No. 10-CM-481

DISTRICT OF COLUMBIA
COURT OF APPEALS

TINOTA CLARK, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION
(DVM 293-10)

BRIEF OF AMICI CURIAE DOEMSTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT (DV LEAP), AYUDA, BREAK THE CYCLE, D.C. COALITION AGAINST DOMESTIC VIOLCENCE, PROFESSOR CATHERINE F. KLEIN, PROFESSOR MARGARET MARTIN BARRY, AND PROFESSOR LISA VOLLENDORF MARTIN in Support of Appellee and Affirmance

---

Joan S. Meier (D.C. Bar No. 398745)
Director, Domestic Violence Legal Empowerment
and Appeals Project (DV LEAP) and
Professor of Clinical Law
George Washington University Law School
2000 G Street, N.W.
Washington, D.C. 20052
202-994-2278

Elizabeth S. Liu (D.C. Bar No. 482566)
Domestic Violence Legal Empowerment
and Appeals Project (DV LEAP)
2000 G Street, NW
Washington, D.C. 20052
202-994-4306

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICI CURIAE

The following organizations respectfully submit this brief as *Amici Curiae* in support of the Appellee. Each of the Amici regularly work with clients who seek, have sought, or will in the future seek, to have civil protection orders ("CPOs") enforced by contempt or misdemeanor prosecutions in the D.C. Superior Court. These clients would be profoundly harmed should this Court recognize a consent defense. Recognition of a consent defense would send a message to the lower courts that victims should pay a price for any real or perceived ambivalence with regard to CPOs and their batterers and victims' ability to enforce their CPOs would be significantly undermined.

The **Domestic Violence Legal Empowerment and Appeals Project (DV LEAP),** a non-profit organization, was founded in 2003 by one of the nation's leading domestic violence lawyers and scholars. DV LEAP's mission is to enforce battered women's and their children's constitutional and legal rights and to promote fairness for victims and defendants by providing expert representation to appeal unjust trial court decisions. Systematic and sophisticated appellate is critically needed to provide the legal rights of and provide safety and justice for victims of domestic violence. DV LEAP fills this vacuum 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, we also accept 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.

Ayuda is the District of Columbia's leading source of multilingual legal and social assistance for low-income Latinos and foreign-born persons in domestic violence, family law, immigration, and human trafficking. For over 30 years, immigrants in the greater D.C. area have

turned to Ayuda ("help") in Spanish for legal representation and advice to protect their rights and address their grievances. In fact, Ayuda, a non-profit organization, is the only agency that serves low-income immigrant clients on a walk-in basis in the entire metro area. While Ayuda has a history of serving the Latino community, it also represents a substantial number of individuals from Africa, Asia, and Eastern Europe. Ayuda is a safe, trusted community space where victims of violence can turn to for culturally sensitive help to navigate the legal system, resolve their immigration status and gain access to social service benefits.

Break the Cycle is an innovative national nonprofit organization whose mission is to engage, educate, and empower youth to build lives and communities free from domestic and dating violence. Break the Cycle achieves this mission by providing young people ages 12 to 24, with preventive education, free legal services, advocacy and support. With offices in Los Angeles and Washington DC, Break the Cycle works on both a national and a local level to empower youth to end domestic violence, providing a continuum of services to youth including educational programs about domestic violence and free legal advice, counsel and representation to young people who are experiencing abuse in their relationships or homes in protective order cases and related family law matters.

The **District of Columbia Coalition Against Domestic Violence (DCCADV)**, founded in 1986 and incorporated in the District of Columbia, is a non-profit organization serving as the professional association for the District's domestic violence service providers and is the primary representative of battered women and their children in the public policy arena. Members of DCCADV share the goal of ending domestic violence through community education, outreach, public policy development, and services for survivors. DCCADV is extremely interested in

assuring that the judicial system adequately protects the rights of domestic violence victims and vulnerable, at-risk children.

Women Empowered Against Violence (WEAVE) is a non-profit organization that engages the metropolitan Washington Dc community in the elimination of intimate partner violence and other forms of gender based violence through empowering, innovative, holistic and services. WEAVE works closely with survivors of relationship violence and abuse, providing an innovative range of legal, counseling, economic and educational services that lead survivors to utilize their inner and community resources, achieve safety for themselves and their children, and live empowered lives. Through our legal services program, WEAVE has assisted thousands of domestic violence survivors seeking to protect themselves by obtaining Civil Protection Orders (CPOs) and contempt enforcement of those orders against their abusers.

Survivors and Advocates for Empowerment (SAFE), Inc. is a non-profit community-based direct services organization providing assistance to more than 5,000 domestic violence survivors per year who seek services through the DC Superior Court and local law enforcement. SAFE's mission is to ensure the safety and self-determination of domestic violence survivors in Washington, DC through emergency services, court advocacy and system reform. The assistance that SAFE provides includes safety planning, crisis intervention, lethality assessments, legal information about the civil protection order process, assistance writing petitions for pro se petitioners, court accompaniment, and criminal system advocacy as well as advocacy and referrals with social service and government agencies to ensure survivor safety and offender accountability. Nearly 85% of these survivors appear pro se using the legal information provided by their SAFE advocates. SAFE strongly believes that offender accountability is crucial to survivor safety, and that proper enforcement of domestic violence laws through

successful use of the police, and the court system are critical tools that empower survivors to maintain their safety and stability.

Lisa Vollendorf Martin is a faculty member at the Columbus School of Law at the Catholic University of America, where she co-teaches the Families and the Law Clinic, one of the first law school clinical programs in the United States designed to address the issue of domestic violence through individual representation, community outreach and education, and legislative advocacy. Professor Martin also publishes articles, conducts trainings and workshops, and advocates for law and policy reform regarding domestic violence. Professor Martin received a J.D. from the Georgetown University Law Center and a B.A. from the College of William and Mary.

Margaret Martin Barry is a Professor of Law at Columbus School of Law, the Catholic University of America. She has taught in the school's General Practice and Families and the Law Clinics for over 20 years. The Families and the Law Clinic serves victims of domestic violence in the District of Columbia community. In addition to her teaching and supervision of students in the clinical program, Professor Barry has written in the areas of domestic violence and family law. As a result of her work, Professor Barry is particularly concerned with the integrity of the protective orders issued by the Court and the victim's role with regard to effective enforcement.

Catherine F. Klein is Professor of Law at the Catholic University of America and Director of Columbus Community Legal Services, the law school's live-client clinical program. She is also Co-Director of the Families and the Law Clinic at Catholic University, one of the first law school clinical programs in the United States designed to address the issue of domestic violence through individual representation, community outreach and education and legislative advocacy. Professor Klein has published numerous articles and organized many workshops and

trainings on the legal responses to domestic violence. Professor Klein received her J.D. from the University of Cincinnati College of Law and a B.A. from Northwestern University, with a degree in philosophy. She was elected to the Order of the Coif and Phi Beta Kappa.

STATEMENT OF THE CASE

Amici adopt the Counterstatement of the Case provided by Appellee in its Brief to this Court on November 4th, 2010. Amici note the trial court's finding that even if the Appellant believed that it was permissible for him initially to go to her house, "when he returned after the cutting and kicked the door, he should have known that he was in violation of a court order." Tr. 124.

SUMMARY OF ARGUMENT

Amici, a number of DC-area domestic violence organizations and clinical law professors with expertise in representation and advocacy for victims of domestic violence in civil protection order litigation, submit this brief in support of the United States. The primary issue before this Court is the so-called "consent defense" to a Civil Protection Order ("CPO") violation. Amici submit that such a defense – especially as invoked here - is legally untenable, profoundly destructive of the purposes of the IntraFamily Offenses Act, and cannot be meaningfully applied. Such a defense would make CPO enforcement (by either the State or the private party) a losing proposition, because a respondent's mere assertion – true or not – that a petitioner consented to a violation will be sufficient in many cases to create "reasonable doubt."

Amici differ slightly with the government in the framing of one issue: The suggestion that deciding the validity of a consent defense can be avoided because any such consent was "revoked" by the time of the charged conduct. Brief of Appellee at 9. Amici agree that it seems undeniable that there was no consent to the charged conduct. Therefore, we also agree that the question of whether consent to *a particular violation* could be a defense to *that violation* is not presented here. *See* Brief of Appellee at 9 (it is clear petitioner did not consent to the charged conduct). Moreover, this question need not be resolved proactively, as it is not likely to arise in

the future.[1] However, Amici believe a "revocation" analysis is both inappropriate and unnecessary. It is inappropriate for two reasons: First, the idea of "revocation" is impracticable and unrealistic in context of abusive relationships in which both coercion and ambivalence are inherent, change is constant, and intentions are unformed, unstated and constrained. Second, and more importantly, a second[2] revocation ruling will strengthen the appearance – without the benefit of thorough analysis - that this Court has in fact implicitly recognized the validity of a consent defense. *See, e.g.,* Brief of Appellant at 8 (stating that a consent defense is "available to those charged under Section 1005(f)"). Such a significant inroad on CPO enforcement should not be adopted *sub silentio,* without a full and explicit deliberative process.

Finally, the "revocation" approach is also *unnecessary* because the Court can cabin its ruling and avoid ruling on whether "consent" could ever be a defense, by treating these facts as more appropriately presenting a question of waiver. Mr. Clark's position here necessarily is that *any consent to a particular violation waives* the *order as a whole.* Given that a waiver of legal rights must be 'knowing and intelligent," and cannot be implied, it becomes clear that Appellant's claim here is untenable.

ARGUMENT

This brief argues first that as a legal matter, individual consent can never waive enforceability of a court order regardless of who prosecutes it; next that it would violate public policy to adopt such a defense; and finally, that, insofar as the petitioner's alleged "consent" here

---

[1] Given their ambivalence and the obstacles victims face in pursuing CPO enforcement, prosecution of violations to which the petitioner consented are particularly unlikely to arise. *See* Section III, *infra.*

[2] The first such ruling (arguably dicta) was issued in Ba v. United States, 809 A.2d 1178 (D.C. 2002).

was not to the charged conduct itself, defendant's argument is really one of "waiver" rather than consent, and as such must fail.

I. A PRIVATE PARTY CANNOT WAIVE THE ENFORCEABILITY OF A COURT ORDER, REGARDLESS OF WHETHER THE CONTEMPT ACTION IS LITIGATED BY THE STATE OR THE PRIVATE VICTIM.

The defendant erroneously suggests, without citation to authority, that a consent defense already has been adopted in this jurisdiction for contempt prosecutions brought by the private victim. Brief for Appellant at 8.[3] Amici agree with the government's responses explaining why a private party cannot render a court order unenforceable. Brief for Appellee at 8-12 and note 9. The government, understandably, also emphasizes that a consent defense cannot be squared with the government's independent right to pursue violations as a misdemeanor. *Id.* at 12-13, 20. Amici wish to emphasize that, regardless of whether the government or the petitioner brings the enforcement action, a consent defense is untenable.

Amici submit that it does not matter who litigates the case – no contempt or protection order violation can be defended against on grounds that the aggrieved party "consented" to the violation. First, neither party's intention or belief in consent can render an order unenforceable because such intent does not negate the elements of a protection order violation – a general intent offense - under D.C. law. Both the misdemeanor for violation of a protection order and criminal contempt require identical elements: (1) willful (2) violation of a CPO. Grant v. United States, 734 A.2d 174, 176 (1999) (citing Mabry v. Demery, 707 A.2d 49, 51 (D.C. 1998)). This Court has repeatedly affirmed that proof of "willfulness" requires only knowledge of the order and intent to act in violation. Grant, 734 A.2d at 177 n.6; Jones v. Harkness, 709 A.3d 722, 723-24

[3] As the government notes, the Ba Court expressly refused to decide whether a consent defense is available to defendants accused of CPO violations, whether privately or publicly litigated. Brief of Appellee at 9; citing Ba v. United States, 809 A.2d 1178, 1183 (D.C. 2002).

(D.C. 1998)(rejecting appellant's claim that his psychological disorder which purportedly compelled his repeated contacts of petitioner, rendered his conduct not "willful"); In re Wiggins, 359 A.2d 579, 581 (D.C. 1976)("[h]aving conceded ... that he had knowingly violated two conditions of his release, appellant in effect confessed to contemptuous conduct"). Thus, as a matter of law, an opposing party's "consent" *cannot* negate an element of criminal contempt (or misdemeanor violation): It neither negates the contumacious conduct nor the "willfulness," so long as the respondent knows that the order exists and prohibits his conduct.[4]

The absence of any mens rea requirement other than knowledge of the order is reflective of the purpose of contempt or misdemeanor violation of a CPO: vindication of the court's authority, and punishment of breaches of that authority.[5] "The ability to punish disobedience to judicial orders is regarded as essential in ensuring that the Judiciary has a means to vindicate its own authority ..." Young v. U.S. Ex Rel. Vuitton et Fils S.A., 107 S.Ct. 2124, 2131 (1987). Thus, "[c]riminal contempt ... is a sanction imposed to punish a contemnor for intentionally violating a court order." Mabry v. Demery, *supra* at 51, citing Zapata v. Zapata, 499 A.2d 905,908 (D.C.

---

[4] The Model Penal Code confirms that consent can only be a defense "when it is logically relevant either to negative a prescribed element of the offense or to preclude the occurrence of the harm or evil that the law defining the offense seeks to prevent. . . However, it is not a defense in other situations where the law has objectives that go beyond the interests that may be asserted by an identifiable victim." Model Penal Code, Sec. 2.11, Comment I (1980-1985). *See also* Keith M. Harrison, "Law, Order, and the Consent Defense," 12 St. Louis U. Pub. L. Rev. 477 (1993)("Generally the consent of an individual victim of a crime will not operate as a defense to a criminal prosecution unless the lack of the individual victim's willing, capable, and informed consent is an element of the charged offense, such as in the crimes of rape or larceny")(footnotes omitted).

[5] The fact that criminal contempt may also benefit the private opposing party, Ba, 809 A.2d at 1183, does not negate this difference between criminal and civil contempt. *See* Gompers v. Bucks Stove & Range Company, 221 U.S. 418, 441-443 (1911) (while criminal contempt sanction such as imprisonment may also have "remedial" effects benefiting the complainant, it remains distinct from civil contempt, in which the coercive sanction is designed purely to remedy the harm to the complainant from the violation). *See also* Brief for Appellee at 16 (citations omitted).

1985)(internal citations omitted). Because the power to enforce its orders by contempt is "inherent" in "the judicial function," Young at 2131, the Supreme Court has held that "[c]ourts cannot be at the mercy of another branch in deciding whether such proceedings should be initiated." Young, *supra*, 107 S.Ct. at 2131-34 (upholding federal courts' power to appoint a private prosecutor of contempt to enforce violations of their orders, even where the executive branch declines to prosecute). It is axiomatic that if the executive branch may not, in its exercise of prosecutorial discretion, negate the court's ability to enforce its orders, neither may a private party by his or her conduct.

Rather, once a court order is issued, only the *Court* can render it unenforceable, by modifying or vacating it after a proper adjudication. Any other rule delivers the authority of the Court into the hands of private litigants. Gompers, *supra,* 221 U.S. at 450 ("'the judicial power of the United States' would be a mere mockery" if a private party could "make himself a judge of the validity of orders").[6] Thus, even an invalid order "issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." United States v. United Mine Workers of America, 330 U.S. 258, 293 (1947); Walker v. City of Birmingham, 388 U.S. 307, 320 (1967).[7]

---

[6] Accord, People v. Townsend, 538 N.E.2d 1297, 1299, 183 Ill. App.3d 268, 271 (Ill. App. 1989)("Orders of protection are orders of the court, not orders of the victims"); State v. Washington, 726 A.2d 326, 328, 331 (N.J. Super. 1998)("This Court does not believe that the conduct of the parties to a domestic violence order can serve as a defense to a contempt charge. Courts must control the operation of their own orders. An order of a court must be obeyed unless and until a court acts to change or rescind it ... defendants are protected by procedure for vacating order")(citation omitted); State v. Dejarlais, 969 P.2d 90, 93 (Wash. 1998) (en banc)(consent defense would allow "de facto" modification rather than the legislatively required notice, hearing, and court determination).

[7] Accord, New Jersey v. Sanders, 327 N.J. Super. 385, 743 A.2d 385 (2000)("We conclude it is irrelevant in a criminal contempt proceeding whether the temporary restraining order in effect at the time of the violation is later vacated or dismissed..."); Jacko v. Alaska, 981 P.2d 1075 (1999)("even though a person may rightly believe that a court made a mistake of fact or law when it issued a restraining order, the person to whom the restraining order is directed must obey

In direct contradiction to these fundamental principles, adoption of a consent defense would set a private party up as arbiter of the validity of the order and its enforceability. Defendant's argument suggests that if a CPO respondent is lucky enough to obtain consent to his initial violation of the order – or even merely to credibly claim such consent was given – he will have engineered the vacating of his own order. However, to Amici's knowledge, no court has ever held that a party to a court order may *waive* the order such that it becomes unenforceable. Rather, not surprisingly, all courts addressing this question of which Amici are aware, have ruled that a court order remains in effect, and enforceable, until vacated or modified in effect until vacated or modified *by the court.* *See* Washington, *supra*, 726 A.2d at 331 ("it would be folly to allow a defendant in a domestic violence contempt matter to determine if a restraining order is in effect or if it is vacated because of a reconciliation"); State v. Kidder, 843 A.2d 312, 317(2004)(rejecting defendant's claim that his attorney's contact with victim constituted a "legitimate exception" to the no-contact order and stating, "we emphasize that protective orders are orders of the court, not orders of the victim, and neither the defendant, the victim, nor a representative of either party has the authority to approve exceptions to the order . . . If the defendant has a legitimate reason to contact the victim, he is not without remedy. He can petition the court for an exception to or modification of the restraining order"); Henly v. Iowa District Court for Emmett County, 533 N.W. 2d 199 (1995)(upholding criminal contempt enforcement even against victim who reconciled with respondent); People v. Barshney, 644 N.E.2d 791, (Ill. App. 1994)(even when beneficiaries of the order "decide they do not wish the benefits of the court order, persons subject to that court order are not relieved from obeying it"; holding that defendant's failure to complete court-ordered visits with children, despite their wish not to see her, constituted criminal contempt); Doe v. Lutz, 625 N.E.2d 325, 329 (Ill. App. 1993)(defendant's return (through agents) of opposing party's

---

the order until the person convinces the issuing court (or a higher court) to reverse or vacate the order").

phone call violated no-contact order); People v. Townsend, 538 N.E. 2d 1297, 1299 (Ill. App. 1989)("we do not agree that a victim's invitation to violate the court's order frees those contemnors from conviction for willful misconduct. A contrary result would lead to mockery of the powers granted the courts under the Act"); Reynoldsburg v. Eichenberger, 1990 WL 52467 (Ohio App.5 Dist. 1990) ("appellant admitted that he went to the marital residence. It was irrelevant whether appellant's wife gave her consent or not, because only the trial court could give appellant permission"); Cole v. Cole, 556 N.Y.S.2d 217 (N.Y. Fam. Ct. 1990)(enforcement of protection order not waived after consent ceased, where parties had consensually cohabited); Kammerman v. Kammerman, 543 A.2d 794, 798-99 (D.C. 1988)(court will not "permit anyone affected by the order to set up his own judgment against that of the court"). *See also* NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES: A MODEL STATE CODE 30 (1994)(underscoring "the principle that court orders may only be modified by judges and [rejecting] the notion that any party, by his or her conduct, can set aside or modify the terms and conditions of any order for protection"); State v. Branson, 167 P. 3d 370, 373 (Kan. Ct. App. 2008)("nothing in the language of [the statute] suggests a legislative intent to excuse an abuser just because the victim later consents to contact in violation of the PFA order. . ."); State v. Dejarlais, 969 P.2d 90, 91 ("The statute, when read as a whole, makes clear that consent should not be a defense to violating a domestic violence protection order"); Brief of Appellee at 15-17.

In short, it is simply not consistent with judicial authority for a private party to be permitted to waive enforcement of a court order, under any circumstance.

II. A CONSENT DEFENSE FOR PROTECTION ORDER VIOLATIONS IS AGAINST PUBLIC POLICY.

As a general rule, a consent defense to a crime is precluded where it would be against public policy, and "[t]he great weight of authority disfavors the defense of consent in assault

cases" because "criminal statutes are enacted to protect citizens and to prevent breaches of the public peace." State v. Mackrill, 345 Mont. 469, 477 (Mont. 2008)(citations omitted).[8] Allowing a consent defense to violations of civil protection orders would violate public policy in two critical respects: First, by generally undermining the binding authority of the court, *see supra* pp. 3-7 , Brief of Appellee at 15-17; and second, by undermining the purpose and public policy underlying the Intrafamily Offenses Act, which is to provide legal protection to vulnerable individuals from domestic violence through the issuance and enforcement of civil protection orders. *See* Cloutterbuck v. Cloutterbuck, 556 A.2d 1082, 1086 (D.C. App. 1989) (recognizing "substantial public policy interest protecting the victims of domestic violence through a simple and expeditious proceeding"); Murphy v. Okeke, 951 A.2d 783 (D.C. App. 2008)(the Intrafamily Offenses Act was designed to counteract the abuse and exploitation of women)(citations omitted). The following discussion addresses this second concern.

Adoption of a "consent defense" would directly contradict the purpose and function of the IntraFamily Offenses Act in two ways: First, it would encourage respondents to disregard the no-contact, stay-away, and other provisions of CPOs, in an effort to obtain "consent" to contact, and/or to stage contact which could then be claimed to have been consented. Second, it

---

[8] *See also* Baxter v. State, 224 P.3d 1211 (Mont. 2009)(rejecting consent defense where wife agreed to let husband assault her if she consumed alcohol, because "doing of a particular act is a crime regardless of the consent of anyone, consent is obviously no excuse...")(citation omitted); People v. Meza, 2009 WL 861493 (Ca. 2009)("we see no merit in appellant's contention that consent is a valid defense to the crime of spousal abuse")(unpublished). *See also* People v. Jovanovic, 700 N.Y. S. 2d 156 (App. Div. 1st Dep't. 1999)(as a matter of public policy a person cannot avoid criminal responsibility for assault that causes injury or carries risk of serious harm, even if victim asked for or consented to the act); State v. Hiott, 987 P.2d 135 (Wash. App. Ct. 1999)(where two minors play with BB guns, victim's consent would not constitute a defense because the game was not a formal "athletic contest"); Helton v. State, 624 N.E.2d 499 (Ind. App. 1993)(consent defense not available to defendant who struck new gang member's head as part of initiation ritual, despite victim's advance consent); State v. Dunham, 118 Ohio App. 3d 724, 693 N.E. 2d 1175 (1st Dist. Hamilton County 1997)(no consent defense to assault despite fact defendant and victim agreed to fight each other).

would be difficult, if not impossible, to overcome even a false claim of consent, making CPOs virtually impossible to enforce.

A. A Consent Defense Encourages Respondents to Contact Petitioners.

Contrary to the intent of the IntraFamily Offenses Act, which is to provide legal intervention to stop ongoing abuse in relationships, the recognition of a "consent defense" contemplates respondents making at least an initial contact, *to see if the petitioner consents.* In other words, a consent defense is *predicated on an initial violation* of a CPO, and endorses the contemnor's "own act of disobedience" to "set aside the order." Gompers, 221 U.S. at 418. Even if the defense were not predicated, remarkably, on an initial violation, it would still be bad policy: It gives abusers a green light to attempt "reconciliation" and to pursue contact, both because it legally validates any "reconciliation" or consent the respondent can obtain from the petitioner, and because it makes it far more difficult to convict for violation of the CPO. Even if a petitioner does *not* consent, a respondent can assert that she did, or that he believed she had, and create "reasonable doubt" sufficient to escape contempt liability.[9] *See* Davis v. United States, 834 A.2d 861, 867 (D.C. 2003)(reversing CPO contempt conviction because beyond a reasonable doubt standard requires "near certitude" of guilt)(citations omitted). Moreover,

[9] Although the court below found that defendant "should have known that he was in violation" when he returned the second time, Tr. 124, and the Ba court held that the respondent "clearly knew" there was no consent to his contact on that date and at that time, Ba, 809 A.2d at 1183, such findings reflect – rather than either party's subjective intent or understanding – the courts' own inferences about the reasonableness of the respondent's conduct. For instance, it is not necessarily clear that the respondent in Ba, who had lived with the petitioner for months after entry of the CPO, actually knew for sure that his return to her residence would be "unconsented" to. Moreover, it would be easy to imagine circumstances where the petitioner had not actually consented, but a court decided that the circumstances justified the respondent's belief that she had, or the court itself simply believed that her conduct was sufficiently confusing to relieve the defendant of liability. A defense that is so subjective should not be grounds for rendering a court order meaningless– nor is it fair to *either* party to have the determination of enforceability subject to such after-the-fact judgments.

whether an initial contact is sincere and non-violent or, as in many cases, manipulative, coercive, or even violent, the defense actually indicates that such a contact *might* be legally condoned, thereby encouraging contact in defiance of a given order.

The importance of ensuring that abusers cannot control a legal intervention by controlling the victim is widely understood in other parts of the justice system. For instance, many prosecutors' offices, including the U.S. Attorney's Office, have adopted "no-drop" policies which make clear that the prosecution decision is not made by the victim (after the initial complaint). See Casey G. Gwinn & Anne O'Dell, "Stopping the Violence: The Role of Police Officer and the Prosecutor," 20 Western State U. L. Rev. 297 (1993). The purpose of such policies is to remove the abuser's incentive for further abuse, threats, or sweet-talking, by eliminating the victim's control over whether the prosecution goes forward. Gwinn, *supra* at 310. It would be strange indeed if this jurisdiction adopted a "consent defense" to CPO violations which would serve precisely the *opposite* end: *increasing* abusers' incentives to threaten, coerce or sweet-talk.

Amici recognize that the idea of a consent defense is appealing for two reasons: (i) the view that victims should not be free to "frustrate the CPO", Ba, *supra* at 1183, by engaging in conduct inconsistent with the order, and (ii) the concern that it is unfair to a respondent to be punished for a violation which a petitioner has condoned or invited. *See, e.g.,* Brief of Appellant at 9-10 (arguing it is "unjust" to grant contempt relief to a consenting victim). While these concerns are understandable, they are easily and best addressed by the legal avenue that already exists: Either party may ask the court to vacate or modify the CPO. D.C. Code Section 16-1005 (d) ("[U]pon motion of any party to the original proceeding," the court may "extend, rescind, or modify the order for good cause shown"); Kidder, *supra* at 317 ("[i]f the defendant has a

legitimate reason to contact the victim . . . [h] can petition the court for an exception to or modification of the restraining order"). Requiring a judicial proceeding before the Order is changed is important because (i) it respects the authority of the court; (ii) it offers the opportunity for the court to ensure that the victim does affirmatively want to vacate or modify the CPO, and that she is not being coerced or pressured to do so by the Respondent, a concern this jurisdiction has long recognized Norman v. Norman, 113 Daily Wash. L. Rptr . 1517, 1520 (July 29, 1985)(rejecting petitioner's oral request to vacate CPO on grounds of the severe violence leading to the CPO and the respondent's initiation of post-CPO contact, and stating ""one of the most prominent such emotions is ambivalence. . . even among those who- at least on the surface – seem physically, mentally and emotionally self-sufficient"); (iii) it offers the respondent the opportunity to demonstrate that the petitioner's conduct is rendering the CPO unfair; and (iv) it provides the trial court with the opportunity to provide oversight of its own orders, and to ensure that the Respondent fully understands what conduct is and is not permitted under the CPO. Defendant's alternative – allowing an order to be retroactively abrogated, based on subjective and retroactive judgments of "consent," would create far greater injustice and harm to public policy and the authority of the court, than would merely requiring the parties to follow the existing orderly lawful process for lifting or modifying the order. *See* Finn and Colson, *supra* at 53 (reporting judges' concerns about victims allowing contact and urging that modification procedures be followed).

B. A Consent Defense Would Be Impossible to Apply Accurately.

Even if a consent defense were legally permissible, it is not capable of fair implementation as a practical matter. It is virtually impossible to assess "consent" accurately in domestic violence cases; the validity or autonomy of any alleged "consent" by victims of

domestic violence is in most cases questionable and in many cases unknowable. *See, e.g.,* Norman, *supra;* Torres v. Lancellotti, 607 A.2d 1375, 1377 (N.J. Super. 1992)(exploring six different factors to determine whether a reconciliation was [genuine], including the previous history, dangerousness, financial circumstances, the "best interests" of the victim, etc). Victims of abuse are frequently ambivalent about legal intervention and whether and how to end the relationship. *See generally* Sally F. Goldfarb, "Reconceiving Civil Protection Orderse for Domestic Violence: Can Law Help End the Abuse without Ending the Relationship?" 29 Cardozo L. Rev. 1487 (2008). This ambivalence may reflect not only mixed feelings toward their intimate partner but also, more significantly, fear. It is well-documented that "the most dangerous time for battered women is when they attempt to separate from their abusers." *See* Catherine Klein & Leslye Orloff, "Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law," 21:4 Hofstra L. Rev. 810, 112 (1993)(hereinafter "Klein and Orloff"). Most battered women are well aware that saying "no," exerting their autonomy, or separating from their abuser may trigger retaliatory violence. Mahoney, *supra* at 58, 72 (1991) (women's risk of being killed increases by 75% after they leave batterer)(citations omitted).

Thus, for victims whose batterers seek further contact (i.e. most), there is no good choice: If they let the respondent back into their life, they risk further abuse – and if they reject his overtures or demands, they almost certainly incur his immediate wrath. Mahoney, *supra*, passim (coining phrase "separation assault" to describe domestic assaults as retaliation for women's efforts to separate). In short, whatever "consent" battered women give to contact with their batterer must be presumed to be at least partly coerced. Even where the batterer does not make explicit contemporaneous threats, some danger is almost always implicit, based on his past conduct and threats. Under these circumstances, "consent" is a chimera. Ultimately, given the

inherent ambivalence in most victim's situations, and the unavoidable backdrop of fear (whether spoken or unspoken), even *respondents* cannot be expected to necessarily "read" the victim's mind and know in advance whether she consents to contact. Retroactive judicial conclusions about victims' "consent" to CPO violations – and respondents' knowledge thereof - will be more a function of individual judges' predilections about how most women and men *should* behave in these situations, than an accurate assessment of meaningful "consent" (or "revocation").[10]

C. As a Significant Obstacle to Enforcement, a Consent Defense Would Exacerbate the Key Weakness in the CPO System.

Civil protection orders provide an important avenue for protecting victims of domestic violence. Klein & Orloff, *supra* at 811. CPO proceedings offer a critical opportunity to enlist the legal system to disrupt the abuser's pattern of control and subordination. Judith A. Smith, "Battered Non-Wives and Unequal Protection Order Coverage: A Call for Reform," 23 Yale L. & Pol'y Rev. 92, 120 (2005)(CPOs empower victims by giving them control in what is otherwise a "powerless situation") CPOs are effective in reducing repeat violence[11] both because they

---

[10] For example, in the Ba case, the trial court found that the Respondent's violation was "willful" because he came to the complainant's home "at that time of night", six weeks after the parties had last separated. 809 A.2d at 1181. However, it is not clear that Respondent was – or should have been – certain that his overture would be completely unwelcome, particularly given the recent history of "reconciliation" as found by the Court. Indeed, the court's "willfulness" finding appeared to express its own judgment that respondent *should not* have initiated at this hour in this manner, and *should have* "known" that her prior consent had been "revoked." This is an expression of the court's own judgment, not the respondent's own awareness.

[11] A National Center for State Courts study of three states found that 92.7% of survey respondents who obtained a CPO stated that they felt better and 80.5% stated that they felt safer. Susan L. Keilitz, Paula L. Hannaford, & Hillery S. Efkeman, "Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence," 1997 Nat'l Ctr. State Ct. Reports 37, available at http://tinyurl.com/NCSCSTUDY (last visited April 14, 2011) . Another study found that having a permanent protection order in effect was associated with a statistically significant 80% reduction in police-reported physical violence in the 12 months after an intimate partner violence incident. Victoria Holt et. al., "Civil Protection Orders and Risk of Subsequent Police-Report Violence" 288, No. 5 J. Amer. Med. Assoc. 593 (August 7, 2002). And the most

reflect a judicial command to the abuser to desist, and because they provide an authoritative legal and social statement of the injustice that has occurred which holds the abuser accountable for his violence. David M. Zlotnick, "Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders," 56 Ohio St. L.J. 1153, 1197 (1995) (Civil protection orders provide the opportunity for society to '"legitimiz[e] [victims'] claims of abuse and demonstrate[]...to [victims] that they have access to and the support of societal institutions."

While CPOs have proven surprisingly effective interventions in some respects (see n. 11, *supra*), their impact has been undermined by inadequate enforcement. There is "considerable anecdotal evidence . . . that some batterers flout civil protection orders with impunity." Peter Finn & Sasha Colson, U.S. Dept. of Justice, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE AND ENFORCEMENT 49 (1990). "The most serious limitation of civil protection orders observed in the study, however, is widespread lack of enforcement...[A]n order without enforcement at best offers scant protection and at worst increases the victim's danger by creating a false sense of security." *Id.* at 3, 49.

The same concern continues today. In the most recent federally funded study of the effectiveness of CPOs, the researchers found that protection orders were violated approximately half the time, and enforcement was inadequate. "In those cases with reported violations few perpetrators were arrested and even fewer had official charges that were noted in their court records. This trend was even greater for cases from the rural area." Logan, *supra* n. 13 at 156. The majority of recipients of protection orders indicated that the orders' effectiveness was based

---

recent study found that even among the 50% of protection order recipients that experienced violations, most said the abuse and their fear decreased. TK Logan et al., "The Kentucky Civil Protective Order Study: A Rural and Urban Multiple Perspective Study of Protective Order Violation Consequences, Responses, and Costs" (hereinafter "Logan") at 97-98 (2009), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/228350.pdf (last visited April 15, 2011).

on the perpetrator's fear of legal repercussions, which "underscores the importance of the criminal justice system response to protective order violations; if protective orders are violated without consequences this fear would be eliminated." *Id.* *See also* Zlotnick, *supra* 56 Ohio St. L.J. at 1194 ("lack of enforcement is still cited as the principal weakness of protection orders"); 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, 223-224, 228 (1993)(over 80% of those surveyed reported that police respond "slowly or ineffectively" to reports of protection order violations; 41.3% characterized the failure of police response as a "significant or very serious problem...[a]lmost three-fourths (70.9%) reported that prosecutors refuse to prosecute violations except in very limited circumstances").[12]

In short, enforcement of CPOs is already, as it has been from the beginning, the "Achilles heel" of the CPO system. Finn & Colson, *supra* at 49. Yet adoption of a consent defense would compound the difficulties: Even when victims (or the State) overcome the hurdles to bringing an enforcement action, permitting a consent defense will make it at best, difficult, and at worst, impossible, for the victim to prevail. And when courts find abusers not guilty -- especially if they do so on the ground that the victim (wrongfully) "consented" to the violation -- the message

[12] Local data indicate that police in the District of Columbia are no better and may be worse than the national norm. According to court statistics, DC police *made arrests for CPO violations in only 14% of CPOs in 2006 and 9% in 2005.* Given that the rate of CPO violations around the country is in the range of 50%, *cf.* Logan, *supra*, and that most petitioners call the police for violations of concern, *id.* at 161, this extremely low rate of arrests likely reflects police under-enforcement. D.C. police presented the U.S. Attorney's Office only 225 CPO violations in 2006 and 194 in 2005. Electronic mail from Kelly Higashi, Chief, Sexual Assault/Domestic Violence Unit, USAO, to Joan Meier, George Washington University Law School (Feb. 23, 2007, 18:41:24 and 20:07:48) (on file with author).

will be sent that the abuser did nothing wrong – or that she is to blame for his actions.[13] *See* Goldfarb, *supra,* 29 Cardozo L. Rev. at 1522. This would be a tragic development in a legal system that has only tenuously begun to provide – and still only erratically follows through on - recourse for victims of domestic violence. Victims of abuse already struggle to present their experiences in court, are often left intimidated, unheard, and/or disrespected, Logan, *supra* at 163 ("[t]he negative perceptions of women who obtain protective orders must be addressed"), and worn down by repeated delays and burdensome court processes. Barbara Hart, *Battered Women and the Criminal Justice System, in* DO ARRESTS AND RESTRAINING ORDERS WORK 100-102 (Eve S. Buzawa et. al. eds. 1996)("...some battered women, initially committed to prosecution, become discouraged with the criminal process because of delays...lack of witness protection...or prosecutor indifference or insensitivity"). When victims find their legal forays to be fruitless they are less likely to seek legal recourse in the future. If victims who try to have their orders

---

[13] Defendant's assertion (Brief of Appellant at 9-10) that a victim should be precluded from enforcing her CPO if her prior consent to violations means she has "unclean hands" explicitly proposes to blame the victim for the abuser's actions. Such a purely equitable claim is inapplicable in the criminal enforcement context. *See* Appellee's Brief at 19-20. There can be no question that criminal contempt, as a purely punitive retroactive sanction imposed to vindicate the authority of the court, is not equitable, but criminal. Hicks v. Feiock, 485 U.S. 624 ("if it is for criminal contempt, the sentence is punitive, to vindicate the authority of the court"), *quoting* Gompers, supra; Michaelson v. United States, 266 U.S. 42, 65 (1924)(purpose of criminal contempt is "to vindicate the authority of the court and punish the act of disobedience as a public wrong"); Davis, 834 A.2d at 866. Importing a "clean hands" doctrine into criminal contempt for CPO violations also fundamentally undermines the Act's clear purpose of protecting – and not blaming – victims for abuse. *See* Murphy v. Okeke, 951 A.2d 783, 790 (issuance of a civil protection order against a victim was improper because "[t]he suggestion that a victim of domestic violence brings the harm on herself...shifts the responsibility for the abuse onto the victim and does not hold the abuser accountable"). National expert bodies in the domestic violence field have long cautioned against this kind of victim-blaming when an abuser violates a protection order. *See* National Council of Juvenile and Family Court Judges, CIVIL PROTECTION ORDERS: A GUIDE FOR IMPROVING PRACTICE 7, 13 (2010) (recommending that courts avoid that penalize victims for violations of protection orders and urging judges to "[r]efrain from using language that accuses a victim of violating her own protection order").

enforced learn that they will be blamed for the violations and/or it is virtually impossible to succeed, not only will they be unlikely to try again, they will learn that their CPOs are no more than "just a piece of paper." Logan, *supra* at 6.

III. THE APPROPRIATE ANALYSIS DOES NOT CONCERN CONSENT OR REVOCATION OF CONSENT, BUT RATHER WAIVER.

As in the Ba case, the acts for which defendant was arrested and prosecuted here, standing outside her home and "hollering" and kicking the door hard enough to damage it (after she earlier cut him with her knife and ran away after he grabbed her), were clearly not acts to which the petitioner consented.[14] *See also* Ba, 809 A.2d at 1183. However, Amici urge this Court, should it reject defendant's claimed consent defense on these facts, to resolve this case pursuant to a "waiver" theory rather than the Ba court's "revocation" theory, for three reasons.

First, the difficulty of accurately discerning "consent" in domestic violence cases is compounded when trying to discern whether such purported consent has been "revoked." Since any purported revocations in this context will never be written or explicit, these determinations would inevitably rest on a court's inferences about each party's unspoken intent or what their conduct communicated, and about each party's understandings of each other's intent or what their conduct meant. Such mercurial and subjective determinations – particularly in a relationship marred by a history of abuse - are far too idiosyncratic a basis on which to render a court's order unenforceable.

Second and more important, since any "revocation" means there was a prior "consent," the development of a line of appellate decisions invoking a "revocation" theory will all too easily

[14] The defendant does not claim that she consented to these acts, nor would it be a plausible claim. *See* Brief of Appellee at 9; Jarvis v. Palmer, 2008 WL 3285767 (E.D. Mich. 2008)(no error in trial court's omission of consent defense instruction, where no reasonable jury could have concluded the victim consented to the level of violence inflicted upon her by defendant).

be construed to indicate that the Court has acknowledged a consent defense *sub silentio* even as it sidesteps the fundamental questions raised by such a defense. *See, e.g.,* Brief of Appellant at 8. Amici submit that litigants under the IntraFamily Offenses Act deserve a more direct and transparent determination of these significant questions.

Finally, it is unnecessary for this Court to reach the question of whether any kind of "consent defense" can ever apply to a CPO violation – because where, as here, the charged conduct was concededly[15] not consented to, the claim is properly not one of "consent," but one of "waiver." That is, as in the Ba case, defendant here does not claim that petitioner consented to the charged violations – rather he claims that because the petitioner *previously* consented to particular contacts in violation of the CPO,[16] she essentially waived all *future* enforcement, or "voided" the CPO. Brief of Appellant at 7-8; Tr. 61; Brief of Appellee at 5. The question, then, is not whether she "consented," but whether by consenting to previous non-violent violations she could thereby have "waived" enforcement of the order, for all time, and in all respects.

Defendant points to no authority to support such a claim. Nor could he, because waiver of legal rights is well-recognized as constituting the "intentional relinquishment or abandonment of a known right," which requires a "knowing, intelligent" decision. Thus, in Estate of Starr, 443 A.2d 533 (D.C. 1982), this Court held that a broker could not knowingly and intelligently - and thereby legally – have waived her brokerage fee, despite her explicit agreement to do so, where she "clearly did not know of a court procedure" which might have allowed her to maintain her commission. *Id.* at 539. The facts here are even weaker for application of a waiver of a legal

---

[15] This argument applies does not depend on whether defendant concedes the lack of consent to the charged conduct, but on whether the Court agrees with the government's and trial court's view of this fact.

[16] Amici take no position on the factual question of whether petitioner actually consented to the prior contacts, and to what extent.

right: There is no suggestion here that petitioner ever suggested that she intended to waive the CPO in all respects, even if she had the legal power to do so. On the contrary, by calling the police and reporting his CPO violation, she clearly indicated that she thought the CPO was still in effect and wanted it enforced. Nor has there been any assertion that by consenting to contact at one point she thereby demonstrated that she did not care if defendant committed other, more violent violations. In short, if defendant's claim is analyzed – as Amici believe it must be -- as an assertion that petitioner "knowingly and intelligently" waived her right to later enforcement, its invalidity becomes apparent.

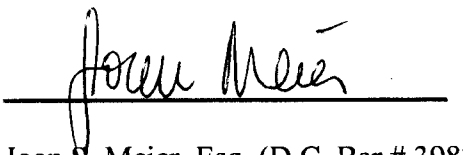
Finally, the Court does not need to reach the larger question of whether a consent defense can *ever* be appropriate even where the victim consented to the particular violation being prosecuted, because such a case is unlikely to arise. In their many collective years of practice under the IntraFamily Offenses Act, Amici have not seen Petitioners report or seek contempt enforcement for conduct to which they consented, although they have seen many Respondents claim consent when defending against contempt litigation. One reason for this is that going to court is a stressful, time-consuming and unpleasant process - victims of abuse do not seek court intervention without reluctance and difficulty: "[O]btaining a protective order and seeking enforcement of a protective order take courage and persistence to overcome obstacles." Logan, *supra* at 6. As in this case, Petitioners generally pursue contempt enforcement only when they feel they must, for their own safety, after *un-consented* violent or threatening conduct, such as assaults, threats or harassment. *See* Goldfarb, *supra,* 29 Cardozo L. Rev. at 1521-22 ("many women are reluctant to impose criminal prosecution on their partners for a variety of financial, practical and emotional reasons"). Thus, if "consent" becomes a recognized defense, not only will it become much more difficult to prove a CPO violation, but that difficulty will arm abusers

with a powerful weapon against accountability, based on a problem that is at best, rare. Because a lawful and accessible avenue already exists to fully protect fairness to respondents, this Court should decline the invitation to open this floodgate.

Conclusion

This Court's acknowledgment that petitioner's purported consent could negate enforcement – even if such consent was "revoked" here – risks normalizing and validating a consent defense *sub silentio*, without fully weighing such a defense's destructive impact on the CPO process, and on judicial authority itself. For these reasons, Amici Curiae respectfully request that this Court affirm the decision below, but on the alternative "no waiver" grounds suggested herein.

Respectfully Submitted,

By: 

Joan S. Meier, Esq. (D.C. Bar # 398745)
Elizabeth Liu, Esq. (D.C. Bar # 482566)
DV LEAP
2000 G St. N.W.
Washington, D.C. 20052
(202)994-2278

On behalf of
Domestic Violence Legal Empowerment and Appeals Project (DV LEAP)
Ayuda
Break the Cycle
D.C. Coalition Against Domestic Violence
Survivors and Advocates for Empowerment (SAFE)
Women Empowered Against Violence (WEAVE)
Catherine F. Klein, Margaret Martin Barry, and Lisa Vollendorf Martin, Professors of Law,* Families and the Law Clinic, Columbus School of Law, Catholic University of America

*In their individual capacities

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 2011, I caused the foregoing Brief of Amici Curiae to be delivered by first class mail and electronic mail to

Joanne Vasco, Esq.
4102 Madison Street
Hyattsville, MD
20781-1754

and

Elizabeth Danello, Esq.
United States Attorney's Office
555 Fourth St. N.W., Room 8104
Washington, D.C. 20530

Joan Meier, Executive Director, DV LEAP