What Does “Shall” Mean?

By G. Kristian Miccio, Guest Commentary, Denver

When my father said “shall,” we all knew what he meant. When my teachers said “shall,” we all knew what they meant. And when the Lord said “shall” in the Ten Commandments, we all knew what that meant. In the old days, “shall” meant “shall.”

“Not so,” says Justice Antonin Scalia.

In *Castle Rock vs. Gonzales*, the Supreme Court took the meaning of the word “shall” and redefined it to mean “maybe or maybe not.” Such a distortion is perplexing at best.

In 1994, Colorado joined approximately 32 jurisdictions nationwide in removing discretion from police officers in domestic violence cases. The legislature mandated police to either arrest or secure an arrest warrant when restraining orders were violated. Simply put, the legislature, through the use of the word “shall,” commanded one and only one course of action: arrest.

Colorado took away discretion from police because of overwhelming evidence that police refused to arrest boyfriends and husbands when these men assaulted their girlfriends or wives.

Colorado police officers were not unlike their brethren in other states. During the Federal Violence Against Women Act hearings, held by the Senate Judiciary Committee in 1993 and 1994, we learned a leading cause of such violence was law enforcement’s hands-off attitude when it came to domestic violence. We learned what Jessica Gonzales of Castle Rock already knew.

Gonzales had a protective order from the court commanding her husband, Simon Gonzales, to stay away from her and her children except for mutually agreed-upon visitation with the three children. One evening in 1999, Simon Gonzales picked up the three girls in violation of his restraining order. Later that evening, Jessica Gonzales called the Castle Rock police and asked them to get the children. Police responded and took a report.

We know the police chose not to notify Denver police when Jessica Gonzales told them later that evening that Simon Gonzales and the girls were at Elitch Gardens in Denver. We know the police chose not to go to Simon Gonzales’ house, as promised, when Jessica Gonzales called them at 12:50 a.m. to say that neither he nor the girls were there. We know that an hour later, Jessica Gonzales went to the police station to ask for assistance. After an officer made a report, he chose to go to dinner.
You know the ending. The three little girls were shot by their father, and their bodies were discovered in the back of the cab of Simon Gonzales’ truck when he was killed by police after opening fire at the Castle Rock Police Department building.

Jessica Gonzales sued, claiming that they should have followed Colorado law and enforced the restraining order either by arresting Simon Gonzales or getting an arrest warrant.

The case found its way to the U.S. Supreme Court. Jessica Gonzales’ claim was simple and eloquent: The police failed to follow mandates enacted by the Colorado legislature to arrest violators of restraining orders.

But the Supreme Court disagreed. The court decided that Colorado really didn’t mean “must” when they used the word “shall.” The court concluded that “shall” really meant “maybe or maybe not.” In other words, the cops could choose to arrest, to secure a warrant, to go to dinner or to do nothing.

In writing for the majority, Justice Scalia ignored both legislative history and the intent of the Colorado legislature, a rather strange position for a justice who harps on deference to states, on the plain language of law and original intent of legislators.

So what does this mean? For Jessica Gonzales, all avenues for redress are closed. She can’t sue the city for negligence because Colorado, via the state’s Governmental Immunity Act, protects the police from suit except in the narrowest of circumstances. She can’t claim that police conduct violated her daughters’ substantive due-process rights, because that avenue was closed by the Supremes in 1985. And now she can’t claim that police failure to enforce the order violated her procedural due-process rights.

Quite simply, Castle Rock gets a pass.

If you or I find ourselves in the same situation as Jessica Gonzales, there is no recourse – there is no way to hold cops and the city accountable. We have come full circle. More important, we have done violence to notions of care, collective accountability and common sense.

So maybe we should do what the Castle Rock police chief advised: “Move on.”

I agree. We should move on – move on to the state Capitol and demand that Colorado legislators mean what they say. Go on record that “shall” means “shall.”

Coloradans should hold cities responsible when their police ignore statutory mandates. It’s time we held ourselves, our police and our legislators accountable. Perhaps then there will be justice for Jessica Gonzales and her three little girls.

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