DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 11-FM-1467
2010-CPO-3646

IN RE MR. R,

APPELLANT

BRIEF OF AMICUS CURIAE DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT (DV LEAP) IN SUPPORT OF APPELLEE'S MOTION TO VACATE AND REMAND

CONSENTED TO BY BOTH PARTIES

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INTEREST OF AMICUS CURIAE

The **Domestic Violence Legal Empowerment and Appeals Project (DV LEAP),** a non-profit organization, was founded in the District of Columbia 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 at the appellate level. DV LEAP provides *pro bono* appeals, training, and strategic assistance to lawyers, courts, mental health professionals, and advocates. While DV LEAP prioritizes cases from the District of Columbia, it also accepts cases of substantial importance from other states. DV LEAP also organizes and spearhead the domestic violence community's advocacy in Supreme Court domestic violence litigation.

DV LEAP's founder began litigating civil protection order ("CPO") cases of behalf of victims in the District of Columbia in the 1990's, and has a deep appreciation of D.C.'s civil protection order system and its vital importance for victims of abuse. DV LEAP and its founder have filed *amicus* briefs in the DC Court of Appeals in numerous cases concerning contempt enforcement of CPOs, including *Green v. Green*, 642 A.2d 1275 (D.C. 1994), *Ba v. United States*, 809 A.2d 1178 (D.C. 2002), *Clark v. United States*, 28 A.3d 514 (2011), *In re Robertson I*, 940 A.2d 1050 (2008), *John Robertson v. United States ex rel. Wykenna Watson*, 130 S. Ct. 2184 (2011), *In re Robertson II*, 19 A.3d 751 (2011), *In re Patrice Taylor*, 10-FM-1167 (pending), *In re Robert Kimbrough*, 10-FM-890 (pending), *and In re Kevin Jackson*, No. 11-FM-1123 (pending).

SUMMARY OF ARGUMENT

Amicus Curiae, Domestic Violence Legal Empowerment and Appeals Project, respectfully submits this brief to offer the Court a broader perspective on the issue presented in this case. While *Amicus* agrees with the U.S. Attorney's Office that this judicially prosecuted contempt conviction was unfair to the Appellant, depriving him of an impartial fact-finder, we note that it was also likely detrimental to the victim. For both these reasons we support the U.S. Attorney's Office's request to vacate and remand the case, pursuant to this Court's supervisory authority.

Amicus further seeks to ensure that this Court is cognizant of the broader implications of any ruling limiting judicial management of show cause hearings. Should this Court choose to reverse the order below in whole or in part, we ask that the Court limit its ruling so as to ensure that judicially-initiated compliance (or "show-cause") hearings with appropriate constitutional protections remain a viable means of enforcement of certain "technical" violations of CPOs, as it is in other jurisdictions. This is especially critical and necessary for violations of system requirements such as batterer's counseling, which petitioners may either not know about or choose to pursue, and which are relatively simple to determine in a brief evidentiary hearing.[1]

[1] This argument is also developed in Brief and Appendix of *Amicus Curiae* Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) in Support of Neither Party, filed in *In re Kevin Jackson*, No. 11-FM-1123 (D.C. Feb. 27, 2012). In that case Appellant challenges the trial court's right to hold an evidentiary hearing to determine whether the defendant had violated the CPO provision requiring him to participate in batterer's counseling, as reported by the counseling program. While the USAO suggests in its Motion herein that the court's action in *Jackson* may have more problematic than the proceeding here, because there the victim had no role in initiating the contempt (cf. Appellee's Motion to Vacate and Remand, at fn. 11, p. 15), *Amici* take the opposite view: For a court to initiate a show cause hearing to hold a respondent accountable to the court's counseling order, based on the counseling program's notice of violations, as it did in *Jackson,* is both unremarkable and fully appropriate. *See* Brief and Appendix of *Amicus Curiae* Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) in Support of Neither Party, filed in *In re Kevin Jackson*, No. 11-FM-1123 (D.C. Feb. 27,

Within the domestic violence context, as well as other civil settings, judicially-initiated show cause hearings are an essential judicial tool to ensure compliance with and enforcement of civil protection orders. *Adams v. Ferreira,* 741 A.2d 1046 (D.C. 1999)(emphasizing trial court's authority to issue show cause orders and hold respondents in contempt for violations of civil protection orders, in this instance, the counseling provision). *See also In re Grand Jury Proceedings,* 875 F.2d 927, 934 (1st Cir. 1989) (holding that where "the evidence is so simple that the judge is not diverted from the role of impartial judge and factfinder, we are not convinced that a prosecutor must be appointed"); *compare* cases cited in U.S. Attorney's Office Motion to Vacate and Remand, pp. 17-18. However, judges' power to *sua sponte* hold an evidentiary hearing on CPO violations when there is neither a moving party nor an appointed attorney to prosecute the action should be limited to proceedings involving technical violations of those orders, such as the violations at issue in *Adams* (and *Jackson*). These violations are reported by the system, not the victim, and are factually straightforward (*In re Grand Jury Proceedings, supra*) - requiring neither an interested party nor appointed prosecutor to present the case. In such cases the court's commitment to enforcement of its order stands distinct and apart from the victim's interest. *Adams*, 741 A.2d at 1047. *But see also In re Shirley*, 28 A.3d. 506, 512 (D.C. 2011) (citing *Adams* for the proposition that a trial court "may *sua sponte* hold an

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2012). *See also Adams v. Ferreira, supra* (trial court held show cause on counseling violations after notification of non-compliance; Court of Appeals affirmed court's power to hold such a hearing *sua sponte*, but limited the court's authority to proceed *sua sponte* only on adjudications of contempt, rather than other civil remedies). In contrast, for a court to essentially try a case such as the one below, that requires discerning facts and violations rather than merely evidence of a cut and dried violation, is extraordinary, and arguably deprives both parties of procedural fairness. See Section I *infra.*

evidentiary hearing and find a defendant in contempt for violating a CPO" in context of *non-technical* violations to which the Appellant claimed the victim had "consented").[2]

However, where factually complex or ambiguous contempt allegations require the exercise of legal expertise and judgment to shape and present the case, that expertise and judgment cannot be provided by the judge. Defendants are entitled to an unbiased judge to adjudicate the facts and ensure a fair trial. Nor should victims be forced to have their case essentially framed and presented by the judge who does not actually know their facts, rather than an attorney whose role it is to prosecute valid contempt allegations. For these reasons, Amicus submits that both parties to this appeal are correct in charging that the proceeding below violated fundamental fairness.[3]

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[2] In other contempt cases initiated by the victim, the proceeding may be litigated by the victim's lawyer, *see In re Robertson*, 19 A.3d 751 (2011) ("*In re Robertson II*")(upholding prosecution of criminal contempt on behalf of the victim by the Office of the Attorney General), or, where simple and straightforward, by the victim *pro se*. In both contexts the judge remains the impartial fact-finder. If the judge feels that a *pro se* litigant is incapable of adequate presentation of the case without legal guidance and advice, counsel should be appointed – the judge should not assume those responsibilities.

[3] Amicus agrees with the U.S. Attorney's Office that this Court need not employ a constitutional due process analysis in order to establish a minimum of fair procedure in such cases. U.S. Attorney's Office Motion to Vacate and Remand at 19. This Court's supervisory authority is appropriately exercised in cases such as this, where the issue involves judicial conduct of a trial, the situation may be somewhat unusual, and where the full implications of a broad constitutional rule are not yet clear. *See, e.g., Young v. ex Rel. Vuitton et Fils SSA*, 481 U.S. 787 (1987 (utilizing supervisory authority to prohibit the "interested" prosecution of criminal contempt in federal courts); *In re Peak*, 759 A.2d 612 (D.C. 2000)(utilizing supervisory authority to adopt same rule in D.C., except for civil protection order cases). *See also* cases cited in U.S. Attorney's Office Motion to Vacate and Remand at 19.

ARGUMENT

I. FAILURE TO APPOINT AN ATTORNEY TO PROSECUTE A CRIMINAL CONTEMPT INVOLVING POTENTIALLY CONFUSING OR AMBIGUOUS VIOLATIONS IS HARMFUL TO BOTH PARTIES.

Where the factual complexity or ambiguity of alleged CPO violations require application of legal judgment and strategic expertise, a judge who attempts to exercise that judgment in the absence of a prosecutor is unlikely to be capable of remaining an impartial judicial fact-finder, and regardless, the *appearance* of impartiality is irrevocably destroyed. D.C. Code of Judicial Conduct Canon 1 (2012)("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety"). Furthermore, if the facts are sufficiently complex as to necessitate the degree of judicial intervention that occurred in this case, a victim should have the benefit of attorney guidance and legal judgment to develop the case and put forth the strongest claims and evidence to support those claims. This case involved precisely such complicated and ambiguous facts, and the trial court's assumption of the role of litigator as well as judge, was thus unfair to both parties.

A. The Trial Court's Simultaneous Assumption of the Role of Prosecutor and Fact Finder Deprived the Appellant of a Fair Proceeding.

Amicus adopts and supports the overview by the US Attorney's Office of the proceedings below, and the aspects thereof which caused the judge to be improperly in the simultaneous role of litigant and judge. U.S. Attorney's Office Motion to Vacate and Remand at 4 – 17. For instance, the judge not only conducted all direct examinations of the witnesses, but also chose which contempt allegations should proceed and which should not, how they should be framed, ruled on defense objections to the court's own questions, made objections to defense counsel's questions, and indicated that he would question the Appellant should he choose to testify. U.S. Attorney's Office Motion to Vacate and Remand at 15.

The trial court's role exceeded that of a judge merely managing the conduct of a trial or even assisting a *pro se* party. For instance, by shaping Ms. R's testimony, the court sought to build the case against Appellant, and also discarded claims it deemed insufficient as her testimony progressed. *See, e.g.*, August 16, 2011, Tr. 55-56 (striking victim's testimony about defendant stopping up her toilets); August 16, 2011, Tr. 60 (not allowing victim to explain connection between man and woman at her house and the defendant). When the trial court questioned Ms. R about the origin of an undated and unsigned letter offered into evidence, it purposefully elicited helpful testimony and overruled all the defense counsel objections to the court's line of questioning.[4] Throughout the testimony of the witnesses, the trial court

[4] Court: All right. Very well. Have you seen this handwriting before?
Ms. R: Yes.
Q: How so?
Mr. D: Objection.
Court: Overruled.
Q: Where have you seen this handwriting before?
A: With all his paperwork. He's my husband so I see it often—
Q: When you say, when you say all of his paperwork understand –
A: Okay.
Q: -- None of us lives with you.
A: Right. At home.
Q: So, you have to explain to me—
A: At home.
Q:-- what, and what type of paperwork?
Mr. D: Objection, leading.
Court: Overruled.
Q: Go ahead.
A: Any type of paper when he's writing I've seen it several times. I can tell his handwriting. I have many other letters but I don't have them with me.
Q: Okay, very well. I think I asked you this question before. It was about how long total you've been living together. How long did you actually live together out of the eight years that you previously mentioned.
A: Four.
(Pause).
Q: Now, I'm going to ask you the question that you attempted to ask, answer before. What, how do you, why do you assert that this violates the civil protection order?
A: He wasn't supposed to contact me at all.

purposefully extracted facts to substantiate the contempt charges, despite objections from defense counsel.[5]

Appellant chose not to take the stand because of jeopardy concerns and, it may be speculated, because of the court's statement that it would conduct questioning of Appellant after his direct examination. Oct. 27, 2011, Tr. 53, 55. While the court did not refer to this as a cross-examination, it seems likely that it would approximate one. This Court has made clear that such a partisan role may not be assumed by the judge. *See Williams v. United States*, 576 A.2d 1339, 1345 (D.C. 1990)(warning against "the apparent, if not actual, danger of conflicting roles . . . when the trial court acts as prosecutor, judge, and jury"); *United States v. Barbour,* 420 F.2d 1319, 1321 (D.C. 1969)(" the right to fair trial may be imperiled by an apparent breach of the atmosphere of judicial evenhandedness that should pervade the courtroom)(citations omitted).

B. The Trial Court also Harmed the Victim's Right to a Fair Trial by Acting as Prosecutor at Trial.

The court's decision not to appoint an attorney to prosecute the contempt but to interject himself to shape the presentation of testimony compromised Ms. R's opportunity to present a clear theory of her case and all allegations which might in fact have been meritorious.

No one – including the trial judge - could have a full understanding of Ms. R's claims without first discussing them with her in preparation for trial. An appointed attorney would have been able to effectively frame each issue, determine which claims were valid and/or lacked merit, and to strategize as to the manner of presentation. Thus, in the trial below, on several occasions Ms. R would present an issue, only to have the trial court dismiss it or not follow up

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August 16, 2011, Tr. 50-51.

[5] *See*, e.g., August 16, 2011, Tr. 39-41; August 16, 2011, Tr. 55-56; August 16, 2011, Tr. 74-76. In addition, the court told one witness how she could answer on cross-examination. October 27, 2011, Tr. 18-19.

on certain statements.[6] An attorney would have sorted through the allegations to help Ms. R focus on her strongest claims, avoided asserting unsubstantiated claims to the court, and elicited testimony about important facts that may have been missed by the trial court. [7]

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[6] In questioning the victim about whether the appellant was sabotaging the victim's home, the judge asked:

> Court: Okay, and so you are alleging that he did what now?
> Ms. R: They were entering my property, stopping up toilets.
> Q: Who was entering?
> A: I can't, you know, it's hard to say but I believe it was Mr. R.
> Q: Okay, and so you didn't see Mr. R enter your home?
> A: Uhn-uh.
> Q: There's no witness who is going to testify he entered the home?
> A: No. No but just the targeting of my home.
> Q: Okay, just a minute and was there any witness to testify, to observe something being placed in your toilet or your sewer causing the—
> A: No.
> Q: -- sewer line, causing it to back up?
> A: No.
> Q: Okay. Well, it seems to me, Ms. R, that on these issues there is insufficient information—
> A: Right.
> Q: For the Court to even consider these and so there won't be any need for cross-examination—
> A: Okay.
> Q: --because that's going, I'm ruling that these matters are stricken from the record.

August 16, 2011, Tr. 55-56.

[7] Amicus is not suggesting that *pro se* litigation of criminal contempts is always unfair or should be outlawed, nor that judges have no right to seek clarification of the testimony or allegations. However, where one side lacks representation, and this much assistance *to that side* is required to enable the court to determine and adjudicate the claims, *Amici* suggest that the only fair and proper way to proceed is to appoint an attorney to prosecute the contempt, consistent with *Robertson II*. DV LEAP notes, however, that it does not agree with either Appellant's or the US Attorney's Office's implication that only a "disinterested" attorney may prosecute a criminal contempt. Brief for Appellant at 23; U.S. Attorney's Office Motion to Vacate and Remand at 19. On the contrary, in *Robertson II*, this Court clearly rejected such a narrow view, holding instead that the victim could be *represented* by the Office of the Attorney General in bringing such an action. 19 A.3d at 759. However, since this question is not at issue here, for purposes of this case Amicus submits it does not matter whether an appointed counsel would be "independent" or represent the victim. In either case, legal judgment would be able to be brought to bear on the shaping of the case, would assist the victim's presentation of the contempt allegations, and would preserve both the appearance and reality of judicial impartiality.

By conducting the direct examination while necessarily lacking knowledge of Ms. R's evidence, the trial court unintentionally elicited testimony which Appellant used in an attempt to discredit Ms. R.[8] Although in this instance, the court chose to credit some allegations (Oct. 27, 2011 Tr. 27, 35), it was just as possible that by its unintentional eliciting of potentially unnecessary and confusing testimony, such a process would harm a victim's credibility unnecessarily, to the detriment of her valid claims.

In short, *Amicus* believes that both parties here were deprived of the opportunity to fully develop their cases when the trial judge failed to appoint an attorney and placed himself in the simultaneous roles of prosecutor and fact-finder. This Court should exercise its supervisory authority to rule such a procedure unlawful. *Cf.* p. 3, n. 3, *supra.* However, *Amicus* urges the

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[8] Despite the judge's striking of the victim's testimony regarding Appellant's systematic plotting against her house from the record (August 16, 2011, Tr. 55), defendant's counsel used that information in cross-examination to depict the victim as mentally unstable and therefore not a credible witness:

> Mr. D: Okay. Okay, and you said you wanted to see him behind bars, isn't that what you said?
> Ms. R: If he keeps stalking me.
> Q: By stalking you you mean sending the people to your mom's house?
> A: That.
> Q: And clogging up your toilet as well?
> A: That.
> Q: Okay.
> A: Running my tenants away.
> Q: Uh-huh.
> A: Stopping up my drain on the outside.
> Q: Uh-huh.
> A: Plotting. Having my tenant to move as if I stopped up my drain. Wouldn't fix my drain. My drain would never stop up in the basement.

August 16, 2011, Tr. 107. Because the court controlled the direct examination on these issues, Ms. R lacked an advocate who could help her explain to the court why she believed the appellant was involved, and thus why her statements might have been credible.

Court to consider the following discussion, before issuing a broad ruling outlawing *all* judicial show cause hearings without a prosecutorial attorney.

II. WITH PROPER PROCEDURAL SAFEGUARDS, SYSTEM INITIATED SHOW CAUSE HEARINGS ARE ESSENTIAL TO THE EFFECTIVENESS OF CIVIL PROTECTION ORDERS INVOLVING TECHNICAL VIOLATIONS.

A. Enforcement is the Critical Weakness in the CPO System

While CPOs have proven surprisingly effective interventions in some respects, there is "considerable anecdotal evidence . . . that some batterers flout civil protection orders with impunity." Peter Finn & Sarah Colson, U.S. Dept. of Justice, *Civil Protection Orders: Legislation, Current Court Practice and Enforcement* 49 (1990);[9] s*ee also* David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders,* 56 Ohio St. L.J. 1153, 1194 (1995) ("lack of enforcement is still cited as the principal weakness of protection orders"). Research has consistently shown that CPOs are violated approximately half the time. *See, e.g.*, T.K. Logan et al, *The Kentucky Civil Protection Order Study: A Rural and Urban Multiple Perspective Study of Protection Order Violation Consequences, Responses, and Costs* 97 (2009)(hereafter "Kentucky CPO Study")(*see* Appendix), https://www.ncjrs.gov/pdffiles1/nij/grants/228350.pdf (finding that during the six-month follow-up period after women obtained a protective order, half reported a violation of the protective order)(last visited May 30, 2012); Sally F. Goldfarb, *Reconceiving Civil Protection orders for Domestic Violence: Can Law Help End the Abuse without Ending the Relationship?* 29 Cardozo L. Rev. 1487, 1512 (2008) (citing a Colorado study that found sixty percent of women who obtained orders reported re-abuse during the following year and a Massachusetts study that found forty-nine percent of offenders re-abused their victims within two years).

[9] Authorities cited herein which are not easily accessible have been compiled in an Amicus Appendix attached hereto.

In the largest recent in-depth study of CPO enforcement**,** the majority of recipients of protection orders indicated that the orders' effectiveness depended on the perpetrator's fear of legal repercussions. The study concluded, "if protective orders are violated without consequences, this fear would be eliminated." Kentucky CPO Study, *supra* at 156. Other studies emphasize the same point. *See* Office for Victims of Crime, U.S. Dep't of Justice, NCJ 189190, Enforcement of Protective Orders (2002), available at https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin4/welcome.html (last visited May 30, 2012).

There thus can be no doubt that unequivocal, reliable enforcement of court orders is imperative if protective orders are to be taken seriously by offenders. *Id*. Enforcing orders through sanctions helps to maintain victim safety and to hold respondents accountable for changing their behavior. Numerous leading policy bodies in the domestic violence field affirm that this duty to enforce must be taken seriously by enforcement officers, judges and prosecutors to produce the best compliance results. *See* Stop Violence Against Women, *Promising Practices: Improving the Criminal Justice System's Response to Violence Against Women* 225-26 (2002)(*see* Appendix). Furthermore, third party compliance verification and judicial enforcement of offender compliance helps protect victims against the retaliation they often face if they are the sole agent of an enforcement action. *See Quincy Domestic Violence Community Response Manual* 41 (1997)(*see* Appendix).

Regular compliance review hearings for respondents have been shown to benefit overall compliance. *See* Nat'l Council of Juvenile & Family Court Judges, *A Guide for Effective Issuance & Enforcement of Protection Orders* 66, 71 (2005)(*see* Appendix). In a study performed in Dade County, Florida, the highest rates of recidivism as measured by re-arrest rates

were generated by defendants who had also failed to complete court-ordered batterer intervention programs. Nat'l Council of Juvenile & Family Court Judges, Dade County Domestic Violence Division, *Family Violence: Emerging Programs* 114 (1998)(*see* Appendix). In short, as common sense suggests, if batterers violate a counseling provision without consequence, they are also more likely to violate other more serious provisions, such as non-abuse of the victim. *Id.*

B. Contempt is an Inherent Power of all Courts.

Recognition of the inherent judicial power to punish litigants for contempt dates back centuries. *Ex parte Robinso*n, 86 U.S. 505, 510 (1873) ("The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice"). *See Robertson II*, 19 A.3d 751, 760 (2011, *citing Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 328 (1904); *Young v. United States ex. Rel. Vuitton et Fils SSA*, 481 U.S. 787, 800 (1987) (reiterating 'the longstanding acknowledgment that the initiation of contempt proceedings to punish disobedience to court orders is a part of the judicial function. . . [based on the] need for an independent means of self-protection").

Since contempt is a power inherent to all courts, *Bloom v. Illinois,* 391 U.S. 194 (1968), neither the Executive nor the Legislature may remove it. The Supreme Court has thus ruled, pursuant to its supervisory authority, that federal courts may not be deprived of the inherent power to enforce their own court orders through contempt, even where a public prosecutor declines to prosecute. *Young, supra.*

While many violations of CPOs are un-reported, and others are brought to the court's attention by petitioners, there is a class of violations, colloquially known as "technical" violations, of which petitioners often lack knowledge, or the motivation to enforce. These

violations involve orders to participate in counseling, drug testing, and the like, i.e., required activities which do not involve the petitioner, although they may impact her safety. For such violations, the *system* must report the violation to the court, because only the system (e.g., the probation department or batterers' counseling program) knows of the violation. In such cases proof of the violation is typically straightforward, entailing only documentation and/or testimony as to the respondent's failure to attend the program or comply with other requirements. Courts must be able to initiate enforcement of these provisions, lest their orders become meaningless and the provisions which aim to help the respondent change his destructive behavior rendered impotent.

A court's *sua sponte* show cause hearing was precisely the procedure utilized by the trial court in *Adams v. Ferreira, supra,* a procedure which this Court *affirmed,* while reversing the court's *extension* of the CPO at its own initiative as beyond the court's authority. *Id.* The *Adams* ruling emphasizing trial courts' authority to *sua sponte* adjudicate contempts of CPOs was reiterated in *dicta* by this Court, in a context where *non*-technical violations brought by the victim were at issue. *In re Herschel D. Shirley*, 28 A.3d 506, 512 (2011) (quoting *Adams v. Ferreira*, 741 A.2d 1046, 1047 (D.C. 1999).

C. Courts Around the Country Utilize System-Initiated Compliance or Show-Cause Hearings Without an Indpendent Prosecutor.

Several jurisdictions across the country utilize judicially-initiated show-cause or contempt hearings as a best practice for holding domestic violence offenders accountable.

1. Florida

Florida was one of the very first jurisdictions to establish a domestic violence court; Amicus recalls that Florida was also the court which provided in-depth consultation to the D.C. Superior Court during the development of its Domestic Violence Court. Florida's courts and

legislature have grappled with the question of how courts may or may not enforce their orders, and have resolved it by affirming the judicial power to hold parties in contempt, with or without the assistance of a prosecutor.

In *Walker v. Bentley*, 660 So. 2d 313 (Fla. 2d DCA 1995), Mr. Walker sought a writ of prohibition against Judge Bentley restraining him from holding Walker in criminal contempt. Prior to Mr. Walker's case, the Florida legislature had passed a statute requiring enforcement of CPO violations to be by traditional criminal prosecution, thereby purporting to eliminate the use of indirect criminal contempt proceedings which were not initiated by the public prosecutor. The Florida Supreme Court overturned the Florida statute and upheld Judge Bentley's sentence of indirect criminal contempt, holding that a judge possesses the inherent right to enforce orders via contempt, which cannot be removed or limited by the legislature. *Id.* at 325. As no prosecutor had been provided legislatively for contempt, the enforcement proceeding which the state Supreme Court upheld was conducted by the judge.

The Court held:

> Indirect criminal contempt allows a judge considerable flexibility in deciding the elements of an offense against a victim for acts occurring outside the presence of the judge. The judge also determines who should be prosecuted, and then tries, convicts, and punishes.

Id., *aff'd, Walker v. Bentley*, 678 So.2d 1265, 1266-67 (Fla. 1996)("we approve the well-reasoned opinion of the district court . . . we note that this Court has repeatedly found that the power of a court to punish for contempt is an inherent one that exists independent of any statutory grant of authority and is essential to the execution, maintenance, and integrity of the judiciary.")

Currently, after an initial CPO hearing, Florida court coordinators monitor all court orders and treatment referrals for compliance, and bring non-complying parties back before the

court for appropriate sanctions if necessary. See *Family Violence: Emerging Programs*, *supra* 112. Amicus is informed that when a violation is reported, the judge either leads the contempt proceeding or appoints a special prosecutor, depending on the county and their procedures. Email from Nina Zollo, Vice President of Legal & Policy, Florida Coalition Against Domestic Violence, to Corrie Brite, DV LEAP intern (Feb. 15, 2012, 13:58 EST) (on file with author); Email from Marta Estevez, Domestic Violence Attorney, Coast to Coast Legal Aid of South Florida, to Corrie Brite, DV LEAP intern (Feb. 2, 2012, 15:09 EST) (on file with author). Where judicially initiated contempt is practiced, the judge hears evidence and asks questions of the individual or entity who reported the violation (e.g. a petitioner or the compliance monitor) without the involvement of a prosecutor. The defendant is given an opportunity to rebut and present his own evidence. Email from Nina Zollo, *supra*. In some jurisdictions, the local office of the states attorney has not been involved in these contempt hearings in many years. *Id.*

It should be noted that Florida also permits judicially initiated contempt hearings *even in criminal proceedings. See* Fla. R. Crim. P. 3.840(d) (Indirect Criminal Contempt—Arraignment, Hearing - "The judge may conduct a hearing without assistance of counsel or may be assisted by the prosecuting attorney or by an attorney appointed for that purpose. The defendant is entitled to be represented by counsel, have compulsory process for the attendance of witnesses, and testify in his or her own defense. All issues of law and fact shall be heard and determined by the judge"). Amicus submits that if, even where a state prosecutor is necessarily already on the case, courts are deemed capable of enforcing their orders without prosecutorial involvement; there should be fewer impediments to holding such a hearing in a civil case where no criminal prosecutor is already involved.

2. Kentucky

Courts in Louisville, Kentucky use a similar procedure. Judge Jerry Bowles, a leading judge in the domestic violence field, describes his use of the following procedure:

> After the full due process hearing for a Civil Protective Order, an automatic "show cause" hearing is set for several weeks later and the Respondent is served with the Order, which he signs, to appear and demonstrate his compliance with the Order. The Show Cause Hearing is an opportunity for the Respondent to demonstrate that he is attending the Batterer's Intervention Program ("BIP"), paying his child support, and has vacated the residence or any other affirmative duty under the Order. If the Respondent is not in compliance with the BIP, the provider will have already filed a sworn affidavit to that effect with the Court. At the compliance hearing, the judge engages the Respondent regarding his reasons for non-compliance. Respondents are typically re- referred to the program and again advised of the implications of continuing to ignore the Orders of the Court. The case is then scheduled for additional show cause hearings for the Respondent to show cause why he should not be held in contempt. While the Respondent is given several chances to comply with the court's order if, the Respondent repeatedly fails to comply, the Judge will find the Respondent in contempt and impose a sentence. Throughout the entire show cause process, no prosecutor is involved in the Court's enforcement of the civil judgment. The judge places the Respondent under oath and then allows him to make any statements regarding his continued refusal to comply with the judgment of the court so that the Court can make a fully informed decision as the fact-finder.

Email from Judge Jerry Bowles, Family Court Judge, Jefferson County Judicial Center to Corrie Brite, DV LEAP Intern (Feb. 24, 2012, 11:08 EST)(on file with author). Judge Bowles explains this procedure by noting that the Court is not only charged with entering Orders and Judgments in the Family Court but is also charged with their enforcement, to make sure the order is not meaningless. In explaining his view of the Court's role, Judge Bowles states the following:

> A court enters an order with the expectation that it will be followed and enforced. To the extent that we continue to hear in the media that a Civil Protection Order is 'only a piece of paper, and will not stop violence,' that presupposes that it is not an enforceable judgment. In the jurisdictions where courts are not only entering judgments of protection but also enforcing them, petitioners are being protected. No civil court judgment would be perceived by the public as worthwhile or valued if there is an accepted expectation that it is unenforceable 'by the issuing authority.' Many accommodations and indulgences are provided along the way, including multiple schedules, sliding fees, indigent slots [for counseling], and

> repeated re-referrals. In the end, contempt is the only ability judges have to enforce their court orders. It does no good to courts or batterers to legislate a judge to enter an order and then forbid them from properly enforcing it.

Id. (on file with author). In addition, Judge Bowles stresses the importance of judicial involvement in engaging the parties in questions and answers, either after counsels' questions, or where parties lack representation, as a "best practice" which allows the fact finder to make the most informed decision. *Id.*

3. Other Jurisdictions

While Amicus' research has not been exhaustive, we have identified several other jurisdictions which also expressly permit courts to hold contempt hearings themselves, with no prosecutor present. For instance, in Michigan, the family court utilizes show cause orders to hold litigants accountable for technical violations of family court orders, particularly those involving parenting time, custody, or child support. Friend of the Court Bureau/SCAO, Michigan Supreme Court, *Show Cause Proceedings*, http://courts.michigan.gov/scao/resources/publications/pamphlets/focb/psa25.pdf (pro se publication describing show cause orders, procedures and remedies) (last visited May 28, 2012) (*see* Appendix). The outcome of such a show cause hearing can include new orders or contempt sentences, including an array of penalties including jail or fines. *Id. See also* Wyo. R. Crim. Pro. 42 (Contempt)("[t]he judge may conduct a hearing without assistance of counsel or may be assisted by the attorney for the state or by an attorney appointed by the court for that purpose")

Courts in Kansas may issue an order to show cause after a motion alleging violations has been filed; judges may then conduct the hearing. Kan. Stat. Ann. Sec. 20-1204a (2009). Kansas advocates who responded to Amicus' query, however, have not seen Kansas courts utilize this procedure. Email from Stephine Bowman, Protection Order Attorney, Kansas Coalition Against

Sexual and Domestic Violence, to Joan Meier (Feb. 23, 2012, 4:00 p.m. EST)(on file with author); Email from Gary West, Protection Order Attorney, Kansas Coalition Against Sexual and Domestic Violence, to Joan Meier (Feb. 23, 2012, 6:04 EST)(on file with author).

Thus, utilization of *sua sponte* direct evidentiary hearings in criminal contempt proceedings involving clear, black and white violations, is not uncommon around the country. It is, as this Court has recognized in *Adams v. Ferreira, supra, and In re Shirley, supra,* and as leading domestic violence Judge Jerry Bowles has articulated, essential to ensuring that civil protection orders are not "merely a piece of paper" but meaningfully embody the power and authority of the court.

In short, each provision of a civil protection order needs to be enforceable as a practical matter. If the USAO or a disinterested prosecutor were willing and able to commit to the enforcement of every non-violent CPO violation, it might be possible to contemplate a system which prohibited judicially-initiated show-cause hearings; but this is impracticable in the actual world. As other jurisdictions have recognized, judges must be able to fully enforce some provisions of their civil orders without the required involvement of a prosecutor. Mandating such prosecutorial involvement casts doubt on the court's inherent authority and power to enforce its own orders, is impractical, and in contexts such as those described by Judge Bowles, or in the Michigan family court context, would be akin to an empty formality. While DV LEAP fully supports procedural protections to ensure that the overall fairness of the proceeding and defendant's rights are protected, we also ask this Court to preserve a meaningful avenue for courts to enforce all provisions of their civil orders.

CONCLUSION

The power of a judge to enforce his or her own orders is intrinsic to the effectiveness of all court orders; and this is especially true for CPOs. *Adams*, supra; *Shirley, supra.* In some situations where there are objectively documented violations of CPO provisions involving system requirements, prosecutorial involvement is both impractical and unnecessary. Rather, swift and lawful accountability through the legal system's compliance-monitoring is a critical aspect of effective adjudication in several leading domestic violence courts around the country. However, the court's role in the case below exceeded an impartial fact-finding role, at the expense of fairness to both parties.

For all the foregoing reasons, Amicus requests that this Court vacate and remand this case for further proceedings consistent with both parties' right to a fair process and an impartial factfinder. Amicus further asks that this Court limit any such ruling to cases involving complex or ambiguous factual issues such as those below, and preserve the power of trial courts to adjudicate criminal contempts without a plaintiff/prosecutor in straightforward technical violation cases.

Respectfully Submitted,

By: _____

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CERTIFICATE OF SERVICE

I, Joan Meier, hereby certify that I caused the foregoing Brief and Appendix of *Amicus Curiae* to be served upon counsel for Appellant and counsel for the U.S. Attorney's Office by placing email and it in first-class mail, postage prepaid, on or before May 31, 2012, to:

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