

Trial Court Legal Services Newsletter

Our Services

Trial Court Legal Services provides expert legal research and analysis for trial judges who do not have law clerks or staff attorneys. Our growing team currently includes two full-time attorneys who can assist with any case regardless of subject matter, including civil, criminal, and domestic cases. The service is free of charge and does not require any financial contribution by courts or counties. Our team makes its best efforts to respond to each request as soon as possible, and will prioritize urgent requests including questions related to ongoing trials.

State v. Flannery

In *State v. Flannery*,¹ Division II held that mandatory firearms surrender orders issued along with domestic violence protection orders under a prior version of Washington’s statutory scheme are unconstitutional under both the Fourth and Fifth Amendments. Although the court did not analyze the current version of the statute, the opinion and its reasoning strongly suggest that it is unconstitutional as well. Since courts across the state issue these orders in criminal and civil cases every day, the opinion has exceptionally far-reaching implications.

The legislature has added a partial immunity provision to the current version of the statute, however, this addition is unlikely to shield the statute from violating the Fifth Amendment. Under well-settled federal precedent, an individual cannot assert a Fifth Amendment privilege against self-incrimination if the government has granted them complete immunity from prosecution and from derivative use of the evidence given to locate other incriminating evidence.² However, Washington’s immunity provision does not provide complete immunity; instead, the statute only protects against prosecution for certain crimes such as unlawful possession of a firearm.³ This means that the statute does not provide immunity from prosecution for a plethora of other crimes, including all crimes against persons.

Additionally, the legislature has not amended the statute to address the Fourth Amendment violation that Division II found. The *Flannery* court found that the firearms surrender orders compel individuals to search their own property on behalf of the government, then allow the government to seize the property, all without a warrant. Under the Fourth Amendment, warrantless searches and seizures are justified only where an exception to the warrant requirement exists. Here, because the orders are issued mandatorily, there are no individualized findings made that could justify use of an exception. Further, the nature of the orders means that time to obtain a warrant must have existed. Indeed, only a judge can sign a firearm surrender order. Thus, if probable cause to believe an individual possessed firearms and posed a threat to the community was present, that same judge could issue a warrant for a search and seizure of firearms.

In light of the *Flannery* decision, courts across the state are modifying their procedures around firearm surrender orders and often declining to issue them at all. The Trial Court Legal Services Program is ready to assist judges as they tackle these issues in their cases. - Victoria Latus, Legal Analyst

Newsletter Highlights

What the Flannery?

Firearms and 5th and 4th Amendment concerns

Contact Us

To submit a research request to Trial Court Legal Services, email: trialcourtlegal@courts.wa.gov

Sources:

¹ *State v. Flannery*, 24 Wn. App. 2d 466, 520 P.3d 517 (2022)

² *Kastigar v. United States*, 406 U.S. 441, 444–45 (1972).

³ RCW 9A.18.010 states that evidence of compliance with a surrender order cannot be used “in any criminal prosecution under [RCW chapter 9A.18], chapter 7.105 RCW, or RCW 9A.56.310.”

