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Civil Liability Law Section – February 2020

**Ninth Circuit Applies “State-Created Danger” Doctrine
To Police Liability for Domestic Violence**

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❖ **Introduction**

In an important recent decision, involving alleged domestic violence by a police officer, the actions of fellow officers in response to reports of the abuse have led a federal appeals court, the U.S. Court of Appeals for the Ninth Circuit, to rule that conduct by officers that tends to encourage or tacitly approve such abuse, may lead to civil liability.

While those individual officers involved in the immediate case will not face the possibility of civil liability, based on a finding that the rights involved were not “clearly established” at the time of the incident, allowing them to claim qualified immunity, the court made it clear that the doctrine it was pronouncing would apply prospectively—issuing a clear warning that such alleged conduct will not be tolerated in the future.

Domestic violence, whether by members of the public or fellow officers, is a very serious crime and irreparably tarnishes the quality of life in our communities and families, especially for women and children, although it should be noted that males and the elderly, as well as disabled persons and those in same-sex relationships and marriages, may also be subjected to domestic violence.

In recent days, there has been a growing outcry against such incidents. An estimated 9.7% of women and 2.3% of men have been stalked by an intimate partner during

their lifetime, according to an estimate in 2017 by the Centers for Disease Control (CDC), and nearly half of all women and men in the United States will experience psychological aggression by an intimate partner in their lifetime. Domestic violence is known to often be an underreported crime, for a variety of factors.

This article briefly examines this recent case, discusses the general rule that police have no duty to protect members of the public against private third-party violence, sets forth the application of the “state-created danger” in this case, and touches on the implications of the case for law enforcement. At the end of the article, there are a number of useful resources and references listed.

❖ **General Rule: No Duty to Protect**

In general, the U.S. Supreme Court has held, there is no federal due process constitutional requirement to provide adequate protection against violence by private third parties. [*DeShaney v. Winnebago County Dep’t of Social Services*](#), #87-154, 89 U.S. 189 (1989).

An exception to the general rule has occasionally been found where the officers’ actions or failure to act have arguably either created or enhanced the danger to the ultimate crime victim. This is often referred to by the courts as the “state-created danger” doctrine.

In a 7-2 decision in [*Town of Castle Rock v. Gonzales*](#), #04-278, 545 U.S. 748 (2005), the U.S. Supreme Court held that a woman who obtained a state-law restraining order against her estranged husband did not have a constitutionally protected due process property interest in having the police enforce the restraining order when they have probable cause to believe it has been violated.

Characterizing the facts in the case as “horrible,” the majority’s decision noted that the Colorado woman who was the plaintiff in the case had obtained a restraining order against her husband in connection with their pending divorce, and it required that he not molest or disturb her or the couple’s three daughters, ages 10, 9, and 7, and remain at least 100 yards from the family home at all times. The judicial order also contained a notice to law enforcement officials commanding them to “use every reasonable means to enforce this restraining order,” and to arrest, or seek a warrant for the arrest of the restrained person if they had probable cause that the restrained person had violated or attempted to violate the order.

The order was later modified to give the husband visitation with the daughters on certain days and “upon reasonable notice,” for a mid-week dinner “arranged by the parties.” One day, however, he took the three daughters while they were playing outside the home, without any advance arrangement. The mother then called the

police department, and she showed the two officers who responded the copy of the restraining order and requested that it be enforced, and the children be returned to her at once. The officers allegedly said that there was nothing they could do, and suggested that she call the department again if the children did not return by 10 at night.

She later allegedly talked to her husband on his cell phone, and he admitted having the children at an amusement park. She called police again, and they allegedly refused to put out an all-points bulletin for her husband or look for him and his vehicle at the amusement park. She called again at 10 p.m. and allegedly told officers that her daughters were still missing, and was told to just wait until midnight. She went to the police station at 12:50 a.m. and submitted an incident report, and the officer who took the report allegedly made “no reasonable effort” to enforce the restraining order or locate the children, but instead “went to dinner.”

The husband arrived at the police station at 3:20 a.m., and opened fire with a semiautomatic handgun he had purchased that evening. The officers shot back and killed him. Inside his pickup truck, the bodies of his three daughters were found. He had previously murdered all of them. The wife claimed in her subsequent federal civil rights lawsuit that the town violated her due process rights because it had an official policy or custom of failing to respond properly to complaints of restraining order violations, and tolerated the non-enforcement of restraining orders by its police officers.

A federal appeals court, both through a three-judge panel and on rehearing en banc, found that the mother had a “protected property interest in the enforcement of the terms of her restraining order” and that the town had deprived her of due process because “the police never ‘heard’ nor seriously entertained her request to enforce and protect her interests in the restraining order.”

The U.S. Supreme Court’s majority, in an opinion written by Justice Scalia, reversed. The Court found that the “benefit” of having such a restraining order enforced by police was not a protected property interest, rejecting the argument that Colorado, in passing its laws concerning restraining orders, had created such an entitlement to the enforcement of the order.

“We do not believe that these provisions of Colorado law truly made enforcement of restraining orders mandatory. A well-established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.”

A true “mandate” of police action, the Court ruled, would require “some stronger indication” from the Colorado legislature than “shall use every reasonable means to enforce a restraining order.”

“It is hard to imagine that a Colorado peace officer would not have some discretion to determine that -- despite probable cause to believe a restraining order has been violated -- the circumstances of the violation or the competing duties of that officer or his agency counsel decisively against enforcement in a particular instance. The practical necessity for discretion is particularly apparent in a case such as this one, where the suspected violator is not actually present and his whereabouts are unknown.”

The Court’s majority further reasoned that if the plaintiff had a statutory entitlement to enforcement of the restraining order, “we would expect to see some indication of that in the statute itself.” The opinion concludes that the plaintiff did not have, for purposes of the due process clause, a property interest in police enforcement of the restraining order against her husband.

The high court’s prior rejection of civil liability for failure to protect domestic violence victims makes the recent 9th Circuit ruling that is the focus of this article all the more important. It carves out a narrow set of alleged egregious circumstances which seek to pronounce a “clearly established” type of enhancing the danger to such victims which will not be tolerated.

❖ Facts of the Case

In [*Martinez v. City of Clovis*](#), #17-17492, 943 F.3d 1260 (9th Cir. 2019), a federal appeals court upheld summary judgment for police officers in a federal civil rights lawsuit pursued by a domestic abuse victim. It found that the officers’ conduct had in fact violated the plaintiff’s constitutional right to due process by affirmatively increasing the known and obvious danger she faced. At the same time, however, the officers were entitled to qualified immunity, as it was not clear at the time of the incident that their conduct was unconstitutional.

The plaintiff, Desiree Martinez, was a victim of domestic violence. In addition to suing her alleged abuser, Kyle Pennington, a City of Clovis, California Police Department officer, she also asserted federal civil rights claims [against](#) a number of police officers for failure to protect her against such abuse under the “state-created” danger doctrine, contending that they helped create or enhance the danger that she faced.

Martinez and Pennington began residing together in 2013 with Martinez’s daughter, Destiny, in Clovis. Pennington allegedly first physically and sexually abused Martinez in April 2013, while the two were staying at a hotel in Dublin, California. Following that, she asserts, a pattern of violence ensued. Her claims arose out of two incidents that took place on May 2, 2013, and June 4, 2013.

In the May 2, 2013 incident, Martinez was at her cousin's house. When officer Pennington arrived at the house, he allegedly became physically abusive. Pretending to leave, Martinez exited the house, hiding outside. After Pennington left, she dialed 911 and took a taxi to the house where she lived with Pennington. Officers Hershberger and Santillan were dispatched to the home, and were onsite when Martinez arrived.

Pennington walked over to the taxi and warned her not to say anything to the officers. Martinez told Hershberger that she did not want to speak to officer Santillan because he was Pennington's friend. Officer Hershberger then spoke with Martinez outside of Pennington's immediate presence. According to Martinez, however, Pennington was still within eye and earshot.

Hershberger testified that Martinez had told her about Pennington's prior physical abuse in Dublin but did not mention that he had been physically abusive that evening. Hershberger tried to probe further, but Martinez asked to go inside, insisting that she was fine. Martinez gave inconsistent testimony about whether she told Hershberger that Pennington had pushed her down the stairs that evening, ultimately clarifying that she had. She claimed that Hershberger asked her to "hold on just a second" and moved away. Pennington then stared at Martinez in a manner she perceived as intimidating, so she walked toward him, "because [she] didn't want him to think that [she] was talking to the officer."

While Martinez was standing in front of Pennington, Hershberger returned. She had a tape recorder and asked Martinez to repeat her statements about what had happened in Dublin. Martinez testified that "[a]t that point [she] was scared because [Hershberger] had said Dublin and she had said it in front of [Pennington], so [Martinez] told her, 'Nothing, nothing happened.'" Martinez heard Pennington clear his throat, which she claimed he does when he is angry, and therefore "acted like [she] didn't know what . . . she was talking about."

Officer Hershberger had previously received domestic violence training. She believed that Martinez faced potential risk if she stayed with Pennington that night. She was aware that domestic violence victims "might tend to recant accusations of violence" out of fear of reprisal.

However, she did not arrest Pennington. She did not advise Martinez of her right to make a citizen's arrest, her right to obtain a restraining order, or the possibility of staying at a shelter. She also did not provide Martinez with Clovis's pamphlet for victims of domestic violence. She later argued that this was because Martinez did

not indicate that any violence had occurred that evening, and because she was responding to a “check the welfare” call, not a domestic violence call. Instead, she recommended that Martinez be contacted and interviewed again.

Hershberger and Pennington had both worked with the Clovis Police Department for about nine years. Hershberger reportedly did not socialize with Pennington and had only a “neutral” opinion of him. Pennington testified that after Martinez went back inside the house, Hershberger spoke with him briefly. As Pennington describes it, she “was asking me, you know, what I was doing dating a girl like Desiree Martinez and what was going on, what was going on in my life because I was recently divorced and, you know, that she didn't think that she was necessarily a good fit for me.”

Later that night, Pennington allegedly physically abused Martinez, calling her a “leaky faucet” and asking her what she had told Hershberger and whether she was trying to get him in trouble. The next day, Martinez spoke with a detective over the phone. Pennington had allegedly “scripted” the conversation, and Martinez denied everything that she had said to Hershberger.

In May 2013, Martinez contacted members of the Clovis police department again about an incident unrelated to the current appeal. To avoid further investigation by the Clovis department, Martinez and Pennington moved to Sanger at the end of the month.

In the second incident at issue, on the night of June 3, 2013, officer Pennington allegedly physically and sexually abused Martinez. Martinez said that he choked, beat, suffocated, and sexually assaulted her. Martinez did not have access to a phone, but one of their neighbors made a 911 domestic violence call. Officers Yambupah and Sanders arrived at the house with two other officers. When the officers arrived, both Martinez and Pennington were standing outside of the house.

Officer Yambupah had previously received domestic violence training. She recorded that Martinez had injuries consistent with those of a victim of physical abuse, including a red cheek, scrapes on her knees, a manicured fingernail that was broken and bleeding, a torn shirt, and bruising on her arms. She photographed these injuries. Although Yambupah later acknowledged that separating Martinez and Pennington was important because of the possibility of intimidation, Martinez testified that they were not separated by more than seven feet when she and Yambupah spoke. Martinez, believing that Pennington was within earshot, whispered to Yambupah that the injuries had been inflicted by Pennington, that

Pennington had tried to smother her with a pillow, and that he had attempted to choke her.

Officer Yambupah believed that she had probable cause to arrest Pennington and determined that he was the dominant aggressor. She in fact believed that this made Pennington's arrest mandatory under California Penal Code § 836(c)(1). She also believed that as a police officer, Pennington had access to weapons. Yambupah learned from Martinez that Pennington was then on administrative leave from the Clovis Police Department because of a domestic violence incident with another ex-girlfriend.

Yambupah told Martinez that she was going to make an arrest, and "huddled" with the other officers. When Yambupah informed them of Martinez's allegations and Pennington's position with the Clovis police, officer Sanders, who was acting as a supervisor on the scene, ordered her to refer the matter to the District Attorney instead of making an arrest. Yambupah testified that had Sanders not given the order, she would have arrested Pennington on that day "in the interest of Ms. Martinez's safety."

The officers once again did not give Martinez the jurisdiction's domestic violence information handout, did not inform her of her right to make a citizen's arrest, did not offer her transportation to a shelter, and did not issue an emergency protective order. Officer Yambupah testified that she did not give Martinez the handout because she did not want to leave her side. She "asked Martinez to let [her] help her," but Martinez refused. She did not issue a protective order because Martinez "was not willing to pursue any assistance from [her] at all." She foresaw a risk of continued violence, which she attempted, unsuccessfully, to address by verifying that Pennington was going to leave.

Officer Yambupah did not know that Pennington was a Clovis officer until Martinez informed her that he was. Pennington testified that he knew of Sanders, but that they were not friends. Pennington's father (also an officer) and Sanders had known each other for at least 25 years. On leaving, Sanders stated that the Penningtons were "good people."

After the officers left, Martinez was again allegedly beaten and sexually assaulted by Pennington. He was arrested the next day, and a criminal protective order was issued. Martinez continued to live with Pennington after his arrest on June 5, 2013. He allegedly physically and sexually abused her multiple times between July and September 2013, when she finally moved out. Pennington was eventually convicted

of multiple counts of violating the criminal protective order. He also pled guilty to one domestic violence charge.

❖ “State-Created Danger” Doctrine Applied

The 9th Circuit federal appeals court in the *Martinez* case ruled that the “state-created danger” doctrine applies when an officer reveals a domestic violence complaint made in confidence to an abuser while simultaneously making disparaging comments about the victim in a manner that reasonably “emboldens” the abuser to continue abusing the victim. It also applies when an officer praises an abuser in the abuser’s presence after the abuser has been protected from arrest, in a manner that communicates to them that they may continue abusing the victim “with impunity.”

In order to prevail in this case, the court stated, the plaintiff was required to initially show that the officers affirmatively exposed her to “an actual, particularized danger,” or whether the officers left the person in a situation that was more dangerous than the one in which they found her.

She argued that officer Hershberger placed her in greater danger by failing to inform her of her rights or options, failing to provide her with the handout for domestic violence victims, and failing to make an arrest.

While those failures may have been a dereliction of officer Hershberger’s duties, the court found, they were not “an affirmative act [that] create[d] an actual, particularized danger.” Hershberger did not thereby make the situation worse for Martinez, but simply left her in the same position she was in before the police had arrived.

Additionally, failing to affirmatively separate Martinez from Pennington left her in the same position she would have been in had Hershberger not responded to the 911 call. At least under these circumstances, Hershberger did not violate Martinez’s right to due process.

However, the court noted, the record also revealed that Hershberger told Pennington about Martinez’s testimony relating to his prior abuse, and also stated that Martinez was not “the right girl” for him. The court reasoned that a reasonable jury could find that Hershberger’s disclosure “provoked” Pennington, and that her disparaging comments emboldened Pennington to believe that he could further abuse Martinez, including by retaliating against her for her testimony, “with impunity.” The causal

link between Hershberger's affirmative conduct and the abuse Martinez suffered that night was supported by Martinez's testimony that Pennington asked Martinez what she had told the officer while he was hitting her.

That Martinez was already in danger from Pennington "does not obviate a state-created danger," the court stated, when the state actor enhanced the risks. A reasonable jury could infer that Martinez was placed in greater danger after Hershberger disclosed Martinez's complaint and made comments to Pennington that conveyed contempt for Martinez, the first requirement of the state-created danger doctrine was satisfied.

The conduct of officer Yambupah—the failure to separate Martinez from Pennington when conducting the interview, failure to arrest Pennington despite Martinez's complaints of abuse, failure to provide information that may have allowed Martinez to escape further abuse, and failure to issue an emergency protective order were not "affirmative acts[s] [that] create[d] an actual, particularized danger." She was left in the same position she would have been in had Yambupah not acted at all, so this failure to protect Martinez against private violence thus did not violate the Due Process Clause.

But officer Sanders's conduct materially differed from Yambupah's in several respects, according to the court. Knowing that Pennington was a police officer with the Clovis department, Sanders ordered Yambupah not to arrest Pennington. This decision, on its own, did not leave Martinez in a more dangerous situation than the one in which he found her, and thus was not itself unconstitutional.

But the record contained evidence of more than just Sanders's order not to arrest Pennington. In instructing Yambupah not to arrest Pennington, which he did in Pennington's presence, Sanders also expressed that the Penningtons were "good people." Sanders spoke positively about the Penningtons against the backdrop that everyone involved, including Sanders, knew that Pennington and his father were police officers. While hearing Sanders speak positively about the Penningtons, Martinez also "heard Sanders telling [Yambupah] that, you know, 'We're not going to arrest him. We're just going to turn it over to Clovis PD,' whatever."

When viewing the record in the light most favorable to Martinez, the court stated, a jury could reasonably find that Sanders's positive remarks about the Penningtons placed Martinez in greater danger. The positive remarks were communicated against the backdrop that Sanders knew that Pennington was an officer and that there was probable cause to arrest, which the jury could infer Pennington, as a police officer,

understood. A reasonable jury could also find that Pennington felt emboldened to continue his abuse with impunity. In fact, the court pointed out, the following day, Pennington abused Martinez yet again. Under these circumstances, the first requirement of the state-created danger doctrine is satisfied, exposing the plaintiff to “an actual, particularized danger.”

Beyond that first requirement, the court ruled, to impose liability under the state-created danger doctrine, the plaintiff must show both that her “ultimate injury” was “foreseeable,” and show that the officers acted “with ‘deliberate indifference’ to a ‘known or obvious danger.’”

“As a matter of common sense,” the court found, the assaults Martinez suffered after the police interventions on May 2, 2013, and June 4, 2013, were objectively foreseeable.

As for deliberate indifference to a known danger, the court noted, this is “a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.” It is a standard higher than gross negligence, because it requires a “culpable mental state.”

Given the foreseeability of future domestic abuse here, the court held, a reasonable jury could find that disclosing a report of abuse while engaging in disparaging small talk with Pennington, and/or positively remarking on his family while ordering other officers not to make an arrest despite the presence of probable cause, constituted deliberate indifference to a known or obvious danger. That Pennington was already under investigation by the Clovis Police Department for allegations of abuse against an ex-girlfriend also suggests that future abuse was a known or obvious danger. By ignoring the risk created by Pennington's violent tendencies, the officers could be found to have acted with deliberate indifference toward the risk of future abuse.

As these three factors were all met, the appeals court concluded that “a reasonable jury could find that Hershberger and Sanders violated Martinez’s due process right to liberty by affirmatively increasing the known and obvious danger Martinez faced.

❖ Implications Going Forward

In the end, the appeals court ruled that officers Hershberger and Sanders were entitled to qualified immunity from liability because the due process right conferred in the context before us was not clearly established, either by binding U.S. Supreme Court or 9th Circuit precedent, or by a consensus of other courts. While a prior ruling by another federal appeals court in [*Okin v. Village of Cornwall-on-Hudson*](#)

[*Police Department*](#), #06-5142, 77 F.3d 415 (2d Cir. 2009) did bear many similarities with the holding in the immediate case, it has not at this time been widely embraced by other courts, and indeed has been criticized by the 7th Circuit (see [*Wilson-Trattner v. Campbell*](#), #16-2509, 863 F.3d 589, 595 (7th Cir.2017) as possibly “in tension with” [*DeShaney*](#) and [*Town of Castle Rock v. Gonzales*](#). Although the application of the state-created danger doctrine to this context “was not apparent to every reasonable officer at the time the conduct occurred, we now establish the contours of the due process protections afforded victims of domestic violence in situations like this one... Going forward, the law in this circuit will be clearly established that such conduct is unconstitutional.”

With at least two federal circuits now setting forth established law on the application of the state-created danger doctrine to protection of domestic violence victims, it remains to be seen whether this doctrine will be ultimately accepted by the U.S. Supreme Court or a consensus of other circuits. For now, at least in the nine states in the 9th Circuit, the law on the subject is “clearly established,” and law enforcement agencies that fail to adopt policies and conduct training in this area or officers who ignore this ruling and give tacit encouragement or approval to domestic violence abusers should not be surprised to increasingly face the consequences of civil liability.

❖ Resources

The following are some useful resources related to the subject of this article.

- [Amicus brief](#) of several black and women police officer organizations joined by AELE, and [appendix](#) of relevant documents in U.S. Supreme Court case [*Town of Castle Rock v. Gonzales*](#), #04-278, 2005 U.S. Lexis 5214.
- [Domestic Violence & Child Abuse](#). AELE Civil Case Summaries.
- [Public Protection: Crime & Accident Victims](#). AELE Civil Case Summaries.
- [Domestic Violence](#). Wikipedia article.
- [Domestic Violence](#). U.S. Department of Justice.
- [Domesticviolence.org](#). Resources for domestic violence victims.
- [Domestic Violence by Law Enforcement Officers](#)
- [Domestic Violence. Law Enforcement Guidelines](#) (Massachusetts 2017).

- [How Police Are Trained to Respond to Domestic Violence](#).
 - [Law Enforcement, Justice System and Domestic Violence](#)
 - [Police Family Violence Fact Sheet](#), on the website of the National Center for Women & Policing.
 - [Statistics](#): National Coalition Against Domestic Violence.
 - [Who Will Help Me? Domestic Violence Survivors Speak Out About Law Enforcement Responses](#).
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- **Relevant Monthly Law Journal Articles**
 - [Civil Liability and Domestic Violence Calls -- Part One](#), 2008 (5) AELE Mo. L.J. 101.
 - [Civil Liability and Domestic Violence Calls -- Part Two](#), 2008 (6) AELE Mo. L.J. 101.
 - [Civil Liability and Domestic Violence Calls -- Part Three](#), 2008 (7) AELE Mo. L.J. 101.
 - [Domestic Violence and the Reluctant Victim](#), by Rodney Hill, J.D., 2009 (4) AELE Mo. L. J. 501.

❖ **References:** (*Chronological*)

1. [11 Tips for Responding to Domestic Violence Calls](#), by Doug Wyllie Police Magazine (Feb. 15, 2019).
2. [The 2 most dangerous moments of domestic violence calls](#), by Dan Marcou, PoliceOne.com.(Aug. 25, 2017).
3. [Recognizing the Right to Petition for Victims of Domestic Violence](#), by Tamara L. Kuennen, 81 Fordham Law Review Issue 2, Article 14 (2012).
4. [Domestic Violence Within Law Enforcement Families: The Link Between Traditional Police Subculture and Domestic Violence Among Police](#) by Lindsey Blumenstein (2009). Graduate Theses and Dissertations.
5. [Law Enforcement Response to Domestic Violence Calls for Service](#), by Meg Townsend, Dana Hunt, Sarah Kuck, Caity Baxter, October 2006. 109 pgs., PDF format. Prepared for the National Institute of Justice (NIJ).

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