In the

Supreme Court of Virginia

At Richmond

Record No. 130757

COMMONWEALTH OF VIRGINIA,

Appellant,

– v. –

FELECIA AMOS,

Appellee.

BRIEF FOR AMICUS DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT IN SUPPORT OF DEFENDANT/APPELLEE FELECIA AMOS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

Other Authorities

The Domestic Violence Legal Empowerment and Appeals Project (***DV LEAP***), by counsel, and with the written consent of all other parties to this action (*see* Exhibit A), submits this brief *amicus curiae* in support of the Defendant/Appellee in this matter, Felecia Amos.

INTEREST OF AMICUS CURIAE

DV LEAP was founded in 2003 to further the civil rights of battered women and children by making appellate litigation possible. DV LEAP's mission is to establish strong legal precedents upholding the rights of victims of abuse, and to hold trial courts accountable to the law by ensuring appropriate appellate review. DV LEAP fills a vacuum in advocacy for victims of abuse by providing pro bono appeals, training, and strategic assistance to lawyers and courts. While DV LEAP prioritizes cases from the District of Columbia, DV LEAP also accepts cases of substantial importance from other states. DV LEAP also organizes and spearheads the domestic violence community's advocacy in Supreme Court domestic violence litigation. DV LEAP has a particular expertise and interest in national and local issues relating to contempt and has filed several party and amicus briefs, including in the U.S. Supreme Court, on the subject.

INTRODUCTION

Virginia affords victims of domestic violence critical legal protections, including but not limited to the criminal prohibition of assault and battery, civil protection orders, and conditions of probation or suspended sentences. Coupled with meaningful enforcement, these mechanisms can be essential tools in preventing further injury to victims of abuse. However, the legal system is not always helpful to victims; at times it creates its own difficulties. When the legal system unjustly denies victims the protection to which they are entitled, or worse, punishes victims without legitimate basis, it makes seeking legal protection intolerably costly for victims.

Making matters worse yet, these unwitting systemic obstacles may coincide with abusers' intentional efforts to penalize victims who seek legal protection and to manipulate the legal system against them. DV LEAP is aware of, and describes below, a variety of strategies that abusers have been known to use to create false evidence and mislead the legal system into punishing or disbelieving the victim.[1]

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[1] Although not every batterer is male and not every victim is female, the majority of victims are women and the majority of their attackers are men. *See* SHANNAN CATALANO, BUREAU OF JUSTICE STATS., U.S. DEP'T OF JUSTICE, SPECIAL REPORT: INTIMATE PARTNER VIOLENCE, 1993–2010, NCJ 239203 at 1

(continued on following page)

DV LEAP believes it is possible that this is what happened here. Originally, a Virginia court duly and properly found Antonio Amos guilty of assault and battery against his then-wife Felecia Amos. Instead of ordering Mr. Amos to serve his sentence, the judge suspended the sentence on the condition that Mr. Amos obey various restrictions for the benefit and safety of Ms. Amos. According to Ms. Amos, Mr. Amos violated those conditions during a custody exchange of their child by threatening and harassing her outside the McDonalds restaurant at which they met. With no other recourse, Ms. Amos contacted the Commonwealth's Attorney and asked the Commonwealth to seek revocation of the suspended sentence, which it did.

But when her ex-husband introduced testimony and played a purported audio recording that seemed to refute her story, the trial judge called her to the podium and—even though she was not a party to the case, even though she had no lawyer, even though she had no chance to cross-examine the witness or challenge the recording's integrity, even though technology makes audio recordings easy to manipulate, even though she

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(Nov. 2012) (approximately four in five victims of domestic violence are female). Accordingly, this brief describes domestic violence in terms of female victims and male attackers. We adopt gendered pronouns for simplicity.

could not introduce her own evidence to corroborate her story, and even though she was given no opportunity to be heard whatsoever—found her in summary contempt. He instructed the sheriff to haul her off to jail and immediately called the next case without giving her a chance to speak.

Due process requires much more, and so does any reasonable legal protection from domestic abuse. If victims of domestic violence who turn to courts to enforce their legal protections incur the risk of imprisonment without fair process, ***they will have nowhere to turn***. Virginia's legal regime for stopping domestic violence will become a dead letter.

There is, of course, a better option than summary contempt. When a court believes that a non-party witness has engaged in dishonesty, the proper recourse is a separate proceeding in which the witness has the procedural protections afforded to any other defendant. For this reason Amicus DV LEAP respectfully requests that this Court confirm unequivocally that the trial court violated Ms. Amos's due process rights by jailing her for alleged contempt without affording her any procedural protections.

STATEMENT OF THE CASE

DV LEAP adopts the statement of the case submitted by Ms. Amos.

STATEMENT OF FACTS

DV LEAP adopts the statement of facts submitted by Ms. Amos.

STANDARD OF REVIEW

Constitutional arguments are questions of law that the Court reviews de novo. *Shivaee v. Commonwealth*, 270 Va. 112, 119, 613 S.E.2d 570, 574 (2005). The interpretation of Code § 8.01–384(A) and Rule 5A:18 of the Rules of the Supreme Court of Virginia also are questions of law reviewed de novo. *See Jay v. Commonwealth*, 275 Va. 510, 517, 659 S.E.2d 311, 315 (2008).

ARGUMENT

I. Summary contempt is not appropriate for a non-party witness's alleged perjury.

A. Summary contempt cannot be used to punish a non-party witness's alleged perjury consistent with the demands of due process and basic fairness.

Because summary contempt is the only form of criminal penalty permitted under our legal system which can be imposed *without* due process protections, the Due Process Clauses of the federal and Virginia constitutions limit summary contempt to that "narrowly limited category" of cases where immediate punishment is essential to permit the justice system to

proceed. *In re Oliver*, 333 U.S. 257, 275 (1948).[2] Summary contempt is available only for:

> charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority" before the public.

Id. at 443. By contrast, "'[i]f some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires . . . that the accused be accorded notice and a fair hearing . . . .'" *Scialdone v. Commonwealth*, 279 Va. 422, 443–44, 689 S.E.2d 716, 728 (2010) (quoting *Oliver*, 333 U.S. at 275–76). The reason is straightforward. As a general rule, due process requires minimum procedural protections for all persons threatened by the government with a deprivation of liberty:

> [e]xcept for a narrowly limited category of contempts, due process of law . . . requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation,

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[2] "[As] the due process protections afforded under the Constitution of Virginia are co-extensive with those of the federal constitution, the same analysis will apply to both." *Shivaee*, 270 Va. at 119, 613 S.E.2d at 574 (2005).

> have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation.

Id. Amicus DV LEAP submits that due process prohibits a trial court from holding a non-party witness in summary contempt when the alleged contempt sounds in perjury. Misconduct sounding in perjury may be punished only after a separate proceeding in which the witness enjoys the usual protections afforded to any other criminal defendant. As one Virginia court aptly put it:

> The goal of eradicating perjury . . . must be pursued in the proper manner. A contempt proceeding ill fits this task. . . . In cases where perjury alone has been established, ***this principle requires that the offender be afforded the plenary due process protections common to all other criminal prosecutions***."

Nuckles v. Nuckles, 56 Va. Cir. 405, *1 (Va. Cir. Ct. Suffolk Cnty. 2001) (emphasis added). And in *In re Michael*, 326 U.S. 224 (1945), the U.S. Supreme Court interpreted the federal contempt statute not to encompass perjury precisely because holding otherwise would "***permit too great inroads on the procedural safeguards of the Bill of Rights, since contempts are summary in their nature***", *id.* at 227 (emphasis added).

Alleged perjury by a non-party witness inherently falls outside the "narrowly limited category" of circumstances for which due process permits a finding of summary contempt. Holding a person in summary contempt

may be necessary where he or she has made a scene in court, used profanity, or assaulted court staff. In those circumstances, everything the court needs to know, it has seen and heard with its own eyes and ears. In contrast, summary contempt lacks any justification when the alleged "contempt" is in the nature of perjury. The court has seen and heard the witness's testimony, but it has no first-hand access to the other "essential element" of the offense: the truth of the matter about which the witness testified. Nor does the court need to impose immediate punishment to avoid "demoralization of the court's authority", as it does when a person presently and physically disrupts a courtroom.

Holding a non-party witness in summary contempt not only transgresses the specific due process rules governing contempt, but also the more general standards of fairness underlying our adversarial justice system. Where a witness is not a party, he or she often will not receive advanced notice of contrary evidence that a litigant intends to introduce, or even that the litigant intends to challenge the witness's testimony. He or she may not enjoy access to counsel, and even if he or she does, counsel generally will have no recognized role in the proceedings. In any event—and most important—a non-party witness ***never*** will have the opportunity to cross-examine other witnesses who tell a story incompatible with the wit-

ness's own. Nor, similarly, will a non-party witness have the ability to introduce additional testimony or other evidence to corroborate the witness's story. In sum, when a court employs the summary contempt mechanism against a non-party witness for alleged dishonesty, the accused is denied virtually every protection demanded by due process.[3] So even if the U.S. Supreme Court had not spoken directly to the limits that due process places on the use of summary contempt (and it has, as discussed above), it still would be clear that due process prohibits a court from holding a non-party witness in summary contempt for conduct in the nature of perjury.

B. Using summary contempt to punish alleged perjury by non-party witnesses would have particularly dangerous implications for domestic violence victims.

While DV LEAP's position is relevant to any type of case, it has special ramifications for cases involving victims of domestic abuse. There are two reasons: First, victims of domestic abuse in criminal proceedings are necessarily non-parties. All of the protections that Virginia affords victims of domestic violence—civil protection orders, conditions on a batterer's supervised release, conditions on an abuser's probation, and last but not

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[3] Not to mention, of course, the specific protections guaranteed to criminal defendants by the Fifth and Sixth Amendments to the U.S. Constitution, made applicable to the states by the Fourteenth Amendment.

least, the usual criminal prohibition against assault and battery—are primarily enforced ***criminally*** by the Commonwealth, which brings or resumes an action against the abuser.[4] In criminal proceedings, the victim may be a witness but is ***never*** a party.

Second, criminal actions to punish violent abusers almost always require the testimony of victims. Physical evidence of abuse often is scant. Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 771 & n.124 (2005). Domestic violence often occurs out of the sight of others who might testify. And the U.S. Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004), restricted the use of a victim's out-of-court statements. In many cases, if not most cases, the primary evidence remaining is the victim's testimony.

Thus, domestic violence prosecutions almost always will involve non-party victim-witnesses. And although criminal actions against an alleged abuser are suitable vehicles for adjudicating the guilt of that defendant,

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[4] Indeed, under Virginia law a criminal contempt proceeding initiated by a private litigant must be restyled as an action ***by the Commonwealth*** before it may proceed. *Powell v. Ward*, 15 Va. App. 553, 559, 425 S.E.2d 539, 543 (1993); *see also Local 333B, United Marine Div. of Int'l Longshoremen's Ass'n (A.F.L.) v. Com. ex rel. Virginia Ferry Corp.*, 193 Va. 773, 781, 71 S.E.2d 159, 164 (1952).

they are never suitable vehicles for adjudicating alleged perjury by a victim-witness who takes the stand. Consider the imbalance between the respective protections afforded to an alleged abuser and an alleged victim in this context:

	Abuser[5]	Victim-Witness
Has advanced notice of the accusations against him or her?	Yes	No
Has access to counsel?	Yes	No
May call witnesses or introduce evidence?	Yes	No
May obtain evidence and witnesses through compulsory means?	Yes	No
May confront witnesses against him or her?	Yes	No
May compel production of potentially exonerating or exculpatory evidence from the prosecution?	Yes	No

In short, summary contempt must not be used to turn criminal proceedings against domestic abusers into *de facto* perjury prosecutions against victim-witnesses. If this occurs, the deck is inherently stacked against the victim.

[5] Where the Commonwealth resumes an existing criminal action rather than initiating a new one—for example, when it seeks to hold an adjudicated batterer accountable for violating conditions of a suspended sentence—defendants' procedural protections may be reduced, but at the very least, the defendant is still always a party to proceedings with the right to counsel. A victim who takes the stand never enjoys these same minimal protections.

C. Ms. Amos's experience illustrates the inherent flaws of deploying summary contempt to punish a non-party witness's alleged perjury.

Ms. Amos's case illustrates why summary contempt is never appropriate against a witness where the supposed contempt sounds in perjury and the witness is not a party capable of defending herself. Here, a criminal action ostensibly against Mr. Amos transformed into a *de facto* prosecution of Ms. Amos, who, without any rights or protections, was then shipped off directly to jail.

On July 30, 2010, the Arlington County Circuit Court adjudged Mr. Amos guilty of assault and battery and imposed a suspended sentence of six months in jail. (App. 105–06.[6]) The court conditioned the suspension on Mr. Amos having no contact or direct communication with Ms. Amos except as necessary to exchange their child during transfers of custody. (Id.) After the custody exchange on October 29, 2010, Ms. Amos believed that Mr. Amos had violated the conditions of the suspension, but she had no way to enforce the conditions herself. (App. 101–04.) Instead, she asked the Commonwealth's Attorney to seek enforcement of the suspension conditions, (id.) which the Commonwealth's Attorney did.

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[6] Citations to "App." refer to the joint appendix filed in this Court.

The resumed criminal proceeding against Mr. Amos soon turned into a *de facto* proceeding against Ms. Amos. During an initial hearing at which Ms. Amos was not present, counsel for Mr. Amos represented that he would introduce testimony and evidence refuting Ms. Amos' allegations. (App. 90.) In response, the trial court stated:

> I'm going to get to the—something is going on here and if it's from her, I'll deal with her. If it's from him, I'll deal with him. If it's from both of them, I will deal with both of them. I'm going to get to the bottom of it, but I need them here at the same time. And bring your witnesses.

(App. 91.) From this moment, it was clear that ***both*** Mr. Amos, a party, and Ms. Amos, ***a non-party***, were targets of the court's inquest. The judge's subsequent actions confirm that he had contemplated summary contempt against one or both of the Amoses well ahead of time: When he held Ms. Amos in summary contempt at the June 10 hearing, he had the code citation and statutory text already in front of him, ready to go. (App. 82–83.) Ms. Amos, however, received no notice that she faced a summary contempt conviction and imprisonment. To the contrary, the judge ordered the attorneys *not* to give her notice, even after Mr. Amos's counsel suggested that she deserved to be informed of Mr. Amos's evidence:

> **MR. MERRIL**: I tell you what bothers me is because who knows—she has no idea that we could prove—
>
> **THE COURT**: Don't tell her. I'm going to get to the—something is going on here and if it's from her, I'll deal with her.

(App. 91.) Ms. Amos did not even receive reasonable notice that she would testify at the hearing—she only learned of the hearing itself ***the day before***. By its own admission, the Commonwealth "dropped the ball" (App. 43.) and forgot to subpoena Ms. Amos, so it telephoned her instead. (*Id.*; *see also* App. 91–92 (Court instructs Commonwealth to subpoena Ms. Amos).) By contrast, the defense's witness, Jason Salinas, received notice about two weeks before the May 28, 2011 hearing. (App. 60–61.)

After Mr. Amos introduced testimony and evidence calling into doubt Ms. Amos's testimony at the June 10 hearing, the trial court afforded her no opportunity to be heard. He simply found her guilty, sentenced her, and moved on: "[T]he Court finds you in contempt of Court. You're sentenced to jail for ten days. Remand her into custody, Sheriff. ***Call the next case.*** (Whereupon, the proceedings at 11:00 a.m. were concluded.)" (App. 83 (emphasis added).) Ms. Amos had no opportunity to introduce evidence. She had no opportunity to cross-examine Mr. Amos's witnesses or to question the authenticity or integrity of the audio recording. She did not even have an opportunity to make a statement.

All the while, Ms. Amos remained unrepresented. One may suppose that the Commonwealth has an interest in challenging evidence against a victim-witness and that this coincidence-of-interests affords the witness some protection. But the Commonwealth does not represent its victim-witnesses, and a possible coincidence of interests is no substitute for actual representation. The Commonwealth certainly did not protect Felecia's interests in this case: The Commonwealth admits "dropp[ing] the ball" by failing to give Felecia meaningfully advanced notice of the June 10 hearing. And at that hearing, the Commonwealth's Attorney made no effort to cross-examine Mr. Amos about the tape, or to cross-examine him at all. Nor did it object at the initial hearing to the court's insistence on keeping the tape a secret from its own victim-witness.

The trial court proceedings were particularly peculiar insofar as they departed from one of our legal system's first principles: that the goal of a criminal prosecution is to determine whether a particular defendant is guilty or not guilty. Instead, the question in this proceeding became ***which of several persons, only one of whom was the defendant*****,** was guilty. Recall the trial court's statement "something is going on here", that he was going to "get to the bottom of it", and that he would "deal with" whomever was responsible, whether or not that person actually was a litigant in the case.

(App. 91.) A criminal prosecution is not like a game of "Clue" where the object is to select the guilty party from a limited cast of characters. The object is to determine whether any particular defendant's guilt is established beyond reasonable doubt. And even if it were appropriate to treat a criminal prosecution as a contest among multiple defendants, there is no justification for providing protections to one (*de jure)* defendant while denying them to the other (*de facto)* defendant.

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In sum, summary contempt is not appropriate for alleged perjury by a non-party witness. Due process requires that anyone accused of perjury be afforded a separate proceeding in which she has notice of charges against her, access to counsel, the ability to marshal evidence on her behalf, and the right to cross-examine witnesses. *Nuckles*, 56 Va. Cir. at *1; *see In re Michael*, 326 U.S. at 227.

II. Abuse victims accused of lying must have the opportunity to challenge evidence introduced against them, no matter how seemingly conclusive.

A. Little evidence, if any, is beyond challenge.

It may be tempting to conclude that seemingly incontrovertible evidence obviates the need to test the evidence and afford adversary due-process. But properly understood and applied, the requirements of due

process do not hinder courts' fact-finding purpose. They *advance* it through sharp adversarial examination of the evidence.

This is particularly clear with respect to audio recordings like the one Mr. Amos's counsel played in the trial court. Low-tech, common-sense tricks allow a person to manipulate a recording so that it does not quite capture the whole truth. The person operating the recording device could stop recording during certain parts of a conversation or point the recording device away from a speaker's voice. More technical manipulation methods, too, are available. As early as the 1970s, several authors concluded: "It is our opinion that magnetic recordings should never be considered as being reliable evidence, because we are convinced that it is not very difficult to produce edited recordings that will pass the most stringent tests without edits being located." Hugh D. Ford, *The Legal Aspects of Magnetic Tape Recordings*, 22(4) JOURNAL OF THE AUDIO ENGINEERING SOCIETY 226, 233 (May 1974). By the 1990s digital recording and editing technology made manipulation techniques accessible even to laypeople. *See* Jordan S. Gruber, *Foundation for Audio Recordings as Evidence*, 23 AM. JUR. PROOF OF FACTS 3d 315 §10 (1993). Today, the Internet supplies ample means of obtaining cheap or free software to edit audio recordings. *See, e.g.*, List for Free Software for Audio, WIKIPEDIA,

http://en.wikipedia.org/wiki/List_of_free_software_for_audio#Recording-_and_editing (last visited Nov. 14, 2013). One does not need to be tech-savvy to use this software effectively. *See e.g.*, TEE MORRIS ET AL., PODCASTING FOR DUMMIES 45–54 (2005); CARLA SHRODER, THE BOOK OF AUDACITY: RECORD, EDIT, MIX, AND MASTER WITH THE FREE AUDIO EDITOR (2011); MIKE COLLINS, CHOOSING AND USING AUDIO AND MUSIC SOFTWARE: A GUIDE TO MAJOR SOFTWARE APPLICATIONS FOR MAC AND PC (2004). No doubt, methods for detecting the manipulation of audio recordings have advanced and perhaps even kept pace with fabrication techniques. But this just proves the point: Audio recordings, no less than any other evidence, require testing through cross-examination of the witnesses offering the evidence, and potentially through professional forensic analysis. No evidence is immune from the principle that things are not always as they seem.

B. Fabrication or manipulation of evidence by abusers is not uncommon.

The need for robust questioning of evidence applies in any criminal case, but the point holds particular salience in the domestic violence context. Batterers are particularly skilled manipulators of the legal system. And one way (of many) in which batterers manipulate the legal system is by fabricating and falsifying evidence against the victims. ANDREA VOLLANS, YOUNG WOMEN'S CHRISTIAN ASS'N, COURT-RELATED ABUSE AND HARASS-

MENT 5 (2010), *available at* http://www.ywcavan.org/sandbox/UserFiles/-files/Women%20and%20Their%20Families/Legal%20Educator/-Litigation%20Abuse%20web.pdf.

Experts in domestic violence law describe batterers as being "skillfully dishonest", convincing not only others but also themselves that *they* are in fact the aggrieved party. *See, e.g.*, LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 124 (2002). Batterers often project a smooth, appealing persona to the court which is at direct odds with their behaviors in private toward their victims. David Adams, *Identifying the Assaultive Husband in Court: You Be the Judge*, 33 BOSTON B.J. 23 (1989). Batterers often exploit the victim's appearance as angry, distrustful, or emotionally unstable (often a natural consequence of the abuse) to attack her credibility in Court. Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of their Victims Through the Courts*, 9 SEATTLE J. FOR SOCIAL JUSTICE 1053, 1067–68 (2011).

A common way in which batterers manipulate the legal process is through the falsification and fabrication of evidence. VOLLANS, COURT-RELATED ABUSE AND HARASSMENT, *supra*. DV LEAP is aware of a number of

examples from lawyers around the country of batterers falsifying evidence and manipulating legal procedures against their victims.

Several anecdotes demonstrate batterers' use of modern technology to doctor evidence. In one case, a batterer and his girlfriend claimed that the victim was harassing them with threatening texts. The victim asked the prosecutor to obtain her phone records, which, in fact, showed no communications with her batterer. When a police officer called the number from which the victim was supposedly calling, an elderly woman in another state (with a similar area code to the victim's) picked up. The batterer most likely used a "spoofing" application to send false messages which appeared to be from a number similar to that of the victim. Email from Renee Eubanks, Staff Attorney at Southeastern Ohio Legal Services, to Joan Meier, Director, DV LEAP (Nov. 6, 2013, 20:46 EST). In another case, in an attempt to gain an edge in custody proceedings, a batterer submitted a report from the child's school supposedly reporting that the child often arrived unclean and unkempt. The victim's lawyer was able to prove that the incriminating pages had been added to the real report; and that the signature on the false pages had been computer–generated. Telephone interview with Lisa Hopkins, Esq., Hopkins Law Office (Nov. 12, 2013).

The distortion of audio recordings has also been reported. In one case, the victim suffered from a condition that caused her to talk in her sleep. While she slept one night, her abuser asked her whether she was going to kill him and she replied, while asleep, "yes". He recorded this "conversation" and succeeded in prompting the prosecutor to file charges against her on that basis. The victim's counsel pulled the victim's medical records, which showed her sleep-talking condition, and provided it to the prosecution, which then agreed to drop charges against her. Telephone interview with Andrea Vollans, Legal Educator, Young Women's Christian Ass'n Vancouver (Nov. 13, 2013).

In addition, batterers are known to persuade their friends, family and acquaintances to lie for them, or at least to tell only part of the truth. In one case reported to DV LEAP, a batterer's friend submitted an affidavit affirming that he saw the victim behaving irrationally. The friend conveniently omitted the fact that he and the batterer were stalking the victim and that the victim was aware of the stalking—circumstances that could cause anyone to behave erratically. Telephone interview with Andrea Vollans, Legal Educator, Young Women's Christian Ass'n Vancouver (Nov. 13, 2013).

Batterers often also plan extensively to create false evidence. One batterer spent a year telling his therapist phony stories of violence inflicted

upon on him by his victim in order to build up a mountain of false evidence that would be corroborated by a third party, the therapist. Telephone interview with Andrea Vollans, Legal Educator, Young Women's Christian Ass'n Vancouver (Nov. 13, 2013).

Not every batterer may manipulate evidence or induce false testimony. But the mere fact that ***some*** batterers are known to cleverly manipulate evidence in their pursuit for control of their victims reinforces the general principle that a witness whose legal rights are at stake must be able to test evidence that contradicts their version of the story.

C. Ms. Amos's experience shows that no evidence is so foolproof that the adversarial process can be dispensed with.

In the examples described above, it was only through diligent sleuthing by victims' counsel and robust cross-examination that the manipulation of evidence came to light. Ms. Amos had no such advocate and no such opportunity to uncover possible fabrication by Mr. Amos.

The evidence supposedly rebutting Ms. Amos' story consisted of a witness's testimony and an audio recording. Neither is incontrovertible.[7] In fact, it is perfectly possible that the recording may have omitted the very portions of the October 29, 2010 encounter that Ms. Amos was reporting to the prosecutor's office and court. In her motion to vacate the trial court's judgment, Ms. Amos states that there were "significant pauses" in the recording when it was played during the hearing. In addition, ambient noise in the restaurant or the Amoses' child's crying might have obscured key exchanges. The very real possibilities that the recording had been manipulated or that the recording did not capture everything that occurred on October 29 mean that the tape cannot constitute absolute proof that Ms. Amos lied—at least not without giving Ms. Amos a full and fair opportunity to challenge it.

The unfairness to Ms. Amos is compounded by the fact that neither she, nor even the Court is in a position to assess the recording's authenticity and integrity: Not only before the trial, but to date, no one has provided the audio to Ms. Amos. Nor has the recording survived as part of the rec-

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[7] False evidence does not lie beyond the realm of possibility. To the contrary, Mr. Amos already has misled a court about his income in his child support case with Ms. Amos.

ord. Rather, only a transcript introduced by Mr. Amos is part of the record. Brief for Respondent and Assignment of Cross-error at 111–14, *Amos v. Virginia*, 740 S.E.2d 43 (Va. Ct. App. 2013) (No. 130757).[8] Ms. Amos thus had no opportunity to seek an independent analysis of the tape. She had no opportunity to cross-examine Mr. Amos about its origins and whether it had been manipulated. She had no opportunity to introduce evidence showing that the tape did not reflect the entire story of what happened that night. Without the ability to confront her accuser, Ms. Amos had no chance whatsoever of showing that the recording was falsified or otherwise not as it seemed.

Nor could Sergeant Salinas's testimony carry the day without cross-examination. As illustrated above, it is not uncommon for batterers to use friends and family to corroborate their false claims. Sergeant Salinas revealed numerous grounds for bias. Sergeant Salinas belonged to an organization with a strong sense of fraternity. In fact, he testified that he was recruited by his first Army commander to volunteer in order to "help a sol-

[8] The transcript of the June 10, 2011, hearing suggests that Mr. Amos entered the tape as evidence; however, it appears either that the court did not retain the recording or that it otherwise has not survived as part of the record on appeal.

dier out." (App. 46.) Sergeant Salinas' testimony displayed great affinity towards the military and its members—"we don't [have] family around, so we do our best to support [each other]." (App. 56.) Moreover, he drove to the McDonalds with Mr. Amos, during which time Mr. Amos "briefed" him on the "situation." (App. 47.) Sergeant Salinas admitted that Mr. Amos had previously told him that "Mrs. Amos [had] made some false allegations on [him] before." (App. 57.) This implies that Sergeant Salinas was entering the situation with at least some bias in favor of Mr. Amos.

Finally, Mr. Amos has apparently previously lied to a court in his legal disputes with Ms. Amos. In child support proceedings brought by Mr. Amos, in which he demanded a reduction in child support obligations, the Hartford County Circuit Court found that Mr. Amos:

> gave varying income amounts in the financial statements that he filed with this court. The financial statement filed in August, 2011 showed a monthly income of $4,989.00. The financial statement filed in January, 2013, showed income of $10,000.00 per month. During the same time frames as the financial statements, [Mr. Amos] filed for a home loan and his mortgage application showed that he made $15,000 per month.

Master's Report and Recommendations at 2, *Amos v. Amos-Hoover*, No. 12-C-11-2150 (VA. Cir. Ct. Hartford County, 2013) (This too is consistent with well-recognized patterns of legal abuse by batterers against their victims. Przekop, *supra* at 1071–72.

* * *

In sum, no evidence is incontrovertible. Audio recordings, like any other evidence, may be unreliable for one reason or another. And many batterers fabricate evidence. In light of these evidentiary pitfalls, victims must have the opportunity to challenge evidence introduced by their batterers. Ms. Amos received no such opportunity.

III. What happened below sets a dangerous precedent that, if allowed to stand, would compound already significant barriers to Virginia's attempt to provide legal protections for domestic violence victims.

The trial court's denial of Ms. Amos' due process rights sends a warning to victims of abuse: Do not ask the justice system for help. If the Commonwealth brings an action against your batterer, all the abuser needs to do is fabricate evidence against you. If a judge is so inclined, you will not have the benefit of a lawyer; you will have no opportunity to examine your abuser's evidence or cross-examine his witnesses; you will not even get to tell your side of the story. You will simply go to jail. Facing these risks, rational victims will flee the justice system.

This disincentive to turn to courts will compound the already significant barriers to enforcement of protections for victims against their batterers. As noted, Virginia's legal system aims to protect victims of abuse through criminal prosecutions, civil protection orders, and of course, en-

forcement of both civil and criminal orders which restrain an abuser. "For enforcement to work, the courts need to monitor compliance, victims must report violations, and, most of all, police, prosecutors, and judges should respond sternly to violations that are reported." Elizabeth Topliffe, *Why Civil Protection Orders Are Effective Remedies For Domestic Violence But Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1046, n.65 (Fall, 1992) (quoting P. Finn & S. Colson, *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement*, US DEP'T OF JUSTICE 45 (1990)). In reality, though, enforcement of the legal protections for victims of domestic violence is inconsistent at best. Police often respond slowly or ineffectively to violations of protection orders, and prosecutors often are reluctant to prosecute protection order violations except in limited circumstances. Kit Kinports & Karla Fischer*, Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 223–31 (1993). Unreliable enforcement cripples the deterrent effect of Virginia's legal protections for victims. One study found that issuance of restraining orders alone, with nothing more, fails to prevent future abuse against the same victim in about fifty percent of cases. Andrew R. Klein, *Re-Abuse in a Population of Court Restrained Male Batter-*

ers: Why Restraining Orders Don't Work, in DO ARRESTS AND RESTRAINING ORDERS WORK? 192, 207 (Eve S. Buzawa, et. al., eds., 1996).

The effectiveness of legal protections is undermined not only by the justice system's unreliable enforcement, but by victims' own ambivalence. Under-reporting by victims of their batterers' violations is a recognized problem. Victoria Holt et. al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence,* 288 JAMA 589, 592 (2002) (crime victim surveys have indicated that only about one-third to one-half of all physically abused women report their abuse in the next four months to one year). *See also* Logan, *Protective Orders: Questions and Conundrums*, 7 TRAUMA VIOLENCE ABUSE 175, 192 (2006). A key reason for under-reporting is the victim's fear of retaliation. Barbara Hart, *Battered Women and the Criminal Justice System, in* DO ARRESTS AND RESTRAINING ORDERS WORK? 98, 99–101 (Eve S. Buzawa et. al. eds., 1996). This fear is justified: Domestic abusers retaliate against their victims when victims report violations significantly more often than criminals whose victims are strangers. *Id.* at 99–100; *A Guide for Effective Issuance & Enforcement of Protective Orders,* NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES 17 (stating that obtaining a protection order can lead to separation violence because the battered woman is challenging her abuser's power); JAMES PTACEK, BATTERED

WOMEN IN THE COURTROOM 84–85 (1999); *see also Giles v. California*, 554 U.S. 353, 377 (2008) ("Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions"). Judges with extensive experience with domestic violence cases have acknowledged that there is no other criminal who pursues his victim with the same zeal and perseverance as a domestic abuser. Ptacek, *supra*, at 85. It should be no surprise, then, that a majority of abused women (65%) fear that calling the police or going to court to either obtain or enforce a protection order might lead to more violence. *Id.* at 13, 145. The problem persists even after criminal cases are brought. Domestic violence victims are especially likely to recant their stories or refuse to testify as a result of threats by their abusers. Lininger, *supra*, 91 VA. L. REV. at 768.

Inadequate enforcement of legal protections is exacerbated when victims experience negative experiences with the justice system. Such victims often conclude that the potential benefit of prosecuting their abusers is not worth the risk of retaliation or the costs of participating in their abuser's prosecutions. Hart, *Battered Women and the Criminal Justice System, supra,* at 100–02 (stating that the criminal justice system's past response has led many victims to conclude that calling the police will do them more harm

than good). Even victims who are initially committed to prosecuting their abusers often become discouraged because of delays, lack of witness protection, and prosecutor or judicial indifference or insensitivity. *Id.* at 102. Helping the Commonwealth prosecute batterers often requires victims to take time off of work, to arrange childcare, and to travel; being a witness can be economically ruinous. *Id.* at 102.

In short, legal protections for victims of domestic violence are only as good as their enforcement, and enforcement requires not only vigorous commitment from the legal system but active participation on the part of victims. As things stand today, victims must overcome numerous barriers and obstacles in order to seek legal intervention. Affirmance or endorsement of what happened here—the jailing of a victim of domestic violence based on the un-challenged evidence of her abuser—promises to deter even more victims from venturing to court. It also may give a green light for personnel in the justice system to treat victims who report abuse with hostility—precisely the wrong message for the legal system to send, if it aims to reduce domestic violence.

It should be remembered that the trial court's refusal to honor Ms. Amos due process rights will produce damaging reverberations within the legal system ***whether or not she actually lied***. The mere fact that this vic-

tim-witness could be jailed with no procedural protections, merely because her abuser presented evidence against her, sends a signal to domestic abuse victims to keep as far away from the courts as they can.

CONCLUSION

The trial court violated Ms. Amos's due process rights by holding her in summary contempt. Had she enjoyed the protections afforded to any other defendant, Ms. Amos might well have shown that the audio recording was a fabrication or had otherwise been manipulated to make her look like a liar. The trial court's actions—should they be approved—send a signal to victims of domestic abuse that they stand to lose much more than they stand to gain from seeking protection from the legal system. For these reasons, DV LEAP respectfully submits that the *en banc* decision of the Court of Appeals reversing the trial court's judgment should be affirmed.

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Respectfully Submitted,

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