

April 5, 2024

Public Testimony of Joel B. Russ, South Bristol (Walpole)

Member: Board of Directors, Maine Gun Safety Coalition

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To: The Joint Standing Committee on the Judiciary

Re: Support for LD 2283

Good afternoon:

My name is Joel Russ. I live in South Bristol.

I am a member of the Board of Directors of the Maine Gun Safety Coalition, an organization I agreed to join only after I was convinced that its education and advocacy work was reasonable, made common sense, was evidence-base, would result in safer Maine communities and respected both the 2<sup>nd</sup> Amendment and Maine's historic tradition of responsible gun ownership.

LD 2283 meets all those requirements and I encourage this Committee to support the legislation.

I asked myself four (4) questions about LD 2283:

- Would it save lives?
- Would it apply to people most likely at risk of an act of violence to themselves or others and not just those who are diagnosed with a mental illness.
- Would it be easy to understand and be manageable by those who would implement it?
- Does it provide due process provisions that are constitutionally sound?

1. It is well-documented that states with strong guns laws have a reduced incidence of gun violence. 21 states have ERPO laws.

The five states with the strongest gun safety laws had an average gun violence rate of 8 per 100,000 residents versus the national average of 14.4 per 100,000 residents. Maine had a gun violence rate of 12.0 per 100,000 residents.

Connecticut which has an ERPO law, had the 4<sup>th</sup> strongest gun laws in the nation (enacted after the tragic mass shooting at Sandy Hook Elementary

School) and had a gun violence rate of only 7 out of 100,000 residents. The national average was 14.4 per 100,000 residents.

Massachusetts, which also has an ERPO law, had the 6<sup>th</sup> strongest gun laws in the country and a gun related death rate of 3.5% per 100,000 residents compared to the national average of 14.4%.

2. When a person is in crisis and considering harming themselves or others, family members and law enforcement are often the first people to see the warning signs. Extreme Risk laws allow loved ones or law enforcement to intervene by petitioning a court for an order to temporarily prevent someone in crisis from accessing guns. Only 3-5% of violent acts can be attributed to individuals living with a serious mental illness.
3. The flow chart I will distribute, copies of which you may already have, demonstrates a process that is considerably less cumbersome and more efficient than the existing "yellow Flag" law or the changes contained in LD2224. It permits those who know best, such as family members, an individual who may be experiencing behavior that could lead to violence and harm to themselves or others, to take action.
4. An excellent memorandum prepared by former Maine Law Court Chief Justice Daniel Wathen in 2018, (a copy of which I will distribute to the Committee) concludes that Extreme Risk Protection Order laws, which exist in 21 states, have consistently been determined to be constitutional, citing various state and federal court decisions, including the US Supreme Court.

All of this has convinced me that Maine should and can have, with your support, the kind of responsible gun safety laws that we know the people of the state of Maine want and will support, and which will go a long way toward reduced gun violence and safer communities for everyone.

I hope you will support this important legislation.

Thank you.

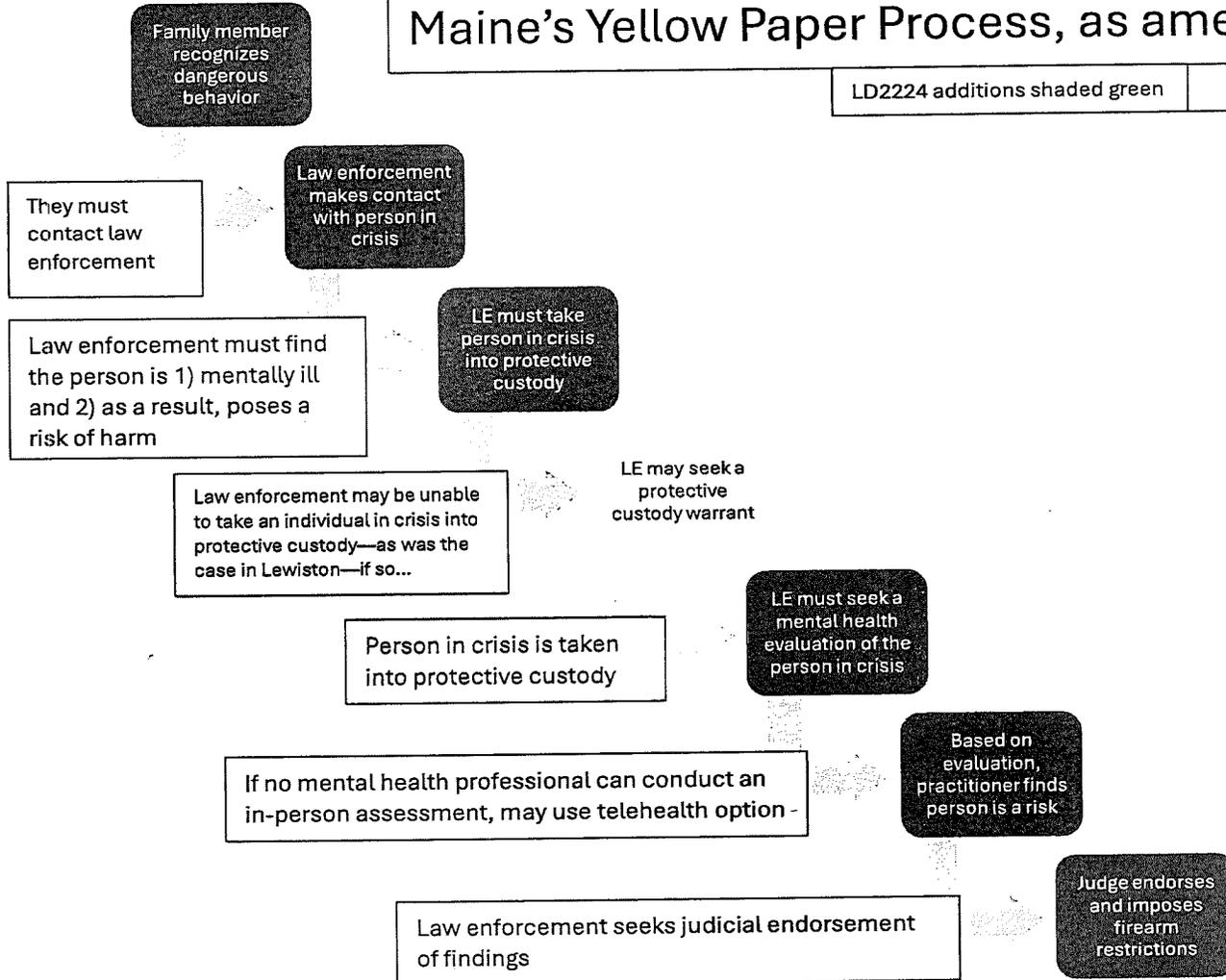
Joel B. Russ

LD 228B

Attachment # 1

Maine's Yellow Paper Process, as amended by LD 2224

LD2224 additions shaded green



Real Extreme Risk Laws: One-Step Crisis Intervention

Family member or law enforcement officer recognizes dangerous warning signs, regardless of the underlying cause

That person goes directly to Court to file an ERPO petition

Court considers the evidence and can issue an ERPO to restrict access to firearms

LD 2283

Attachment # 2

PIERCE ATWOOD

DANIEL E. WATHEN

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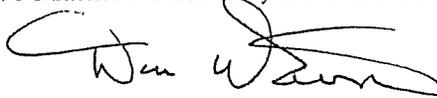
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MEMORANDUM

To: Senator Lisa Keim, Co-Chair of Judiciary Committee  
Representative Matthew Moonen, Co-Chair of Judiciary Committee

From: Dan Wathen



Date: April 9, 2018

Re: LD 1884, An Act to Create a Community Protection Order to Allow Courts to Prevent High-Risk Individuals from Possessing Firearms

I take no position on the merits of this bill. I understand that the provision authorizing a Temporary Order on an ex parte basis raised concerns during the public hearing that the proposal violates the Due Process Clause of the 14<sup>th</sup> Amendment of the U.S. Constitution and also the Maine Constitution. I have worked with similar issues throughout my career. In view of the important public debate that attends this subject and the decision that confronts you, I offer the Judiciary Committee my view of the constitutionality of issuing Temporary Community Protection Orders on an ex parte basis.

Under Subchapter 3 of LD 1884, a law enforcement official or a family member may petition the Maine District Court for a Temporary Community Protection Order. If, based upon oral testimony and/or sworn affidavits, the Judge finds by clear and convincing evidence that a person meeting the definition of a high risk individual “presents an imminent and substantial risk of serious bodily injury or death to the individual or to another individual,” and a Temporary Order is necessary to prevent such injury or death, the Judge may issue an order prohibiting the restrained individual from possessing a firearm. The Temporary Order may be issued on an ex

parte basis and expires twenty-one days after the date the order is served. Each of the underlined phrases above narrows the potential application of this bill and the basic requirement of harm to self or others is a familiar legal concept has been used for decades in other contexts.

The bill provides that within the twenty-one days after service of the Temporary Order on the restrained individual, the Court shall hold a full evidentiary hearing to determine whether the petitioner can establish the requisite facts by clear and convincing evidence. At that hearing, the restrained individual will be given the opportunity to be heard, including the right to present evidence that the Temporary Protection Order should be dissolved. If the Court finds that the petitioner has met the elevated standard of proof, it may extend the Order for an additional 180 days, otherwise the Order is dissolved and is of no further effect.

The relevant question is whether the ex parte provision would violate the procedural due process requirements of the U.S. and Maine Constitutions. In my opinion it would not

The Second Amendment clearly states: “the right of the people to keep and bear arms, shall not be infringed.” In 2010, the Supreme Court in *McDonald v. City of Chicago* ruled that the Second Amendment right to possess a firearm is a right that applies to the states through the Due Process Clause of the Fourteenth Amendment. However, as the Supreme Court cautioned, “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

The Due Process Clause of the Fourteenth Amendment provides: “nor shall any state deprive any person of life, liberty, or property, without due process of law.” As stated by the Supreme Court in *County of Sacramento v. Lewis*, “[t]he touchstone of due process is protection of the individual against arbitrary action of government.” 523 U.S. 833, 845 (1998).

If an individual is to be deprived of life, liberty, or property, procedural due process generally requires notice and the opportunity to be heard before an impartial tribunal. However, the procedures required by due process vary based on the amount of governmental interference and the nature of the individual right. “Due process is a flexible concept that typically requires consideration of a number of factors, including the importance of the individual’s interest, the potential for governmental error and the magnitude of the state’s interest.” *Mahaney v. State*, 610 A.2d 738, 742 (Me. 1992). In *Rogers v. Sylvester*, the Maine Supreme Judicial Court held that in some situations the notice and opportunity to be heard may occur after the deprivation of the individual’s rights. 570 A.2d 311, 314 (Me. 1990). As the U.S. Supreme Court has stated, “in situations where a pre-deprivation hearing is unduly burdensome in proportion to the liberty interest at stake . . . post-deprivation remedies might satisfy due process.” *Zinermon v. Burch*, 494 U.S. 113, 132 (1990).

Given the state’s strong interest in public safety and minimizing the risk of gun violence; the high standard of “imminent and substantial risk of serious bodily injury or death” by a high risk individual; and the limited time during which a restrained individual is prohibited from possessing a firearm, I am of the opinion that a Court reviewing LD 1884 would conclude that the provision authorizing an ex parte Temporary Order does not violate procedural due process.

My opinion is supported by the Maine’s Protection from Abuse Order (PFA) statute that has been the law for many years. Protection from Abuse Orders (“PFAs”) are routinely granted “[t]o allow family and household members who are victims of domestic abuse to obtain expeditious and effective protection against further abuse.” 19-A M.R.S.A. § 4001(2). Not unlike the purpose of LD 1884, the focus of this statute is largely preventative as it “recognize[s] the crucial role of law enforcement officers in preventing further incidents of abuse.” *Id.* § 4001(4).

Under Maine's PFA statute, a judge may issue a temporary order after an ex parte hearing and this order may prohibit contact between family members and may include provisions prohibiting the restrained individual from possessing a firearm for the duration of the temporary order. Ex parte orders have been used extensively for a number of years in this arena and have never been challenged under the Due Process Clause. The notice and opportunity to be heard that is provided at the full hearing following the granting of a temporary PFA, satisfies the requirements of due process just as it would under the more rigorous provisions of LD 1884. Similar reasoning has supported the use of temporary ex parte orders for involuntary commitment to psychiatric facilities for decades.

Finally, on an unrelated subject, I would suggest that the term "owns" should be deleted from the definition of the offense set forth in the first sentence of section 431. A person receiving an ex parte order may own guns that are not in his immediate possession or control. For example, he might own a gun that was seized by the police in another context or he might own a gun located at a distant location or in another state. Under those circumstances, he might have no means of divesting his ownership upon receipt of the Temporary Order. The offense should focus on his possession or control of any firearm, whether owned or not, after receiving the Temporary Order.

Thank you for this opportunity to present my views. If you have any questions or concerns, feel free to contact me.