DISTRICT OF COLUMBIA

COURT OF APPEALS

No. 10-FM-1167

Super. Ct. No. 2009-CPO-3234

IN RE Ms. T,

Appellant

On Appeal from the Superior Court of the
District of Columbia
Family Division / Domestic Violence Unit

BRIEF OF *AMICI CURIAE* DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT (DV LEAP), SURVIVORS AND ADVOCATES FOR EMPOWERMENT (SAFE), AYUDA, D.C. COALITION AGAINST DOMESTIC VIOLENCE (DCCADV), GEORGE WASHINGTON UNIVERSITY LAW PROFESSOR LAURIE KOHN AND CATHOLIC UNIVERSITY LAW PROFESSOR CATHERINE KLEIN

IN SUPPORT OF APPELLEE

Arguing for Affirmance of the Decision Below

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STATEMENTS OF INTEREST OF AMICI CURIAE

The **Domestic Violence Legal Empowerment and Appeals Project (DV LEAP)** is a non-profit organization dedicated to providing appellate advocacy for victims of abuse in the District of Columbia and elsewhere. DV LEAP is directed by George Washington University Law School Professor of Clinical Law Joan Meier, who has been litigating domestic violence cases, teaching, writing, and participating in statutory and court reforms in the District of Columbia for over 20 years. The issue of the quasi-criminal nature of contempt, what rights attach, and specifically the private prosecution of contempt is a subject of particular interest to Professor Meier and to DV LEAP. DV LEAP is committed to preserving the rights adopted by the legislature in the IntraFamily Offenses Act, D.C. Code Sec. 16-1001 *et seq.*, and to furthering constitutional fairness to both parties.

Ayuda is the District's leading source of multilingual legal and social assistance for low-income Latinos and foreign-born persons in immigration, human trafficking, domestic violence, and family law. Ayuda is the only agency that serves low-income immigrant clients on a walk-in basis in the entire metro area. 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.

Survivors and Advocates for Empowerment (SAFE) is a community-based direct services organization that provides assistance, including safety planning, crisis intervention, lethality assessments, legal information about the civil protection order process, court accompaniment, and criminal system advocacy, to more than 5,000 domestic violence survivors per year who seek services through the DC Superior Court, the vast majority of whom lack representation.

The **District of Columbia Coalition Against Domestic Violence (DCCADV)** 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 the 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, including furthering victims' rights and abilities to seek enforcement of their own CPOs.

Laurie S. Kohn is a professor at George Washington Law School where she directs the Family Justice Litigation Clinic. She is the co-author of *Litigating Protection Order Cases: A Practice Manual*, which is the premier litigation resource for attorneys representing domestic violence victims in D.C. Superior Court. She is the co-chair of the D.C. Superior Court's Domestic Violence Unit Task Force, a member of the Court's Domestic Violence Unit Rules Committee, and a member of the Court's Family Court Training Committee.

Catherine F. Klein is Professor of Law at the Catholic University of America and 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. She was elected to the Order of the Coif and Phi Beta Kappa.

ARGUMENT

Amici concur with the United States Attorney's Office (USAO)'s position that permitting Appellee to prosecute the contempt was not "plain error" under *In re Robertson (II),* because Appellant's claims of error are at best, arguable, and at worst, directly contradicted by that decision. *See* Brief of USAO, *passim;* Section I.A., *infra. Amici* seek to explain that, regardless of the standard of review, the existing system for enforcement of CPOs through privately initiated criminal contempts is both lawful and critical to the effectiveness of CPOs.

I. CRIMINAL CONTEMPT ACTIONS FOR VIOLATIONS OF CIVIL PROTECTION ORDERS ARE NOT REQUIRED TO BE SUBJECT TO UNITED STATES PROSECUTING AUTHORITY.

A. This Court's Carefully Considered Decisions Preclude the Claim that CPO Violations May Only be Adjudicated After United States Review.

Defendant's entire argument hinges on a radical assertion – that *In re Robertson (II),* 19 A.3d 751 (D.C. 2011)(hereafter "*Robertson II"*) requires all criminal contempt hearings brought within civil proceedings to be prosecuted only by the United States, or if it declines, by a disinterested court-appointed prosecutor. Brief of Appellant at 12-22. Appellant's argument is fundamentally internally contradictory – she relies on a statement from the *Robertson (II)* opinion for her premise, and then argues that the core holding of the very *same opinion* is legally incorrect, to reach her conclusion.

Appellant first argues that *Robertson II* stated that D.C. Code Sec. 16-1005(f), which authorizes violations of Civil Protection Orders ("CPO"s) to be prosecuted as contempt, is "a penal statute" and therefore that such criminal contempt actions must be "brought in the name and pursuant to the sovereign power of the United States." *Brief of Appellant at 12-13*, quoting *Robertson II,* 19 A.3d at 758-59, 755. Appellant then proceeds to argue that such actions are regulated by D.C. Code Sec. 23-101, and that only the United States Attorney's Office

("USAO") has authority over such actions. *Id.* at 15-17, citing *In re Crawley,* 978 A.2d 608 (D.C. 2009). Appellant suggests that *Crawley* ties this Court's hands and cannot be reconciled with the D.C. Council's adoption of the IntraFamily Offenses Act authorizing privately initiated criminal contempts, because *Crawley* concluded that Sec. 23-101 requires (with limited exceptions) only the USAO to prosecute "crimes committed in the District." *Crawley,* 978 A.2d at 609, cited in Appellant's Brief at 15.

Appellant's logic is, however, flawed. First, Appellant is simply picking and choosing the parts of the *Robertson II* opinion she seeks to make binding and those she wishes to reject. She suggests that the opinion is binding when it rules that D.C. Code Sec. 16-1005(f) is a "penal statute," yet it is neither binding nor correct when it holds that the same statute, in conjunction with Sec. 23-101, permits a private interested party to litigate a criminal contempt proceeding so long as it is brought in the "name of the United States." *Robertson II* at 760. Appellant cannot have it both ways:[1] The core holding of *Robertson II* is the ruling that criminal contempts brought by the private party under the IntraFamily Offenses Act must be brought "in the name of" the sovereign, not "in the name of" the private beneficiary of the CPO. *Id.* at 759-60. In no way does this holding equate to Appellant's outlandish assertion that the US Attorney's Office must now be brought into *every civil action* in which one party alleges that the other has violated an injunction and requested a contempt sanction.

Indeed, this Court already declined to require USAO review of criminal contempts in civil litigation in *In re Peak,* 759 A.2d 612 (D.C. 2000). The *Peak* Court found *Young v. Vuitton,* 481

[1] Amici themselves would reverse the emphasis, and suggest that the Court's statement that Section 16-1005(f) is a "penal statute" must be read in light of the fact that the statute does not distinguish between criminal and civil contempt. A reasonable reading of the opinion's "penal" comment - given that civil contempt actions brought under the Section are clearly *not* "penal" - is that criminal contempt *actions* – but not the "statute" itself, may be denominated "penal."

U.S. 787 (1987), to be "persuasive authority" for its ruling (governing federal courts) that only a disinterested prosecutor may litigate non-intrafamily criminal contempts. *Peak,* 759 A.2d at 620. However, the *Peak* Court did *not* adopt the *Young* Court's requirement that federal civil courts must first refer all such contempts to the United States Attorney's Office in order to preserve executive authority. *See Young*, 481 U.S. at 801. This is understandable, as such a rule would mean that whenever the parties allege violations of a custody or visitation order, child support order, or any other personal civil action, the USAO would have to review the case to determine whether it is of sufficient public interest to warrant the devotion of scarce State resources, and only then could the court then appoint a disinterested prosecutor. It is virtually inconceivable that any busy prosecutor's office, much less the USAO would prioritize or seriously address such an array of petty personal litigation. *Cf.* David Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 Ohio St. L. J. 1153, 1209-10 (1995)(hereafter "Zlotnick").

Third, it is implausible to suggest that the *Crawley* decision, which addressed the distribution of power between the U.S. Attorney's Office (USAO) and the D.C. Office of the Attorney General (OAG) to "prosecute crimes" in the District of Columbia, was intended to reach actions to enforce civil orders in civil courts by contempt, including not only CPO cases, but a vast array of family law contempts and other violations of civil orders.

That contempt is a unique province of the courts and not a traditional "crime" is further demonstrated by this Court's repeated affirmations that certain types of CPO violations (e.g., failures to participate in counseling) may be adjudicated at the initiative of courts themselves, without the necessity of any party acting as "prosecutor." *Adams v. Ferreira*, 741 A.2d 1946, 1047 (D.C. 1999)(where "neither party to the original proceeding initiated the subsequent

proceedings . . . the trial court could have held an evidentiary hearing and upon an appropriate finding held Adams in contempt for violating the CPO"); *In re Shirley,* 28 A.3d 506, 512 (D.C. 2011)(same). *See also In re Grand Jury Proceedings,* 875 F.2d 927, 933-34 (1st Cir. 1989)(district judge is "impartial" and able to adjudicate a criminal contempt without any prosecutor). If *Crawley* governed contempts, this longstanding and appropriate practice of judicial compliance-monitoring and enforcement of civil orders would be impossible: Courts would be required to refer all violations of their civil orders to the USAO.

This backdrop makes clear that this Court meant what it said when it ruled in *Robertson II* that "Ms. Watson, assisted by the OAG, [was free] to initiate a criminal contempt action involving intrafamily offenses in the name of the United States . . . so long as the beneficiary's CPO enforcement action is brought in the name of the United States, we discern no statutory impediment." 19 A.3d at 759-60. This extremely thoroughly and repeatedly litigated and deliberated[2] decision resolved that contempt actions, while "penal," are not constrained entirely by D.C. Code Sec. 23-101. Rather, this Court expressly held that that statute should be "read together" with D.C. Code Sec. 16-1005(f), to permit the beneficiary of the CPO[3] to bring the enforcement action, but only in "the name of the United States." 19 A.3d at 759-760.

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[2] This decision was this Court's second published decision in the case, following both *In re Robertson,* 940 A.2d 1050 (D.C. 2008), and the Supreme Court's grant of *certiorari,* oral argument, and dismissal of *certiorari* accompanied by a dissent signed by four Supreme Court Justices, *Robertson v. United States ex rel. Watson,* 130 S. Ct. 2194 (2010). Moreover, this Court received two additional rounds of briefing in the course of this litigation, including supplemental briefing in response to the Court's own questions after the Supreme Court's dismissal of *certiorari*, *cf. Robertson II,* Order, Sept. 21, 2010 in Nos. 00-FM-925 and 04-FM-1269; and, in the course of the first decision by this Court, briefing in response to Defendant's Petition for Rehearing or Rehearing en Banc (March 2008), in Nos. 00-FM-925 and 00-FM-1269.

[3] Prior to the *Robertson* decision, the OAG's representation was explicitly on behalf of the petitioner, not the "United States." *In re Robertson,* 940 A.2d 1050, 1053 (D.C. 2008)("On April 26, 1999, the Office of Corporation Counsel (now the Office of the Attorney General for the

B. The Rights of Litigants in CPO Enforcement Actions Should not be Determined Solely by Labels; Contempt Is Inherently Different From a "Crime."

If CPOs could be effectively enforced by means of civil contempt, or some other sanctioning mechanism, Amici would readily dispense with the use of "criminal contempt" to enforce CPOs. However, this label appears to be necessary for CPO enforcement actions in light of the Supreme Court's definitions of "criminal" and "civil" contempt: That Court has decreed that a contempt sentence is "civil" *only if* the contemnor is capable of "purging" the contempt and avoiding the sentence by compliance with the order, and that any non-purgeable sentence, no matter whether a fine or jail and no matter how minimal, is necessarily "criminal contempt." *Hicks ex rel. v. Feiock,* 485 U.S. 624 (1988) (holding that a suspended sentence in a child support case constituted criminal contempt, despite the fact that the action was brought on behalf of the private beneficiary). The vast majority of CPO violations are neither purgeable nor remediable; they are past violations that require consequences to be imposed. Moreover, imposition of yet another "coercive" order (or agreement) is pointless when a violator has already ignored a civil protection order. The majority of CPO enforcement actions are thus necessarily "criminal contempts."

Amici wish to emphasize that in supporting private litigation of criminal contempt enforcement actions, we are *not* endorsing or defending the *private prosecution of crimes.* We do not believe such private prosecution is appropriate or consistent with our system of justice. However, private actions to enforce private civil protection orders are simply not the same as criminal prosecutions. We submit that this dispute over "prosecution" of criminal contempt is built on a fiction and fed by the somewhat arbitrary use of the "criminal" label within the

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District of Columbia ("OAG")) entered its appearance on behalf of Ms. Watson"). In fact, it is difficult to understand how the OAG, the attorney for the District of Columbia, can be understood to be representing the interests of the United States.

Supreme Court's jurisprudence. The Court's adoption of the label "criminal" for non-purgeable sanctions - while calling purgeable sanctions, *including extended jail sentences,* "civil" - has created peculiarly inconsistent practices: Even those contemnors who will never spend time in jail (but are given, say, a small fine), are entitled to full constitutional protections. In contrast, those like Elizabeth Morgan, who sat in jail for two years rather than subject her child to ongoing severe abuse, and was only released by an Act of Congress, can be subjected to indefinite incarceration by their private civil adversaries in litigation, and with none of the due process protections afforded accused criminal contemnors.[4]

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[4] *See* Joan Meier, *The 'Right' to a Disinterested Prosecutor of Contempt: Unpacking Public and Private Interests*, 70 Wash. U. L. Q. 85, n. 13 (1992)(hereafter "Meier"). In *Turner v. Rogers,* 131 S. Ct. 2507, 564 U.S. -- (2011), the Supreme Court recently reaffirmed the distinction between civil and criminal contempt, refusing to adopt a right to counsel even where the so-called civil contemnor is sentenced to a determinate jail sentence. 131 S.Ct. at 2518-19. However, acknowledging that civil contempt sanctions can sometimes be erroneous, and that lack of procedural protections for the accused contemnor can make the difference between rightful and wrongful imprisonment, the Court held that civil contempt courts should apply a balancing test to determine what procedures are required to obtain accurate factual determinations in individual cases. *See Turner,* 131 S. Ct. at 2518 ("it is obviously important to assure accurate decisionmaking in respect to the key 'ability to pay' question . . . because an incorrect decision (wrongly classifying the contempt proceeding as civil) can increase the risk of wrongful incarceration"). Amici submit that, if the reason private "prosecutors" are considered anathema is that private parties should not wield the "terrifying force of the criminal justice system" (*Robertson v. United States ex rel. Watson,* 130 S. Ct. 2184 (2010)(Roberts, J., dissenting), the same "terrifying force" is present in civil contempt sentences that subject litigants to jail time. The scholarly commentaries are generally united on this point. *See* Earl Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts,* 79 Va. L. Rev. 1025, 1033 (1993)(arguing that the Court should abandon the civil/criminal distinction and assign procedural rights "in accord with a less complicated due process model that takes account of both the contempt process' peculiar dangers and the costs of affording those protections. The touchstone of the analysis should be avoiding erroneous determinations of guilt, and the consideration triggering the provision of the more costly safeguards, such as appointed counsel and jury trial, should be the severity of the sanction, not its form"); Ronald L. Goldfarb, THE CONTEMPT POWER 175 (1963)(arguing for procedural protections for civil contempt); David J. Harmer, *Limiting Incarceration for Civil Contempt in Child Custody Cases,* 4 B.Y.U. J. Pub. L. 239, 255-56 (1990)(same). Since the Supreme Court's federal regime permits due process rights afforded accused criminal contemnors to be denied civil contemnors facing potentially unjust incarceration, non-federal courts should not feel

Thus, the reality is that criminal contempt, as a sanction (sometimes but not always involving jail) used to enforce a civil order, is far more like *civil contempt* than it is like a crime. Like civil contempt, it arises in civil litigation between private parties; it is adjudicated to enforce privately obtained individual orders – and like civil contempt, it does not reflect "the judgment of community condemnation which accompanies and justifies [criminal sanctions]." Henry M. Hart, Jr. & Albert Sacks, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 65 (Tent. Ed. 1958). While there is a general public interest in vindicating judicial authority, this is not the sort of public interest that defines a crime.

> [T]he criminal law . . . defines the minimum conditions of man's responsibility to his fellows and holds him to that responsibility . . . [a crime is] conduct which . . . will incur a formal and solemn pronouncement of the moral condemnation of the community.

Id. at 70, 65. Contempt does not further the general public mores or values reflected in a criminal code. *See* Meier, *supra,* 70 Wash. U. L. Q. at 126-128. As such, Amici submit that it is mis-named. If, for instance, contempt were simply called a "sanction," Amici submit that it would become more readily apparent - as with civil contempt and other punitive judicial sanctions – that who brings the action, as opposed to how the action is litigated and what protections assure fairness - is neither a matter of constitutional import nor in doubt.[5]

Even the Supreme Court has acknowledged that criminal contempt is *not* in fact the same as a crime, despite its periodic boilerplate pronouncements that criminal contempt is a "crime in

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compelled to adopt the same problematic framework. Rather, in determining appropriate procedural protections, non-federal courts should be driven less by labels, and more by a determination of what procedures actually protect the fairness of the process, reduce error, and reflect the particular context of contempt. Dudley, *supra;* Meier, *supra.*

[5] *See Hart v. Hathaway,* 708 P.2d 1137 (Or. Sup. Ct. 1984)("for centuries courts of equity have been empowered to punish traditional criminal acts if those acts violated a valid court order . . . not as criminal offenses but as violations of the court's order"); N.Y. Family Court Law Sec. 846 (2010) (permitting court to adjudicate contempt of court on protection order petitioner's or court's own motion and permitting a sentence of up to six months in jail).

the ordinary sense," cf. e.g., *Robertson v. United States ex rel. Watson,* 130 S. Ct. at 2189-90 (Roberts, J., dissenting)(citations omitted). In *Young,* the Court held that, while prosecutorial discretion requires that only the Executive may constitutionally decide whether to prosecute a crime, prosecutorial discretion (i.e., declension) can not remove a court's power to enforce its own order. 481 U.S. at 796-801; *Hart v. Hathaway, supra.* The *Young* decision follows numerous others which have affirmed the *sui generis* nature of contempt. *Myers v. United States,* 264 U.S. 95, 103 (1924); *see also Gompers v. Bucks Stover Ranger Co.*, 221 U.S. 418, 441 (1911) ("contempts are neither wholly civil nor altogether criminal"); *Frank v. United States,* 395 U.S. 147, fn. 5 (1969)(criminal contempt is *sui generis*).

In short, Amici suggest that the idea that it is somehow intolerable, unjust, or improper[6] to permit contempts resulting in punitive sanctions to be litigated by private litigants, is demonstrably false, given the unquestioned right of private citizens to litigate actions to incarcerate their adversaries, so long as the action is labeled "civil" contempt.[7] The truth is that the "terrifying force of the criminal justice system" *Robertson (U.S.), supra* at 2185 (Roberts, J.,

[6] Appellant rightly does not argue that it is unconstitutional, nor can she, given that neither the Supreme Court nor this Court has ever held disinterested prosecution to be a constitutional requirement.

[7] Supreme Court Justice Roberts' dissent expresses outrage at the idea that *crimes* could be prosecuted by private citizens on their own behalf. Cf. *Robertson v. United States ex rel. Watson,* 130 S. Ct. 2184, 2186 (2010) (Roberts, J., dissenting) ("administering criminal judgment . . . is a duty to be performed at the demand of a nation")(citation omitted), 2187 ("offenses against the law of nature . . . any criminal case . . .all criminal prosecutions")(citation omitted), 2188 ("Our entire criminal justice system is premised on the notion that a criminal prosecution pits the government against the governed, not one private citizen against another"), 2190 (describing the "sword of justice" "to be used to smite those who violate the criminal laws"). While this proposition is entirely *uncontested,* the dissent devotes only 3 paragraphs to the more relevant question - of whether *criminal contempts* are actually *crimes,* i*d.* at 2189 – and does not even consider whether different sanctions might warrant different constitutional protections. *But cf.* Dudley, *supra* n. 3*;* Meier, *supra* n. 3, 70 Wash. U. L. Q. at 128 (arguing that the question of who brings a contempt action is different in kind and requires a different analysis from the determination of other procedural protections for accused criminal contemnors).

dissenting) – i.e., incarceration – *does not distinguish criminal from civil contempt.* And if incarceration at the hands of a civil adversary is permissible in civil contempt, it is illogical to treat it as anathema simply because the label changes to criminal contempt.[8]

In arguing for retention of CPO holders' rights to enforce their own CPOs through criminal contempt, we are not suggesting that accused criminal contemnors should be denied any fundamental due process rights – all of which are – and should be - in place. *In re Wiggins,* 359 A.2d 579 (D.C. 1976)(presumption of innocence, proof beyond a reasonable doubt, privilege against self-incrimination, notice of the charges, public trial before an unbiased judge, jury trial where applicable, right to confrontation); *United States v. Dixon and Foster,* 509 U.S. 688 (1993)(double jeopardy). We simply ask that the Court continue to recognize that the identity of the litigant who pursues the contempt action against the alleged contemnor, does not implicate defendant's fundamental rights and does not affect the fairness of the proceeding – if anything, private litigants are *less burdensome* to defendants than prosecution by the State. *See* Brief of USAO at 30-31 (describing several ways that the *pro se* plaintiff's lack of legal skill assisted the defense and resulted in two acquittals).[9]

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[8] Amici share the view expressed by the authorities cited in note 4 above, that any accused contemnor facing potential incarceration, whether denominated "civil" or "criminal," should receive the same due process protections now afforded contemnors facing determinate punitive sentences, all of which protect against incorrect determinations and an unfair trial. The identity of the plaintiff in the contempt action does not go to fundamental fairness and hence should not be one of those protections.

[9] This is particularly true when the "prosecutor" is *pro se.* *See* Zlotnick, *supra* at note 199 ("[i]t is the imbalance between a pro se petitioner and a respondent represented by counsel that has led to a low rate of successful pro se contempt actions"), *citing* D.C. Gender and Racial Bias Task Force Report. That intrafamily contempts are minimally burdensome when privately prosecuted is ensured by the IntraFamily Rules' stringent limits on litigants' procedural powers. If litigants' powers were expanded to match the powers of a public prosecutor, as they were in *Peak* and *Young,* a disinterested prosecutor would be appropriate. However, where, as in intrafamily proceedings, the interested party lacks not only the powers of a public prosecutor, but often lacks even a lawyer, and possesses fewer procedural rights than the average civil litigant, concerns

II. THERE IS NO LEGAL RIGHT TO A DISINTERESTED PROSECUTOR OF CRIMINAL CONTEMPT in CPO CASES.

Appellant goes on to argue that, assuming the USAO declines to prosecute a criminal contempt action, only a disinterested attorney may be appointed to do so. Appellant's Brief at 23 et seq. In opposing this claim, Amici wish to add only three points to the apt arguments stated in the Brief of the USAO (at pp. 22-25).

First, it is important to note that while Justice Roberts' dissent from the dismissal of *certiorari* in this matter expressed grave concern about private prosecution of crimes, two of the four Justices (Justices Sotomayor and Kennedy) also signed a concurrence, specifically for the purpose of noting that they were joining the opinion only on "the understanding that the narrow holding it proposes does not address civil contempt proceedings or consider more generally the legitimacy of existing regimes for the enforcement of restraining orders." *Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184, 2191 (2010). These Justices' decision to issue a separate opinion on this point raises doubt about whether a majority of the high Court would seek to end the District's (and many other states') well-established, procedurally strictly constrained and defendant-protective processes for enforcement of civil protection orders. This is particularly true in light of the fact that numerous states similarly utilize private enforcement of civil protection (and other) orders through criminal contempt.[10]

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about private litigants wielding "the full machinery of the State," *Young, supra* at 814, are simply inapplicable. *See Green v. Green*, 642 A. 2d 1275, 1280 ("the *Young* Court could not possibly have envisioned the application of its rather sweeping language dealing with problems associated with private prosecution of contempt under the federal rules to the instant and most similar cases"), *quoting Castellanos v. Novoa,* 117 Daily Wash.L.Rptr. 1189, 1194 (D.C. Super.Ct., 1989); Meier, *supra* at 99, 129.

[10] *See, e.g., Wilson v. Wilson* , 984 S.W. 2d 898, 903 (Tenn. 1998)(allowing husband's attorney to prosecute criminal contempt charge against wife for violation of restraining order and stating that

Second, adoption of Appellant's rule is precluded by the important principle of *stare decisis*, which is especially applicable here. As described in note 2 above, in just the past 4 years of this litigation, this Court has entertained at least three separate rounds of briefing on the question of whether the beneficiary of a CPO may litigate the criminal contempt for violations of that order. This is in addition to the thorough deliberations leading to resolution of *Green v. Green* in 1994, and Judge Alperin's earlier decision in *Castellanos v Novoa*, 117 Daily Wash. Law Rptr. 1192 (D.C. Super. Ct. 1989), *quoted in Green, supra* at 1280. This Court's latest decision in *Robertson II* was also issued with the benefit of the four Supreme Court Justice's opinion dissenting from the dismissal of *certiorari* in the case. This Court has thus devoted more deliberative time to this issue than to most cases which come before it – and has determined *yet again* that the private enforcement mechanism adopted by the D.C. Council is and should remain – the law. *Robertson II*, 19 A.3d at 755-56.

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the trial court provides a gatekeeper function that protects defendant, that requiring disinterested prosecution would impose "tremendous fiscal and administrative burdens" on the State, that the district attorney's office could not be expected to meet the burden, and that the result of such a requirement would be that "many citizens would be deprived of the benefits to which they already have been adjudged entitled… and many state court orders would remain unenforced"); *Olmstead v. Olmstead*, 284 S.W.2d 27, 28 (Ark. 2008); *Gordon v. State*, 960 So. 2d 31, 39 (Fla. Dist. Ct. App. 2007) ("Although an indirect criminal contempt proceeding in a family law case is vitally important to the parties, such a case often has little interest to a professional prosecutor"); *Eichorn v. Kelley*, 111 P.3d 544 (Colo. Ct. App. 2004)(rejecting *Young*, and holding that court's inherent power to enforce its own orders is different from prosecution of "criminal conduct" and that private litigants are necessary to bring the violations to the court's attention); *In re Marriage of Betts*, 558 N.E. 2d 404 (Ill.App.Ct. 1990)(declining to follow *Young*); *State ex rel. O'Brien v. Moreland*, 778 S.W. 2d 400 (Mo.Ct.App. 1989)(same); *Del Dotto v. Olsen*, 628 N.E.2d 1156, 1158 (Ill. App. Ct. 1993)("the private litigant who brings the facts of [the] contempt . . . before the court performs a valuable service to the court"); *Katz v. Commonwealth*, 399 N.E.2d 1055, 1060 (Mass. 1979)("private parties to a civil litigation have the right to press both the civil and criminal aspects of the case"). *But cf. Rogowicz v. O'Connell*, 786 A.2d 841 (N.H. 2001)(prohibiting private prosecution of criminal contempt); *Trecost v. Trecost*, 502 S.E. 2d 445 (W. Va. 1998)(same); *DSS ex rel. Montero v. Montero*, 758 P. 2d 690 (Haw.Ct. App. 1988)(same); *Peterson v. Peterson*, 153 N.W. 2d 825 (Minn. 1967)(same).

While Appellant does not expressly ask that *Robertson II* be overruled, she appears to acknowledge that she is arguing *against* that decision. Brief of Appellant at 15 ("this holding of *Robertson II cannot be reconciled with this Court's ruling in In re Crawley or the plain language of D.C. Code Sec. 23-101")*(emphasis added). However, *Amici* suggest that it is far too soon for any such reversal of the latest decision. While Appellant quotes a single Superior Court judge's opinion suggesting that the private litigant cannot act "disinterestedly" and should not be expected to do so *id.* at 24-25, *Amici* note that another Superior Court judge has issued a contrary opinion that in *Amici's* view accurately reflects this Court's *Robertson II* decision and upholds the right of the beneficiary of the CPO to litigate the criminal contempt. *Bridgeforth v. Brown*, 2009 CPO 3796, pp. 10-12 (2011)(Holeman, J.). In Amici's experience, other Superior Court judges are adopting a variety of approaches to implementing the *Robertson* ruling, including referring privately filed contempts to the USAO, the OAG, or to other outside counsel, or, as here, permitting victims to litigate their own cases, with the understanding that they do so on behalf of the State. This Court should allow the lower courts to work through the practical realities of how *Robertson II* can best be implemented on the ground, before it contemplates replacing it with yet another regime so soon. *Stare decisis* calls for no less. *Cf. Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991)("Time and time again, this Court has recognized that the doctrine of *stare decisis* is of fundamental importance to the rule of law); *Arizona v. Rumsey*, 467 U.S. 203 (1984)("we will not depart from the doctrine of *stare decisis* without some compelling justification"); *Pederson v. Wirth*, 2003 D.C. Super. LEXIS 33, 9-10 and note 14 (D.C. Super. Ct. 2003).

A. The Possibility of Prosecutorial Declension is Not a Legitimate Basis for Outlawing the Beneficiary of the CPO from Bringing An Enforcement Action.

Third, as noted above, Appellant cannot (and does not) argue that she suffered any unfair process or deprivation of procedural rights which affected the fairness of the litigation of her contempt trial. Indeed, it is clear that being prosecuted by the *pro se* Appellee rather than a public prosecutor actually benefitted Appellant in numerous respects. *See* Brief of the USAO at 30-32; *supra* note 9 and accompanying text. Appellant's only arguable detriment from the process below was that, by permitting the interested CPO holder to litigate the contempt, Appellant was forced to undergo a contempt trial which might not have been brought at all by a "disinterested" prosecutor. Brief of Appellant at 24-27. Because this argument is at the heart of the attack on "interested" prosecutions of contempt, Amici, in addition to agreeing with the USAO that there is no legal right to prosecutorial discretion or declension, Brief of the USAO at 27-29, raise two additional points:

First, the assumption articulated in Judge Nash's opinion (see Brief of Appellant at 24-25), that movants for contempt are likely to be engaged in private vengeance, is actually notably incorrect in domestic violence cases. It is well known that domestic violence victims are typically markedly ambivalent about prosecution, and are far less likely than a prosecutor to seek harsh sanctions. Tom Lininger, *Prosecuting Batterers After Crawford*, 91 Va. L. Rev. 747, 768 (2005) (battered women are more likely to avoid participation in criminal trials or recant their accusations than any other crime victims). Victims of abuse are easily intimidated or worn down by the legal process; many ultimately withdraw from legal action. Margaret Barry, *Protection Order Enforcement: Another Pirouette*, 6 Hasting Women's Law Journal 339, 356 (1995) at 355 (describing such cases). Thus, recent data from the Superior Court indicate that victims withdrew or failed to appear for a significant the majority of privately filed CPO contempt motions. Electronic message from Janese Bechtol, OAG, to Joan Meier, Jan. 26, 2012, 2:04 p.m.

Nor is there any reason to believe that a represented victim will abuse the judicial process in contempt proceedings. *Wilson v. Wilson,* 984 S.W. 2d 898, 904 (Tenn. 1998) (a private lawyer does not "detract from the integrity of the judicial process" because "a litigant's private attorney is no less likely to seek justice and no more likely to be influenced by improper motives than a public prosecutor or a disinterested private attorney"). On the contrary, many abused women seek to avoid trials and would prefer civil alternatives to criminal penalties, such as CPO modification or custody settlement. Such alternatives may well be desirable for a criminal defendant - but civil options are not available to a criminal prosecutor. Meier, *supra* at 111 ("The assumption that private prosecutors are overzealous, single minded, and inflexible is distorted at best. * * * Injured parties have a wide array of needs and desires. * * * [P]rivate parties are in fact *more* likely to seek flexible resolutions of their disputes than are public prosecutors").

Amici note that the case at bar is an atypical case – involving the former girlfriend and the current girlfriend of one individual. The IntraFamily Offenses Act was relatively recently expanded to address such "third-party" relationships. *See* D.C. Law 16-306, Sec. 206(a); 53 DCR 8610 (Apr. 24, 2007), now contained in D.C. Code Sec. 16-1001(6)(B)(2011). Such complicated relationships may involve especially convoluted and seemingly trivial interpersonal - rather than criminal - conduct. Cross-allegations in such a situation may more easily appear to be "a game" and not indicative of genuine fear or serious risk. Appellant's Brief at 26 (citing decision below).[11] But the core population who will be deprived of access to the courts in these

[11] While acknowledging that third party cases may appear less serious than the paradigmatic intimate violence case, Amici caution that it is often difficult for even a judge to correctly assess a petitioner's genuine fear and a respondent's actual dangerousness, and that parties' demeanor in court is a poor proxy for either.

proceedings if Appellant's position is adopted, are victims of intimate partner abuse – for whom "gameplaying" is far less likely to be at issue and genuine danger and fear far more likely.

Moreover, judicial monitoring is more than sufficient to guard against potentially trivial or disingenuous contempt motions; the court is free to dismiss such actions, as the Superior court often does. Electronic message from Janese Bechtol, OAG, to Joan Meier, Jan. 26, 2012, 2:04 p.m. It is courts—not the parties—who control whether a contempt adjudication goes forward, which allegations to adjudicate, and any punishment. And, given the sharp limitations on discovery by contempt litigants, such actions are unlikely to significantly burden a defendant. *See* D.C. Super. Ct. Dom. V. R. 8 (all discovery in privately prosecuted criminal contempt proceedings must be approved by the Court); *id.* at R. 14 (no subpoena may issue to an unrepresented private party without judicial authorization).

Second, *Amici* are troubled by the prospect of this Court recognizing a purported right or entitlement to prosecutorial declension as a reason to prohibit private CPO enforcement. Historically, the criminal justice system refused to even treat domestic violence as a crime worthy of State intervention. Emily Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy,* 2004 Wisc. L. Rev. 1657, 1663-1664 (2004) (detailing how, at every stage of the process, "domestic violence was not a matter for the criminal justice system"). While attitudes toward domestic violence have improved, and State resources are now regularly expended on criminal prosecution, it continues to be common for courts, prosecutors and police to minimize and trivialize this "crime." Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System,* 11 Yale J. L. & Feminism 3, 4 (1999) ("[i]n contrast to the remarkable progress made by legislators, those responsible for applying and enforcing the law – prosecutors, judges, and the court system

– have lagged far behind . . . the system's response to domestic violence has been unresponsive and oriented toward non-enforcement"). In this context, judicial recognition of a purported right to prosecutorial declension in CPO contempts could come uncomfortably close to endorsing this checkered history of the criminal justice system's ambivalence toward domestic violence. *See, e.g., Ganger v. Peyton,* 379 F.2d 709, 712-13 (4th Cir. 1967) (affirming vacation of a conviction on grounds that the wife's divorce counsel prosecuted the case, thereby circumventing the then-existing policy of non-prosecution of spousal assaults).

While *Amici* appreciate the commitment of the current USAO for the District of Columbia to the prosecution of domestic violence, requiring that office to be responsible for many or most *violations of CPOs* may be unreasonable. It is unrealistic to expect a busy prosecutor's office to be willing and able to prosecute a substantially increased number of civil order violations. [12] At root, the criminal contempt label does not change the fact that non-criminal violations of a *civil* order are simply never going to be viewed as a "crime" worthy of prosecution like other crimes. As one former USAO domestic violence prosecutor has pointed out:

> the criminal justice system will resist the complete criminalization of civil protection order violations. . . . Despite the wishes of . . . advocates, domestic violence does not behave like an 'ordinary' crime and prosecutors and police have legitimate grievances about being forced to treat it as such.

Zlotnick, *supra* 56 Ohio St. L. J. at 1209-1210. *See also Gordon v. State, supra,* 960 So. 2d at 39 ("Although an indirect criminal contempt proceeding in a family law case is vitally important to

[12] Statistics recently received from the Office of the Attorney General for the District of Columbia ("OAG") indicate that, since certain Superior Court judges have started requiring the USAO to review all motions for contempt, that office has prosecuted only 2 of 132 privately filed contempts which were resolved between August and December 2011. Another 5 were resolved when incorporated into a separate misdemeanor prosecution, but only one of those resulted in a partial conviction for the contempt (on a single count out of 10 alleged violations). Electronic message from Janese Bechtol, OAG, to Joan Meier, Esq., Jan. 26, 2012, 2:04 p.m.

the parties, such a case often has little interest to a professional prosecutor"). It is simply not reasonable to assume that the USAO will see itself as responsible for an entire spectrum of CPO violations – and indeed, the unlikelihood of thorough prosecution of such contempts by the public prosecutor is likely the only reason defendants favor public prosecution over a less powerful, less "coercive" *Young,* 481 U.S. at 811, private adversary.

For all these reasons, this Court should hesitate to endorse Appellant's argument that criminal defendants have a "right" to a public or disinterested prosecutor's decision *not to prosecute* a contempt action. So long as a contempt motion is meritorious on its face, procedural and constitutional rights are protected, and the court monitors the proceedings, the fact that a meritorious contempt action *proceeds* should not be a legitimate basis for treating the action as unconstitutional or improper.

III. PRIVATE ENFORCEMENT IS ESSENTIAL TO THE EFFECTIVENESS OF CPOs.

A. Enforcement is the Critical Weakness of the CPO System

CPOs are only as good as their enforcement, yet they are notoriously under-enforced. Despite the significant advance in legal protections for victims of abuse which CPOs represented, enforcement remains the "Achilles heel" of the CPO process. U.S. DEP'T OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, Peter Finn & Sarah Colson, *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement* (1990) at 49 (hereafter "Finn & Colson"). Studies and reports around the country have repeatedly documented the scant enforcement of these orders, including "considerable anecdotal evidence… that some batterers flout civil protection orders with impunity." *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"); *Developments in the*

Law – Legal Responses to Domestic Violence, 106 Harv. L. Rev. 1498, 1512 (1993)(enforcement by the criminal justice system has "received inadequate emphasis in many jurisdictions").

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) (finding that during the six-month follow-up period after women obtained a protective order, half reported a violation of the protective order)(hereafter "*Kentucky Civil Protection Order Study*"); 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). In a recent, in-depth study of CPO enforcement**,** the majority of recipients of protection orders indicated that the orders' effectiveness depended entirely on the perpetrator's fear of legal repercussions. The study concluded, "if protective orders are violated without consequences, this fear would be eliminated." *Kentucky Civil Protection Order Study*, *supra* at 156.

1. Arrest and Prosecution for CPO Violations are Rare.

Unfortunately, police and prosecutors frequently fail to enforce violations of CPOs, particular if the violations are not independent crimes, on the mistaken belief that such violations are "minor' and not worthy of the criminal justice system's attention.

Research and reports of police response to CPO violations paint a disturbing picture that the State's historically ambivalent response to violence in the family continues today. In a rare national empirical study of protection orders and their enforcement, leading researchers Kinports

& Fischer found that more than four-fifths of the respondents reported that police respond "slowly or ineffectively" to reports of violations; 41.3 % of respondents characterized the failure of police response as a "significant or very serious problem." 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 & the Law 163, 223-224 (1993)(hereafter "Kinports & Fischer"). Even when police did respond, they often refused to arrest respondents. *Id.* A more recent study in the Boston area also reported a widespread reluctance of police to arrest for restraining order violations. Ptacek, 162 (detailing anecdotes of police failures to respond to violations). Local data indicate that the 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 CPO's* in 2006 *and 9%* in 2005.[13]

On the prosecution front, while states have made significant strides in prosecuting domestic violence itself, prosecution of CPO violations nationally is still rare. One study found that "[a]lmost three-fourths (70.9%) of respondents reported that prosecutors refuse to prosecute violations except in very limited circumstance." Kit Kinports and 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, 228 (1993). In another study, it was found that only 17% of protective order violators were arraigned, and only 6% were convicted of the violations. Adams & Powell, *Tragedies of Domestic Violence: A Qualitative Analysis of Civil Restraining Orders in Massachusetts,* Office of the Commissioner of Probation, Massachusetts Trial Court, pp. 15-

[13] D.C. police presented the U.S. Attorney's Office only *225* CPO violations in 2006 and *194* in 2005. E-mails from Kelly Higashi, Chief, SA/DV Unit, USAO, to Joan Meier, George Washington University Law School (Feb. 23, 2007, 18:41:24 and 20:07:48)(on file with author). The total number of CPOs awarded by the court was 1641 in 2006 and 2053 in 2005. Telephone conversation between Kelly Higashi and Joan Meier (February 22, 2007). More recent data could not be obtained in time for the filing of this brief.

17 (1995). *See also* Finn & Colson, *supra* at 49 ("For enforcement to work, the courts need to monitor compliance, victims must report violations, and, most of all, police, prosecutors, and judges should respond sternly to violations that are reported. These conditions were not in place in most of the jurisdictions examined for this report").

While in the District of Columbia, the U.S. Attorney's Office has been dedicated to domestic violence prosecutions and enforcement, the prosecutor's office has declined to prosecute the vast majority of contempts referred by the courts. *See* note 12 above. And as noted above, it is both unrealistic and unreasonable to expect the USAO to handle all legitimate CPO violations, on top of their prosecution of direct domestic violence charges. Indeed, that office often drops contempt charges as part of a plea bargain, resulting in essentially no consequences for CPO violations. *Id.* This was of course the context in which the *Robertson* case arose; *see also In re Kevin V. Jackson*, 11-FM-1123, *appeal pending.*

In short, the criminal justice system is not likely to treat violations of civil orders, especially non-physically violent ones, as real crimes, regardless of the label placed upon them. *See Kentucky Civil Protection Order Study*, *supra* at 99; Goldfarb, *supra* at 1512. When the violations consist of phone calls, verbal harassment and the like, which do not constitute independent criminal behavior, prosecutors not unreasonably believe that it will be difficult to convince a judge or a jury that such conduct should subject a defendant to a traditional criminal conviction. Such violations are generally viewed as minor "law violations" rather than "real crimes" requiring criminal justice response.[14]

[14] Unfortunately, this common attitude can be spectacularly wrong in domestic violence cases, where seemingly minor order violations are often preludes to severe or even lethal attacks. *See, e.g., Town of Castle Rock v. Gonzales,* 545 U.S. 748, 751-54 (police failed to respond to respondent's unconsented removal of children in violation of protection order which allowed the parties to *agree* to a mid-week dinner visit, resulting in abuser's murder of the parties' three

2. There is no Available Cadre of Disinterested Prosecutors.

Although the Supreme Court in *Young* speculated that, where the Executive declines to prosecute a contempt, disinterested private prosecutors could be appointed by federal courts, *Young,* 481 U.S. at 806 n.17, this may have been wishful thinking: Neither state nor federal courts have found any funds to support appointment of "disinterested prosecutors." *See State ex rel. O'Brien v. Moreland,* 778 S.W. 2d 400, 407 (Mo.Ct. App. 1989) ("No such funds are appropriated to State courts"); *Musidor, B.V. v. Great American Screen,* 658 F.2d 60, 65 (2d Cir. 1981), *cert. denied,* 455 U.S. 944 (1982) ("There is no [federal] fund out of which to pay other [disinterested] counsel"); *see generally,* Meier, *supra* 70 Wash. U. Quarterly at 90.

It is also unlikely that such cases will attract *pro bono* counsel. *Pro bono* lawyers are already in short supply for CPOs themselves, as well as a wide array of other public interest or legal service causes of action. *See, e.g.*, D.C. Task Force on Family Law Representation, *Access to Family Law Representation in the District of Columbia* (Fall 1992 p. 12) (finding that the majority of people who seek legal assistance from legal service providers are not receiving it). Legal service and *pro bono* providers can be expected to prioritize devoting their scarce pro bono resources to representing low income or other deserving individuals, over an amorphous "sovereign."[15]

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girls); *Campbell v. Campbell,* 682 A.2d 272, 273 (N.J. Super. 1996) (after police failed to arrest respondent who violated stay-away provision and merely escorted him from the premises, he returned and shot the victim); *Mastroianni v. County of Suffolk,* 91 N.Y.2d 198, 201-02 (Supreme Court, Nassau Ct. 1997) (victim stabbed to death after police failed to arrest husband after he violated order by entering her home and removing her furniture – despite knowing he was visiting neighbors next door).

[15] *Amici* can attest that *pro bono* lawyers for victims are already difficult to find. "Disinterested" representation that is not on behalf of a sympathetic victim of abuse is likely to attract even fewer volunteers. E-mail from Karen Cunningham, then-Legal Director, WEAVE, to Joan

B. Requiring all Criminal Contempts to be Prosecuted by a Public or Disinterested Prosecutor Would Profoundly Undermine the CPO Process.

Even if we could be confident that police would arrest when violations occur, and the public prosecutor would handle even minor CPO violations, the elimination of private contempt enforcement would still cripple the CPO process in several ways.

First, in contrast to the unwieldy, often delayed criminal process, "contempt is faster and faster is better." Zlotnick, 56 Ohio St. L. J. at 1199. The CPO system was created to provide a speedy response to abuse. *See Green v. Green,* 642 A.2d 1275, 1279 (D.C. 1994) (statutory procedures are designed "to expedite the application and if necessary, the enforcement of CPOs"); Scott Harshbarger and Jay Winsten, *Report on Domestic Violence: A Commitment to Action*, 28 New Eng. L. Rev. 313, 327 (1993)(Mass. Attorney General Report recommends expedition of domestic violence cases). Once a violation occurs, a rapid response is critical. "[D]eterrence is generally more potent when a quick punishment follows an infraction." Zlotnick, 56 Ohio St. L. J. at 1201-1202. It is well established that delays inherent in the criminal prosecution process often subject victims to further abuse, and often result in dismissals, as victims and witnesses disappear or become demoralized by the lack of resolution and stress of the process. *Id.* at 1210. Moreover, delay often wears down witnesses, or causes loss of memory and witness attrition, making cases harder to prosecute. *Id*. In contrast to the misdemeanor prosecution process, which can take easily from 3 to 12 months,[16] a private contempt enforcement action is ordinarily begun and concluded within a month.

Meier, George Washington University Law School (Feb. 20, 2007, 11:55 a.m.) (describing how few *pro bono* attorneys take contempts)(on file with author). Sadly, the recent closure of one major domestic violence legal provider, WEAVE, means that even fewer domestic violence lawyers are available for such appointments.

[16] *Zlotnick*, 56 Ohio St. L. J. at note 248, noting that "[s]ome misdemeanor cases in the District of Columbia can take up to a year to go to trial")(citation omitted).

Second, even if a disinterested private lawyer were appointed to bring the action as a contempt rather than a USAO misdemeanor prosecution, this presents other significant problems. Disinterested prosecution removes victims' power to control whether, when, or how a proceeding is brought to enforce their private civil order. Zlotnick, 56 Ohio St. L. J. at 1198 (private contempt enforcement empowers battered women by giving them choice and some control over the process). A disinterested prosecutor, by definition is not guided by the victim's wishes, nor accountable to her in any respect. To the extent that such prosecutors would act as an agent for the USAO, this could subject them to prosecution or other stringent measures from the State.[17] As Professor Deborah Epstein has noted, "[s]uch re-victimization can thwart the survivor's efforts to regain control over her life and move past the abusive experience." Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 Yale J. L. & Feminism 3 at 17 (1999).[18]

Given these potentially grave conflicts between a victim and the State, a "disinterested" attorney's role is difficult even to conceptualize: To whom is such a "disinterested" attorney answerable? Do they take direction from the U.S. Attorney's Office? If not, can they take guidance from the victim, and if so, to what extent? Are they required to implement USAO

[17] Subpoenaing and even incarcerating victims who are reluctant to testify has become unfortunately more necessary in the wake of the Supreme Court's new restrictions on use of reliable hearsay in criminal prosecutions. *See* Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. R. 747, 749 (2005)(*Crawford v. Washington* devastated domestic violence prosecutions and increased prosecutors' coercion of victims to testify); Casey G. Gwinn & Sgt. Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297, 313 (1993)(prosecutors too frequently use subpoenas to force victims' testimony).

[18] The risk of deportation of the abuser is a deterrent to some immigrant victims. Epstein, *supra* at 17. Epstein further notes that for the African American community, reliance on the criminal justice system is also problematic due to racial tension between the community and the police and reluctance to involve the police. *Id*. at 17-18 (citations omitted).

policies regarding, e.g., no-drop prosecution, or to report potential criminal violations by the victim? Are the victim's wishes regarding which allegations to pursue, what evidence to offer (e.g., children's testimony) etc, subject to countermand by this "disinterested" attorney - in a proceeding which she herself initiated in order to enforce her own civil order?[19] What if the victim seeks to *withdraw* her contempt action – is the appointed attorney free to *insist on going forward* – and on what grounds?

The loss of her own lawyer in the proceeding would also mean the loss of the profound support victims receive from their lawyers, including tailored and responsive legal counseling, advocacy and support in various systems, safety planning and risk assessment, and the general empowerment that follows from having representation. Without this kind of support from an attorney, the potential for such actions to provide a transformative legal intervention for victims of abuse would be greatly reduced.

CONCLUSION

For all the foregoing reasons, Amici respectfully request that this Court affirm the decision below and affirm the right of the beneficiary of a CPO to initiate and litigate enforcement of that order, in the name of the United States.

[19] While under such a regime a victim would be stripped of representation or legal guidance, the defendant, in contrast, receives the full panoply of constitutional protections, including the right to counsel. *In re Wiggins*, 359 A.2d 579, 581 (D.C. 1976).

Respectfully Submitted,

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