

1-1-2005

# Is There a Due Process Protected Right to Police Enforcement of a Domestic Abuse Restraining Order?

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## Publication Information

Jay E. Grenig, *Is There a Due Process Protected Right to Police Enforcement of a Domestic Abuse Restraining Order?*, 2004-05 Term Preview U.S. Sup. Ct. Cas. 326 (2005). © 2005 American Bar Association. This information or any portion thereof may not be copied or disseminated in any form or by any means or downloaded or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

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## Repository Citation

Grenig, Jay E., "Is There a Due Process Protected Right to Police Enforcement of a Domestic Abuse Restraining Order?" (2005). *Faculty Publications*. Paper 432.

<http://scholarship.law.marquette.edu/facpub/432>

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# Case at a Glance

In June 1999, the estranged husband of Jessica Gonzales abducted their three daughters.

When Ms. Gonzales contacted the Castle Rock (Colorado) Police Department to ask it to enforce a restraining order against her husband, she was told there was nothing the department could do. Early the next morning, Mr. Gonzales was shot dead after he fired on the Castle Rock police station with a semiautomatic weapon. The bodies of the three girls, who had been murdered by Mr. Gonzales the previous evening, were found in the cab of his truck.

## Is There a Due Process Protected Right to Police Enforcement of a Domestic Abuse Restraining Order?

by Jay E. Grenig

PREVIEW of *United States Supreme Court Cases*, pages 326-330 © 2005 American Bar Association.

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IF YOU VIOLATE THIS ORDER THINKING THAT THE OTHER PARTY OR A CHILD NAMED IN THIS ORDER HAS GIVEN YOU PERMISSION, YOU ARE WRONG, AND CAN BE ARRESTED AND PROSECUTED. THE TERMS OF THIS ORDER CANNOT BE CHANGED BY AGREEMENT OF THE OTHER PARTY OR THE CHILD(REN). ONLY THE COURT CAN CHANGE THIS ORDER.

### ISSUE

Does a court-issued domestic abuse restraining order, whose enforcement is mandated by a statute, create a property interest protected by the Due Process Clause of the Fourteenth Amendment?

### FACTS

On May 21, 1999, Ms. Gonzales obtained a temporary restraining order limiting her husband's ability to have contact with her and their daughters, aged 10, nine and seven. The restraining order commanded in part that Mr. Gonzales "not molest or disturb the peace of [Ms. Gonzales] or ... any child." The restraining order further stated "the court ... finds that physical or emotional harm would result if you are not excluded from the family home" and directed Mr. Gonzales to stay at least 100 yards away from the property at all times. Neither parent nor the daughters could unilaterally change the terms of the order because it explicitly stated:

The order directed law enforcement officials to "use every reasonable means to enforce" the restraining order and required them to arrest or, where impractical, seek an arrest warrant for those who violate the restraining order. The order also instructed law enforcement officials to take the restrained person to the nearest jail or detention facility.

After the trial court issued the temporary restraining order, the order was entered into the state's central registry for protective orders, which is accessible to all state and local

CASTLE ROCK, COLORADO V.  
GONZALES ET AL.  
DOCKET NO. 04-278

ARGUMENT DATE:  
MARCH 21, 2005  
FROM: THE TENTH CIRCUIT

law enforcement agencies. On June 4, 1999, the order was made permanent. The permanent order allowed Mr. Gonzales to collect the girls from Ms. Gonzales's home for parental time.

Early in the evening of June 22, 1999, Mr. Gonzales abducted the girls while they were playing outside their home. Mr. Gonzales had not given Ms. Gonzales advance notice of his interest in spending time with his daughters on that Tuesday night, and the two had not previously agreed upon a midweek visit. When Ms. Gonzales realized her daughters were missing, she suspected that Mr. Gonzales, who had a history of erratic behavior and suicidal threats, had taken them. At approximately 7:30 P.M., she made her first phone call to the Castle Rock Police Department requesting assistance in enforcing the restraining order against her husband. Two officers were sent to her home. When they arrived, she showed them a copy of the restraining order and asked that it be enforced and her children returned to her immediately. The police officers told her there was nothing they could do about the order and suggested that Ms. Gonzales call the Police Department again if the children did not return home by 10:00 P.M.

About an hour later, Ms. Gonzales spoke to Mr. Gonzales on his cellular telephone, and he told her he was with the girls at an amusement park in Denver. Ms. Gonzales immediately made a second call to the Castle Rock Police Department, requesting the police find and arrest Mr. Gonzales. The police officer refused to do so and suggested Ms. Gonzales wait until 10:00 P.M. to see if the girls returned home. Shortly after 10:00 P.M., Ms. Gonzales called the Police Department and reported to the dispatcher that her daughters had yet to be returned home by

their father. She was told to wait for another two hours. At midnight, she called the Police Department again and informed the dispatcher her daughters were still missing. Ms. Gonzales then went to Mr. Gonzales's apartment and found no one at home. Ms. Gonzales called the Police Department a fifth time, and the dispatcher advised her to wait at the apartment until the police arrived. No officers ever came to the apartment.

At 12:50 A.M., Ms. Gonzales went to the Castle Rock police station, where she met with a police officer. The officer took an incident report from Ms. Gonzales, but he made no further effort to enforce the restraining order.

At approximately 3:20 A.M., Mr. Gonzales drove up to the Castle Rock police station. He got out of his truck and began shooting at the station with a semiautomatic handgun. Mr. Gonzales was shot dead. The police found the bodies of the three girls, who had been murdered by their father earlier that evening, in the cab of the truck.

Ms. Gonzales sued Castle Rock and three of its police officers on behalf of herself and her three daughters in the U.S. District Court for the District of Colorado. She sought \$30 million in compensatory damages as well as punitive damages and attorney fees. Relying on 42 U.S.C. § 1983, Ms. Gonzales claimed her due process rights had been violated by the officers' failure to enforce the restraining order against her husband. Ms. Gonzales also alleged that the town maintained a custom and policy of failing to respond properly to complaints of domestic restraining order violations and tolerated the nonenforcement of such protective orders by police officers, resulting in the reckless disregard of a person's right to police protection

granted by such orders. A Colorado statute requires police to arrest restrained persons who are in violation of a restraining order.

The city and the police officers filed a petition for rehearing by all the judges in the Tenth Circuit, seeking review of the panel's conclusion that Ms. Gonzales had stated a procedural due process claim. The Tenth Circuit granted the petition and asked the parties to address whether Colorado law in combination with the restraining order created a property interest entitled to due process protection, and, if so, what process was due.

Reversing the trial court, a divided Tenth Circuit held that Ms. Gonzales had a due-process protected right to police enforcement of the domestic abuse restraining order. *Gonzales v. City of Castle Rock*, 366 F.3d 1093 (10th Cir. 2004) (*en banc*). The court explained that when a court order commands the grant of a government benefit or service through the use of mandatory language and a state statute limits the discretion of official decision makers, a due-process protected property interest exists. The court ruled that Ms. Gonzales therefore had a due-process protected right to police enforcement of the restraining order, which specifically directed, with only the narrowest of exceptions, that Mr. Gonzales stay away from Ms. Gonzales and their three daughters. The court pointed out that the restraining order provided objective predicates that, when present, mandated enforcement of its terms and that the Colorado statutory scheme indicates that the state fully intended the recipient of a domestic-abuse restraining order to have an entitlement to its enforcement.

However, the court also held that Ms. Gonzales did not have a "sub-

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stantive due process” right to police protection against harm from her husband. The court further held that the police officers were entitled to qualified immunity, and the city was not entitled to qualified immunity.

The Supreme Court granted Castle Rock’s petition for a writ of certiorari. 125 S.Ct. 417 (2004).

### CASE ANALYSIS

When a due process claim is premised on a deprivation of a property right, the court first must define the precise nature of the property threatened by state action. *Lehr v. Robertson*, 463 U.S. 248 (1983). In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the Supreme Court held that a county had no constitutional duty to protect a child from the child’s father after the county received reports of possible abuse. The Court declared that the purpose of the Due Process Clause was to protect people from the state, not to ensure that the state protected them from one another. The Court ruled that the county’s failure to protect an individual against private violence does not constitute a violation of the Due Process Clause.

Castle Rock argues that the procedural due process claim allowed by the Tenth Circuit is not sanctioned by, and would effectively overrule, *DeShaney*. Castle Rock warns that the Supreme Court should be wary of ever recognizing a nontraditional type property interest in police enforcement procedures that could result in claims of procedural failure being raised every time the police are unsuccessful in protecting against private-party violence. Castle Rock states that the “nature” of the interest asserted by Ms. Gonzales is simply not within the contemplation of the “liberty” or

“property” protected by the Due Process Clause. According to Castle Rock, Ms. Gonzales’s complaint is not really about any lack of process (Castle Rock says she actually had the opportunity to be heard on several occasions) but about the police department’s alleged failure to respond to her requests in the way she would have liked. Castle Rock claims the alleged procedural failing derives only from the lack of a favorable result, and the only curative procedural remedy would presumably be one that guaranteed Ms. Gonzales a different result. Castle Rock says this is a *substantive* due process claim challenging the outcome, not a *procedural* due process claim concerned about the kind of hearing provided.

Ms. Gonzales disagrees, declaring that the Tenth Circuit’s decision does not conflict with *DeShaney*. Ms. Gonzales reasons that *DeShaney* limited its constitutional review to whether a substantive due process right to government protection exists in the abstract and specifically did not decide whether a state might afford its citizens an “entitlement” to receive protective services in accordance with the terms of a court order and state statute, which would enjoy procedural due process protection against state action.

Ms. Gonzales points out that the Supreme Court is not being asked to address whether she had a substantive right to receive government protection that could not be denied without reasonable justification in the service of a legitimate government object. Rather, Ms. Gonzales says the Court must determine whether Colorado created for her an entitlement that cannot be taken away from her without procedural due process, and, if so, whether Castle Rock’s arbitrary denial of that entitlement was procedurally

unfair under the well-pleaded facts of her complaint.

According to Ms. Gonzales, due to the city’s “policy and custom” of failing to respond properly to complaints of restraining order violations, she was denied the process laid out in the statute. Ms. Gonzales alleges that the police did not consider her request in a timely fashion but repeatedly required her to call the station over several hours. Ms. Gonzales argues that the Colorado statute promised a process by which her restraining order would be given vitality through careful and prompt consideration of an enforcement request, and the Constitution requires no less. Ms. Gonzales says that the police never engaged in a bona fide consideration of whether there was probable cause to enforce the restraining order.

It is the position of Castle Rock that affording procedural due process requirements before state officials fail to protect against private-party violence would be utterly impractical. It says that finding Ms. Gonzales was entitled to procedural due process opens a hornets’ nest of issues with respect to the kind of process that would be required.

Ms. Gonzales responds that the due process to which Ms. Gonzales is entitled is simple and practical. She explains that the process set up in Colorado’s statutory scheme was that the police must, in a timely fashion, consider the merits of any request to enforce a restraining order and if such a consideration reveals probable cause, the police must enforce the order. Ms. Gonzales concludes that the Tenth Circuit’s opinion must be read as reflecting a very narrow, fact-specific issue.

According to Castle Rock, Colorado law did not, and the federal courts

therefore cannot, create a property interest in the enforcement of restraining orders. Castle Rock explains that Colorado has simply established directory procedures for the enforcement of restraining orders. Even if "shall" is read as mandatory, Castle Rock says that Colorado has simply mandated enforcement procedures; it has not created a property interest either in ongoing police protection or in enforcement according to those procedures.

Ms. Gonzales asserts that the terms of the restraining order and Colorado's statutory enforcement scheme created an entitlement to police enforcement of the restraining order. She argues that the mandatory enforcement terms of the order are not inconsistent with police discretion. Ms. Gonzales says that not only did the restraining order clearly evince the state's intent that its terms be enforced by the police, but the Colorado statutory scheme demonstrates its intent to require the enforcement of domestic abuse restraining orders.

### SIGNIFICANCE

The Tenth Circuit's decision in *Gonzales* is the only reported circuit court decision addressing the issues presented in this appeal. Two reported district cases have done so. In both cases, the district court found that the issuance of a restraining order gave the holder of the restraining order a procedural due process right to "reasonable protection" or a "reasoned police response." *Coffman v. Wilson Police Dept.* 739 F.Supp. 257 (E.D. Pa.1990) (properly served domestic abuse protective order created constitutionally protected property interest in police enforcement); *Siddle v. City of Cambridge*, 761 F.Supp. 503 (S.D. Ohio 1991) (although domestic abuse protective order created a property interest

protected by procedural due process, there was no due process violation in manner in which police responded to woman's complaints).

In another case decided after *Gonzales*, a three-judge panel of the Tenth Circuit held that an allegation that police officers violated a female student's rights by failing to investigate adequately her alleged rape by members of the state university football team and discouraging her from pursuing prosecutions did not state a claim for violation of the plaintiff's procedural due process rights. *Jennings v. City of Stillwater*, 383 F.3d 1199 (10th Cir. 2004). The *Jennings* court distinguished *Gonzales* on the ground that the property interest in *Gonzales* was the product of a court-issued restraining order, coupled with statutory language requiring enforcement. On the other hand, the court found that the claim in *Jennings* rested solely on the language of an Oklahoma statute requiring law enforcement officers not to discourage prosecution of a sexual harassment claim.

Castle Rock urges that if the Tenth Circuit's rule is adopted by the Supreme Court, every substantive due process claim could simply be recast as a procedural due process claim, severely undermining *DeShaney*. Castle Rock concludes that expanding constitutional liability would open the door to thousands, if not millions, of claims, supplanting state tort law and imposing crushing levels of liability on state and local government. Castle Rock claims that ratification of the Tenth Circuit's decision would convert hundreds of state procedural mandates into constitutional claims, abolishing as a matter of federal constitutional law the discretion traditionally afforded law enforcement officials, even when the states themselves have disavowed liability remedies.

Castle Rock says that the expansion in both liability and litigation will have devastating consequences both for the public safety and for municipal governments throughout the United States. It argues that every telephone call received by a police dispatcher alleging a violation of a restraining order containing the word "shall" would have to be given the highest priority and afforded federally imposed procedures in order to avoid constitutional liability, no matter how urgent or severe other matters may be.

On the other hand, however, Ms. Gonzales declares that the restraining order, containing mandatory language and specific objective criteria curtailing the decision-making discretion of police officers, clearly commanded that the domestic abuse restraining order be enforced. For the Supreme Court to hold otherwise, Ms. Gonzales states, would render domestic abuse restraining orders utterly valueless and law enforcement agencies completely unaccountable to the legislative or judicial branches of government.

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