red flag

STATES WITH “RED FLAG” LAWS



laws, have real-world consequences – here that consequence is thrusting our law enforcement officers into combustible situations. Officers sent to confiscate firearms are going to be on edge. Citizens – particularly innocent ones – are going to be irate. This is not a good equation, particularly when petitioners are unaccountable and often abuse the system.”

The dead man had not been formally charged with committing any crime. In fact, he had not even been accused of such. There was no warrant for his arrest nor any warrant issued to search his home. The unquestioned word of one family member was enough. As details emerge, other family members have stated they are “dumbfounded” and that while the dead man “liked to speak his mind” that “he was no harm to anyone.”

What happened in Maryland may well have been a tragedy, but isn’t tragedy exactly what these laws supposedly seek to prevent? According to the misguided proponents of red flag laws, yes. However, the laws are unnecessary in most jurisdictions – including West Virginia – as proper mental hygiene laws already exist.

Current West Virginia Code §27-5-2 allows for any adult person to make an application for involuntary psychological examination of another individual, if the person believes that individual to be mentally ill and “likely to cause serious harm to himself, herself, or to others.” This application must be made under oath. After it is filed, a probable cause hearing is scheduled “forthwith” [not a week or two later, as with the red flag laws]. “Forthwith” generally means in a matter of hours – no matter what the time of day it is or day of the week. Counsel is also appointed to the person responding to the mental hygiene petition.

Rather than only hearing from the party making the claim – as the red flag laws do – our mental hygiene statutes provide that the accused is present, with counsel, and able to present witnesses and testimony. After the hearing, if the court finds that there is not probable cause to believe that the individual is a serious harm to himself or to others, the individual is released, with his or her rights intact. If there is probable cause to the contrary, several legal nuances arise that are beyond the scope of this article. Generally, further determinations are made as to the severity of the case and

whether voluntary treatment can be sought. The worst cases call for involuntary commitment. It is important to note that involuntary commitment results in an individual becoming a prohibited person, no longer able possess a firearm.

“Existing mental hygiene laws allow us to address the issue of another person being a danger to themselves or others. Further, and importantly, existing mental hygiene laws protect due process – unlike the red flag laws, which eviscerate it. It may well be a legitimate critique that too few people understand the process provided by our mental hygiene laws. In that regard, it is my hope that this article may help with at least some level of increased awareness.”

It would seem there is a much more insidious problem than mere ignorance at hand, however. Many of the proponents of red flag laws are well-aware of the current mental hygiene provisions of West Virginia law. Nonetheless, they still clamor for West Virginia to adopt red flag laws. To that I leave you with one final question. Why support an anti-gun scheme that obliterates the due process rights of the citizens when an adequate mental hygiene mechanism is already on the books? Given the nature of the organizations pushing for these laws, the answer seems all too apparent.

Existing mental hygiene laws allow for a person to address the issue of another person being a danger to themselves or others. Further, and importantly, existing mental hygiene laws protect due process – unlike the red flag laws, which eviscerate it. It may well be a legitimate critique that too few people understand the process provided by our mental hygiene laws. In that regard, it is my hope that this article may help with at least some level of increased awareness.

Red flag laws infringe upon our rights. Red flag laws will be abused. Red flag laws are unnecessary. WVCDL will remain opposed to any proposed legislation that will infringe upon the rights secured to the citizens under the Second Amendment of the United States Constitution and Article III, Section 22 of the West Virginia Constitution.