

## Blog Post

# Addressing Acute Mental Health Concerns: Parkland's Legacy – Florida's Red Flag Law

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By Kirk S. Davis

We are all too aware of the horrors of the Parkland shooting. In response to that awful day, the Florida Legislature enacted Florida Statute Section 790.401 in 2018, “the Marjory Stoneman Douglas High School Safety Act.” Part of this new law is the “red flag” provision which allows courts to proactively remove firearms from individuals who pose a significant danger to themselves or others upon proper petitions by law enforcement agencies. (Called Risk Protection Orders (RPO’s)). The law is being frequently used in Florida. At the Florida Bar’s September 13, 2019 Masters Class presentation on “Legal Issues with Mental Health and Substance Abuse,” it was mentioned that the RPO’s had been “used about 2,500 times in the State of Florida in the past year and a half. That’s about five times a day.” Undoubtedly, what are “red flags” to some will not be to others. The application of the law in the present case, though, aids in clarifying the concept of “Red Flags.”

In the instant case, Sheriff’s Officer Davis suspected his long-time girlfriend, another sheriff’s officer, of infidelity. While he was off duty he confronted her while she was on duty. He was belligerent, exhibited a negative demeanor, threatened a bystander-fellow officer, and punched and damaged a door and cabinet. He then contacted the Sheriff via text and

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warned him that, “something bad was going to happen.” In a private meeting he expressed to the Sheriff that he wanted to kill his girlfriend’s paramour. He said he would shoot the paramour with his police-issued gun. He repeated this to other fellow officers and then apparently underwent a Baker Act evaluation, after which he was released. He was deemed to be not at risk for further violence.

The Sheriff sought a RPO for removal of Davis’ firearms, and the Court issued a temporary ex parte RPO. After the statutory required hearing was held the Court issued an amended RPO. It found that Officer Davis had expressed homicidal ideation and an overt desire to shoot the paramour.

The facts drove the court’s decision and the First District Court of Appeal outlines them specifically. Officer Davis raised three issues on the appeal:

- The Court misapplied the Statute and there is insufficient evidence to support the Risk Protection Order (RPO) in which his guns were taken away.
- He was deprived due process.
- The Statute itself is unconstitutional.

### **Argument 1: The Court Misapplied the Statute and There is Insufficient Evidence to Support the Risk Protection Order (RPO) in Which His Guns Were Taken Away**

The question whether Davis’s actions was that of simply “blowing off steam” versus manifesting a genuine threat is the entire issue. Factual issues included Officer Davis’s treating neuropsychologist stating that Davis’s actions under this extreme stressor of infidelity were “probably relatively normal.” The Sheriff, however, had fellow officers testify that Officer Davis’ behavior was irrational, aberrant and out of character. They thought he experienced a breakdown and was in need of mandatory health intervention.

The Appellate Court found Officer Davis's hostility was more than hyperbole and hollow threats but were supportive of "a more ominous conclusion." The threats were specific, graphic, and made by someone who could carry them out. He was in a position of authority and had ready access to firearms. He had lost his self-control, was openly aggressive, and caused property damage. It is interesting that the statutory term of a "red flag" is where a volatile individual demonstrates mental/emotional instability through threatening and erratic behavior. The Appellate Court chose to act on that.

### **Argument 2: Due Process**

There were interesting legal arguments regarding the due process issue. Could the neuropsychologist sit through the opposing testimony; was a time limitation on the hearing improper. Both arguments were rejected as harmless.

### **Argument 3: Constitutional Questions**

These constitutional questions had four components. The Statute was vague, it violated substantive due process, was overbroad, and unconstitutional as applied to Officer Davis. The Appellate Court found that the vagueness issue was waived because the standard on appeal is not how a particular set of facts applies. It must be raised at the trial level and was not. The Court further held that key terms alleged to be vague, "significant danger," "relevant evidence," and "mental illness," were not inherently vague. Further, the legislature's own explanation of the law controlled it was to address the issue of the crisis of gun violence and to provide law enforcement and the courts with the tools to enhance public safety.

As for substantive due process, the Court held the statute is preventative, not punitive. The court may consider several factors:

- The Statute requires a hearing within fourteen (14) days; the standard of review is clear and convincing;
- The duration of the RPO may not exceed twelve (12) months; there is an opportunity for early termination of the RPO.
- There is a specific context for the law, “the threat of gun violence.”

It is clear that there will be a number of other challenges to this law as time passes. Since this is the first appellate decision addressing this law, it is the first step enabling law enforcement to proactively disarm those undergoing a mental health crisis.