DOMESTIC VIOLENCE SUPREME COURT ROUNDUP

Reporting on Supreme Court Decisions that Affect the Domestic Violence Field

Issue	Case	Ruling	Impact
Fourth Amendment *Third Party Consent to Search the Home*	*Georgia v. Randolph,* 547 U.S. 103 (2006)	A physically present occupant's express refusal to consent to police search of a home cannot be overcome as to that occupant when another occupant does consent to the search.	The Court's decision will make it more difficult for police to obtain evidence against batterers. C.J. Roberts in dissent specifically mentions the deleterious effect this will have in DV cases.
	Fernandez v. California, 134 S. Ct. 1126 (2014)	An adult co-occupant's consent to police search of a home may override the refusal of an objecting occupant after objecting occupant has been arrested and removed from the premises.	*Fernandez* will alleviate some of the hardships created in *Randolph* by allowing DV victims to consent to police searches and evidence gathering once their abusive partners have been arrested and removed from the home. It also lessens the abuser's ability to control the victim in his absence: "[h]aving beaten Rojas, petitioner would bar her from controlling access to her own home until such time as he chose to relent. The Fourth Amendment does not give him that power." 134 S. Ct. at 1137.

DOMESTIC VIOLENCE SUPREME COURT ROUNDUP

Issue	Case	Ruling	Impact
Fourth Amendment Search of Persons	*Florence v. Board of Chosen Freeholders of the County of Burlington,* 132 S.Ct. 1510 (2012) Amicus Brief submitted by **DV LEAP.** *See* 132 U.S. at 1527 (Breyer, J., dissenting).	Strip searches conducted at the jailhouse without reasonable suspicion do not violate the Fourth Amendment when the arrestee is being admitted into the general jail population.	DV LEAP filed an amicus brief opposing the Court's ultimate decision based on the concern that such invasive yet suspicion-less searches could re-traumatize and violate the Fourth Amendment rights of victims of domestic violence, who are often arrested and booked into jail when police intervene during domestic violence incidents. While the majority's disposition was disappointing, it did reserve the possibility of limiting such searches in other situations.
Sixth Amendment Confrontation Clause	*Crawford v. Washington* 541 U.S. 36 (2004)	Defendant must have had a prior opportunity to cross-examine unavailable witnesses in order to admit their out of court "testimonial" statements, thus overruling *Ohio v. Roberts*, 448 U.S. 56 (1980). The Court points to ex parte statements (e.g., affidavits or depositions); statements that are the product of a formal investigation (e.g., police reports); statements made under circumstances where an objective witness would believe their statements would later be used at trial, as examples.	Many hearsay statements previously admitted under traditional hearsay exceptions are no longer admissible. Thus, it is much more difficult to prosecute batterers without the participation of victims. The reliability standard under *Roberts* is still applied to out of court non-testimonial statements. *See, e.g., Jackson v. McKee*, 525 F.2d 430, 437-38 (6th Cir. 2008) (non-testimonial hearsay does not implicate the Confrontation Clause).

DOMESTIC VIOLENCE SUPREME COURT ROUNDUP

Issue	Case	Ruling	Impact
Sixth Amendment Confrontation Clause (cont.)	*Davis v. Washington*, 547 U.S. 813 (2006) Amicus Brief submitted by **DV LEAP**	Statements made to 911 operators during the course of crime are non-testimonial to the extent that they aid the police in dealing with an "ongoing emergency." Statements made to police responding to domestic violence call are testimonial (and inadmissible) where the police had secured the home and physically separated the battering husband from his wife.	The decision draws a somewhat ambiguous line between statements describing current events and statements "after the fact," for purposes of determining the constitutionality of their admission at trial. This test continues to be elaborated and clarified. See *Bryant*, infra. The Court also acknowledges defendants' coercion of DV witnesses' absence.
	Giles v. California, 554 U.S. 353 (2008) Amicus Brief submitted by **DV LEAP**	Even where a criminal defendant caused a witness to be absent from trial (by killing her), the defendant's right to confront the witnesses against him is only forfeited under the "forfeiture by wrongdoing" exception (making the witness's out of court testimonial statements admissible) if he intended to make the witness unavailable for trial.	On its surface this ruling makes it difficult to claim forfeiture in order to use the victim's hearsay, as it is not always provable that past attacks were committed *for the purpose* of keeping the victim out of court. However, a majority of the Court agrees that a history of "classic abuse" gives rise to a *presumption* that the defendant "intended to silence" the victim by the charged crime. Proactive prosecutors should use the Souter/ Ginsburg concurrence to emphasize this point. *See* Joan Meier, *Tips for Prosecutors after Giles,* www.dvleap.org; *see also* Tom Lininger, *The Sound of Silence: Holding Batters Accountable for Silencing Their Victims*, 87 Tex. L. Rev. 857 (2009).

DOMESTIC VIOLENCE SUPREME COURT ROUNDUP

Issue	Case	Ruling	Impact
Sixth Amendment Confrontation Clause (cont.)	*Michigan v. Bryant,* 131 S. Ct. 1143 (2011)	A statement given to police by a wounded citizen identifying the person who shot him is nontestimonial, and thus may be admitted as evidence at the trial without violating the Confrontation Clause even though the victim has died and thus cannot appear, because the primary purpose of the interrogation was to enable police to deal with an ongoing emergency – the shooter was at large.	This case clarifies the extent of the Confrontation Clause as presented in *Crawford v. Washington* (2004) and *Davis v. Washington* (2006). Specifically, the decision defines what constitutes a "primary purpose." Factors: (1) The primary purpose inquiry is objective, based on the circumstances of the statement, NOT what was subjectively in the parties' minds. (2) "Ongoing emergency" is expanded to cover a situation where the criminal is at large, and is not limited to a threat to the victim. (3) In determining whether the situation was an emergency you must look at reasonable intent of *both* the declarant and interrogator.
	Williams v. Illinois, 132 S. Ct. 2221 (2012)	The admission of expert testimony regarding the "informal" results of DNA testing performed by non-testifying analysts did not violate the Confrontation Clause. However, "formal" forensic reports (reports that are incriminating on their face) can be admitted only if the report's author testifies. Under this 4-1-4 decision, Justice Thomas's concurrence - holding that a "formality" test should apply - is the narrowest opinion, so, *in theory, it controls* future cases involving forensic lab evidence. Jeffrey Fisher, *The Holdings and Implications of Williams v. Illinois*, SCOTUSblog (Jun. 20, 2012, 2:20 PM).	*Williams* is beneficial as it allows experts to base their opinions on personal knowledge, which may include hearsay, without violating the Confrontation Clause. However, under Justice Thomas' controlling concurrence, this is only true if the underlying forensic reports lack formality (e.g. results that are gleaned from multi-step testing or contained within a lab's internal reports, and do not themselves directly implicate the defendant.) Otherwise, a lab's final and incriminating report is testimonial, and may not be introduced through an expert other than the report's author.

DOMESTIC VIOLENCE SUPREME COURT ROUNDUP

Issue	Case	Ruling	Impact
Sixth Amendment Confrontation Clause (cont.)	*Ohio v. Clark,* 135 S.Ct. 2173 (2015) Amicus Brief submitted by **DV LEAP**	Statements made by a three-year-old child to his teacher in which he identified his mother's boyfriend as his abuser could be introduced at trial as evidence without violating the Sixth Amendment's Confrontation Clause, even though the child himself did not testify at trial.	A unanimous Supreme Court strongly held that children's statements will rarely be "testimonial." Clark opened the door for greater flexibility regarding the admission of out-of-court statements made by child victims, flexibility that is greatly needed for proving child abuse. A majority of the *Clark* Justices also state that statements to non-law enforcement are likely non-testimonial. *See* Joan Meier, *Ohio v. Clark*, Geo. Wash. L. Rev. Docket (Jun. 22, 2015).
Police Enforcement of Protection Orders	*Town of Castle Rock v. Gonzalez*, 545 U.S. 748 (2005) Amicus Brief submitted by **DV LEAP**	A mother has no procedural due process right of enforcement of a protection order under a Colorado statute that purported to make police enforcement mandatory. As a result of this decision, the Inter-American Commission on Human Rights determined that the United States failed to provide equal protection under the law, resulting in a violation of the Gonzalez girls' right to life. *See Lenahan (Gonzalez) et al. v. United States*, Case 12.626, Inter-Ann. Comm'n H.R., Report No. 80/11 (2011).	This case had the potential to significantly undermine efforts to implement mandatory arrest by virtue of its dicta suggesting that even mandatory language in a statute does not create an absolute requirement for police. It is not known whether it has had this effect. However, the tragic facts could be used to drive home to police the dangerousness of treating protection order violations as trivial.

DOMESTIC VIOLENCE SUPREME COURT ROUNDUP

Issue	Case	Ruling	Impact
Contempt *Fourteenth Amendment and the right to a lawyer for civil contempt trials*	*Turner v. Rogers*, 131 S.Ct. 2507 (2011)	Petitioner's incarceration for civil contempt violated the Due Process Clause because he received neither counsel nor the benefit of alternative procedure. However, the Clause is not violated if the opposing party is not represented by counsel and other safeguards are taken. What safeguards are needed is weighed by determining: (1) the nature of "the private interest that will be affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirement[s]."	This decision will be critical in civil contempt cases where proper safeguards are not in place and the defendant could be incarcerated. Safeguards include clear notice that an individual's ability to pay child support would constitute the critical question in a civil contempt proceeding, a form (or the equivalent) designed to elicit information about his financial circumstances, a fair opportunity to present and dispute relevant information, and an express finding the petitioner was or was not able to pay the arrearage. This case does not deal with payment owed to the state.
Contempt *Private prosecution for criminal contempt*	*Robertson v. US ex rel. Watson* 130 S. Ct. 1265 (2010) Amicus Brief submitted by **DV LEAP**	In dismissing *cert.* as improvidently granted (after hearing oral arguments) the Court declined to decide whether a private litigant may prosecute the violation of her own civil protection order while seeking a criminal contempt remedy. Roberts (joined by Scalia, Kennedy, and Sotomayor) wrote a stinging dissent in which he harshly criticized this procedure, treating it as no different from a normal criminal prosecution and arguing that only the government has the authority to criminally prosecute citizens.	Retained the status quo re: DC private prosecutions of criminal contempt for violations of CPOs (later changed by the DC Court of Appeals.) The dissent indicates strong Supreme Court disapproval if this issue returns to the high Court. This decision could indirectly (and in the future, directly) impact any state where private litigants are permitted to bring criminal contempt actions for violations of *any civil orders,* including custody, child support, and even corporate injunctions, as well as protection orders.

DOMESTIC VIOLENCE SUPREME COURT ROUNDUP

Issue	Case	Ruling	Impact
Threats *Intent*	*Elonis v. United States*, 135 S.Ct. 2001 (2015) Amicus Brief submitted by **DV LEAP**	Transmission of threats under 18 U.S.C. § 875(c) requires subjective intent to threaten (or knowledge that the communication would be viewed as a threat); negligence (or, a finding that a reasonable person would have felt threatened,) is not sufficient to support a conviction under 18 U.S.C. § 875(c).	*Elonis* makes it slightly harder to prosecute threats under 18 U.S.C. § 875(c); however, the extent to which it will affect victims is debatable. This decision does not bind state laws, and while it is feared that many states will adopt the Court's intent requirement, the practical scope of *Elonis* remains to be seen. Congress is moving toward amending the federal law to permit "recklessness;" states may be expected to follow.
Federal Domestic Violence Firearms Ban *18 U.S.C. § 922(g)(9)*	*US v. Hayes,* 129 S. Ct. 1079 (2009) **DV LEAP** signed onto NNEDV's Amicus Brief	Convictions under 18 U.S.C. § 922(g)(9) for possession of a firearm after being convicted of a misdemeanor crime of domestic violence do not require the predicate offense to include the existence of a domestic relationship as an element of that offense – it is sufficient that the government show the prior conviction was for an offense against a spouse or other domestic victim.	The Court's decision helps the government keep firearms out of the hands of convicted batterers.

DOMESTIC VIOLENCE SUPREME COURT ROUNDUP

Issue	Case	Ruling	Impact
Federal Domestic Violence Firearms Ban *18 U.S.C. § 922(g)(9)* (cont.)	*United States v. Castleman*, 134 S.Ct. 1405 (2014) **DV LEAP** signed onto NNEDV's Amicus Brief	The federal domestic violence gun ban under 18 U.S.C. § 922(g)(9) extends to any state "misdemeanor crime of domestic violence (MCDV)" involving the "use of force." The Court affirmed that the common law meaning of "force," which extends to mere "offensive touching," is sufficient under the federal law.	This case construes the word "force" in "use of force" relatively broadly, which continues to keep the firearm ban alive. The opinion also contains very good language defining domestic violence as coercive control.
	Voisine v. United States, 136 S.Ct. 2272 (2016) Amicus Brief submitted by **DV LEAP**, et al.	A domestic assault with a *mens rea* of recklessness is encompassed under the definition of "use of force" under 18 U.S.C. § 922(g)(9), and therefore can trigger the provision's lifetime firearms possession ban.	The Court's 6-2 decision preserves and extends the gains made under *Castleman.* Here the Court broadly construes the word "use" in "use of force." Allowing recklessness to suffice is critical because many state DV misdemeanors do not specify the *mens rea* upon the conviction is based; which, if specific intent or knowledge were required, most of these convictions would not constitute a MCDV which triggers the firearms ban. *See* Joan Meier, Geo. Wash. L. Rev. Docket, Voisine v. United States: The Supreme Court Just Says No—Again—to Domestic Abusers Seeking to Possess Firearms (Jun. 30, 2016).

DOMESTIC VIOLENCE SUPREME COURT ROUNDUP

Issue	Case	Ruling	Impact
International Child Abduction	*Abbott v. Abbott*, 130 S. Ct. 1983 (2010) Amicus Brief submitted by **DV LEAP**	A non-custodial father's legal right to veto a child's removal from the country of residence is a "right of custody" which entitles him to invoke the "right of return" under the Hague Convention on the Civil Aspects of International Child Abduction, after the custodial parent removes the child from the country of "habitual residence."	This decision makes it harder for victims and children to flee abuse overseas. However, the Court noted that the right of return is not automatic, and that if a mother can prove that her own safety or the safety of her child would be put at "grave risk" by returning the child, then the return remedy is not required. *See Abbott*, 130 S. Ct. at 1997.
	Lozano v. Alvarez, 134 S. Ct. 1224 (2014) Amicus Brief submitted by **DV LEAP**	Equitable tolling does not apply to the 1-year period for the "well settled" provision of Article 12 of the Hague Convention on Civil International Abduction, even where the abducting parent has purportedly concealed the location of the child. The provision allows a court to deny return of children even if wrongly abducted, if it is one year later and the child is well-settled.	DV LEAP argued that equitable tolling, which would remove the "well-settled" exception to return, is inappropriate where battered women are fleeing abuse with their children. The court, by affirming that equitable tolling does not apply, ruled consistently with this position. However, a 3-judge concurrence emphasized that the court still has discretion to order the child returned even if the child is "well settled".

DOMESTIC VIOLENCE SUPREME COURT ROUNDUP

Issue	Case	Ruling	Impact
Violence against Women and Tribal Authority	*Dollar General v. Mississippi Band of Choctaw Indians,* 136 S. Ct. 2159 (2016)	Tribal courts have jurisdiction over civil tort actions that occur on tribal lands, even when such actions were committed by non-tribal members. This case arose out of a civil suit brought against Dollar General after a store manager allegedly committed sexual assault at a store located on tribal land.	Beyond protecting the sovereignty of tribes to exercise civil jurisdiction over their own lands, *Dollar General* will enable tribal courts to hold non-tribal members accountable for domestic violence and sexual assault committed on tribal lands, which is of particular significance, given that two-thirds of all violent assaults committed against American Indians are perpetrated by non-tribal members. *See* *Supreme Court Affirms Tribal Court Jurisdiction Over Dollar General Corporation,* NIWRC (Jun. 23, 2016).
	United States v. Bryant, 136 S.Ct. 1954 (2016)	Tribal court convictions may be used to trigger federal felony charges under the Habitual Offender Provision (§ 117(a) of the Violence Against Women Act) without violating the Sixth Amendment right to counsel and due process.	The unanimous 8-0 decision in *Bryant* closed a dangerous loophole within the state, federal, and tribal legal framework that allowed individuals with multiple tribal domestic violence convictions to escape the harsher penalties available through VAWA § 117(a). The Court recognized the alarmingly high rates of domestic violence experienced by indigenous women. *See* *Supreme Court Affirms Tribal Sovereignty and Upholds Prior Tribal Courts Convictions as Basis for Federal Convictions under VAWA § 117(a) for Repeat Domestic Violence Offenders*, NIWRC (Jun. 13, 2016).