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Clerk of the Court

No. 16-FM-733

DISTRICT OF COLUMBIA COURT OF APPEALS

[redacted]

Appellant,

v.

[redacted]

Appellee.

On Appeal from the Superior Court of the District of Columbia – Domestic Violence Unit

BRIEF OF APPELLANT

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RULE 28(a)(2) STATEMENT

The parties to the case are Appellant [redacted], the plaintiff below, and Appellee [redacted], the defendant below.

In the Superior Court, [redacted] appeared *pro se* through the hearing on her motion for a Civil Protection Order. Joan S. Meier of the Domestic Violence Legal Empowerment and Appeals Project ("DV LEAP") assisted her in drafting and filing a Motion To Amend Findings By the Trial Court and To Alter/Amend the Judgment. [redacted] is represented in this Court by Leah J. Tulin and Bradley P. Humphreys of Jenner & Block LLP, along with Ms. Meier.

In the Superior Court, [redacted] appeared *pro se*. No counsel has entered an appearance on his behalf in this Court.

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ISSUES PRESENTED

1. Whether the trial court's conclusion that there was no good cause to believe that [redacted] committed an intrafamily offense constitutes an abuse of discretion, given that [redacted] himself admitted to threatening [redacted] with bodily harm in violation of D.C. Code § 22-407.

2. Whether the trial court abused its discretion by denying [redacted] petition for a Civil Protection Order on the ground that the matter was "primarily a custody case," which was neither relevant to the legal standard for entitlement to a Civil Protection Order pursuant to D.C. Code § 16-1005(c) nor supported by the record.

STATEMENT OF THE CASE

This is an appeal from the May 27, 2016 denial of [redacted] Petition for Civil Protection Order ("CPO") and the June 21, 2016 Order denying [redacted] Motion To Amend Findings By the Trial Court and To Alter/Amend the Judgment.

[redacted] filed a Petition and Affidavit for a CPO on May 13, 2016. She also requested a Temporary Protection Order ("TPO"), which the trial court granted on the same day, concluding that the safety or welfare of [redacted] and/or a family member was endangered by [redacted] within the meaning of D.C. Code § 16-1004(b)(1).

On May 27, 2016, the trial court conducted a hearing on [redacted] Petition for a CPO, during which [redacted] and [redacted] both appeared *pro se* and testified. The trial court denied [redacted] petition at the conclusion of the hearing.

On June 10, 2016, [redacted], through counsel, filed a Motion To Amend Findings By the Trial Court and To Alter/Amend the Judgment. The trial court denied the motion on June 21, 2016. [redacted] filed a Notice of Appeal on July 20, 2016.

STATEMENT OF THE FACTS

A. [redacted] Petition and Affidavit for a Civil Protection Order

On May 13, 2016, [redacted] filed a Petition and Affidavit in the Domestic Violence Unit requesting entry of a CPO against [redacted], the father of [redacted] two children. [redacted] sought an order prohibiting [redacted] from assaulting, threatening, harassing, or stalking her, her children, sister, and mother; requiring that [redacted] stay away from her and her children, sister, and mother; and that [redacted] not contact her or her family. App. 5.[1] [redacted] also requested that the court award her temporary custody of the two children. *Id.*

[1] Citations to the Appellant's Rule 30 Appendix are marked as "App. __."

In the Petition and Affidavit, [redacted] stated that [redacted] was stalking her and sent a photograph of two bullets to her phone, with the accompanying message "I'm going to kill you bitch." App. 3. [redacted] also stated that the message made her fear for her safety. App. 23. In addition, [redacted] stated that she and [redacted] got into a verbal altercation during which [redacted] told [redacted] "he had guns in the house and if [redacted] disrespects him again [redacted] will kill [redacted] and her family." App. 4. [redacted] further explained that her son "disclosed that [redacted] hit him twice with a metal broom causing the broom to bend" and that [redacted] confirmed to [redacted] that "he did hit the child." *Id.*

B. [redacted] Hearing Testimony

The court held a hearing on [redacted] petition for a CPO on May 27, 2016. At the hearing, [redacted] testified that [redacted] hit her son with a metal broom on May 12, 2016. App. 12. [redacted] further testified that she called [redacted] to inquire about the incident and told him she intended to go to court and get a protection order, that he admitted to this assault on his son, and that he later responded by sending her a picture of bullets and threatening to kill [redacted] and her family. *Id.* ("He sent me a picture that night of bullets and stuff like that and told me he's going to kill me and my whole family."). [redacted] showed her phone to the court, and the court read aloud a message stating, "all of you will die and I will do my time in jail, bitch." App. 15. [redacted] testified that the message came from [redacted] phone number.

[redacted] also testified regarding another text message that [redacted] sent to her, explaining that "every time [redacted] gets upset at me, he tells me he got guns in the house and he'll lay my whole family down." App. 18. [redacted] then proceeded to show the court a message in which [redacted] wrote ".762 come on, bro, right—," explaining that the numbers referred to the caliber of gun. *Id.* ("[H]e sent me the picture of the bullets and he told me what

type of gun that the bullets belong in."). The record reflects that [redacted] handed her phone to the court to look at the message and that the court gave [redacted] an opportunity to look at the messages as well. App. 19-20.[2]

[redacted] testified that [redacted] "has a history of this" and is "very violent." App. 23. She expressed her view that [redacted] "needs anger management," which "needs to happen because now he's doing it to the children." *Id.* When the court asked [redacted] whether her primary concern was for herself or her children, [redacted] responded:

> *It's mostly me* because everybody that's involved with me is getting hassled because of him, my mother, my sister, my children, anything that has something to do with me and him, him, his connection. So I just want to have a protection order *so that I won't have to be worried about my life or worrying about my back all the time . . . .*

Id. (emphasis added). [redacted] explained that she "want him to get some classes so he can be a better father" and "can learn to keep his hands to his self because it's like a war has started with our families." *Id.*

Regarding custody of [redacted] and [redacted] children, [redacted] testified that the children had been living with her since May 12 and that, for the nine months before that, they had been living with [redacted] App. 24-25. [redacted] explained that she had left [redacted] nine months prior and "became homeless" and "didn't want my children to be walking around because I left him from domestic issues." App. 25. [redacted] further testified that [redacted] "gave me a concussion before in front of the children" and "she didn't want them seeing it no more so I left so the kids would be comfortable with a, a stable situation because I didn't really

[2] The record also indicates that the court was unable to view the photographs of the bullets, perhaps due to a wireless connectivity issue in the courtroom. *See* App. 14. Nevertheless, [redacted] expressly admitted to sending the messages generally and to sending the pictures of the bullets specifically. App. 33 ("[S]o I did send those pictures of bullets . . . ."); *id.* ("Yes, I did send those pictures.").

have nowhere to go at." *Id.* [redacted] also explained that she had been served recently with "papers," which the trial court determined were "something [[redacted]] filed for custody" of their children. App. 22, 26-28.

C. [redacted] Hearing Testimony

At the hearing, [redacted] did not address [redacted] testimony about the concussion, nor did he dispute [redacted] testimony regarding [redacted] beating of their son. [redacted] did, however, admit to sending the photograph of bullets to [redacted], stating, "Yes, I did send those pictures." App. 33. [redacted] testified that a person he described as [redacted] "boyfriend/pimp" had threatened him. *Id.* [redacted] stated:

> —if you read the text messages with the pictures, it says I wasn't even talking to her. The picture said come on, bro. I don't call her bro. I'm talking to her boyfriend/pimp who threatened me, said he's going to come kill me and all my witnesses.

Id. [redacted] said, "so I did send those pictures of bullets and said, hey, come on, bro, come, come kill me like you said." *Id.* [redacted] testified that [redacted] "threatened to blow us up, come kill me and my whole family, so that's yeah, sir. . . . I got the right to defend myself, you know." App. 34. [redacted] went on to state that the "text message was directed towards [the boyfriend/pimp] because me and him been going back at it because this is her money, this is his moneymaker and whenever me and her get into it, he jumps into it and threatens me." *Id.* Upon questioning, [redacted] also acknowledged that ".762" in the text message he sent to [redacted] referred to the caliber of a gun. App. 35.

During his testimony, [redacted] also admitted to sending the other text message. Specifically, he said, "if you read those other messages *where I said I'm going to kill all you guys*, that's because her and her, and, and her pimp threatened to blow up my house, my mom's job." App. 33 (emphasis added). [redacted] also stated that [redacted] "lives in a hotel" and

that "I don't want my kids to be with her and her business and, you know, her and her illegal activities that her and her . . . pimp do, all right?" App. 38. [redacted] explained, "I just want to get my kids back to where they belong, you know, out of that environment." App. 41. [redacted] stated that he had served [redacted] with custody papers but that he did not want to wait until the court date on July 7 "to get my kids back." App. 41.

Following [redacted] testimony, [redacted] asked [redacted] questions on cross-examination. Although [redacted] requested an opportunity to refute [redacted] testimony, the court refused to allow any additional evidence.[3] The court then asked [redacted] follow-up questions about the testimony that [redacted] had given regarding where the children had been living. [redacted] testified regarding the bruises on her son that she saw when the children were with her one weekend, stating "[t]he next weekend I got my son had bruises on him and he told me what happened. I kept my kids. I called [[redacted]] and asked him did he do this to my children and he told me, yeah, I did." App. 49. [redacted] further testified that she was keeping the children out of school because [redacted] "threatened to harass me." App. 49. [redacted] explained that "he's been following me everywhere I go at" and "everytime I go somewhere I see him or one of his friends." App. 49.

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[3] The colloquy at the close of [redacted] cross-examination proceeded as follows:

THE COURT: Any [further] questions, [redacted]?
[redacted]: No, I don't have any questions.
THE WITNESS: All right.
[redacted]: I want to rebut. Can, can I come back up there, right?
THE WITNESS: I got a few more things to say, Your Honor. I, I, I, I, I'm going to make it real brief though.
THE COURT: No, it's going to be even briefer than that. Thank you.

App. 47-48.

D. Findings of the Court, Motion to Amend Findings by the Trial Court and to Alter/Amend the Judgment, and Notice of Appeal

At the conclusion of testimony, the court issued the following bench ruling on [redacted] petition for CPO:

> Based on everything that I heard from [redacted] and [redacted], this is primarily a custody case. That's really what this is. It's really a custody case with respect to the children in the case. That is the testimony is about custody.
>
> The case that was filed although I can address issues of custody, is not itself a custody case. It's a request for a civil protection order by the petitioner [redacted] and under the law, these are the types of things a judge can do in this kind of case. In a request for a civil protection order, the judge can grant a civil protection order or the judge can deny it. If the judge grants the civil protection order, the judge can make a decision with respect to custody. The judge can decide custody for the petitioner or decide custody for the respondent. If the judge denies the civil protection order, then the judge can't do anything about the custody issue in the case. I don't find that there's good cause to believe that there's been an intrafamily offense committed in this case even though [redacted] hasn't presented his witness, so at this point before I finish all of the witnesses, the request for the civil protection order is denied. Everybody's excused. Thank you.

App. 51-52.

On June 10, 2016, [redacted] moved to amend the findings by the trial court and to alter or amend the judgment on the basis that (1) [redacted] had admitted to threatening [redacted] and her purported boyfriend with bodily harm, in violation of D.C. Code § 22-407, and, accordingly, that there was good cause to believe an intrafamily offense had occurred; and (2) the existence of a custody dispute was not a valid reason to deny [redacted] petition. App. 54-57. The trial court denied that motion on June 21, 2016. App. 58. [redacted] filed a notice of appeal to this Court on July 20, 2016. App. 59-62.

SUMMARY OF THE ARGUMENT

This Court's longstanding precedents establish that it is an abuse of discretion to conclude, as the trial court did here, that no intrafamily offense has been committed under D.C.

Code § 15-1005 when a victim of violence presents undisputed evidence that her abuser threatened her—and when the abuser brazenly admits to having done so. In the trial court, [redacted] put forth uncontroverted evidence that [redacted], the father of her two children, threatened her and her family with bodily harm. [redacted] showed the court multiple text messages—messages that [redacted] *admitted* to sending to [redacted] phone—demonstrating that [redacted] threatened to kill [redacted] and/or her family and associates. Nevertheless, without referring to this undisputed evidence or providing any explanation whatsoever, the trial court stated that it lacked good cause "to believe that there's been an intrafamily offense committed in this case." App. 52. Because the trial court's conclusion does not "rest on a firm factual foundation," this Court should vacate the trial court's findings and judgment. *Wilkins v. Ferguson*, 928 A.2d 655, 666 (D.C. 2007) (quoting *In re T.L.*, 859 A.2d 1087, 1090 (D.C. 2004)).

In addition to the trial court's unsupportable conclusion that it lacked good cause to believe [redacted] had committed an intrafamily offense, the court also erred by pointing to the apparent custody battle between [redacted] and [redacted] as a basis for denying a CPO. Rather than focusing on the evidence in the record that [redacted] had threatened to kill [redacted] and her family, the trial court summarily denied [redacted] petition for a CPO because, in the trial court's view, the case was "primarily a custody case." App. 51. The trial court's decision that a custody issue somehow negated [redacted] violent threats constitutes an abuse of discretion, because the existence of a custody dispute between the parties to a CPO proceeding simply has no bearing on whether the petitioner is entitled to protection under § 16-1005. The trial court's focus on custody rather than on the proper standard for evaluating [redacted]

[redacted] CPO petition thus provides an independent basis for reversing the trial court's decision.

STANDARD OF REVIEW

This Court reviews a trial court's denial of a CPO for an abuse of discretion. *See Cruz-Foster v. Foster*, 597 A.2d 927, 929 (D.C. 1991). The trial court must, however, "rest its decision on 'correct legal principles.'" *J.O. v. O.E.*, 100 A.3d 478, 481 (D.C. 2014); *see also, e.g.*, *In re J.D.C.*, 594 A.2d 70, 75 (D.C. 1991) ("Judicial discretion must . . . be founded upon correct legal principles, and a trial court abuses its discretion when it rests its conclusions on incorrect legal standards." (internal citation omitted)). Moreover, "an informed choice among the alternatives requires that the trial court's determination be based upon and drawn from a firm factual foundation," and "[i]t is an abuse of discretion if the stated reasons do not rest upon a sufficient factual predicate." *In re J.D.C.*, 594 A.2d at 75 (quotation marks and alterations omitted); *see also Cruz-Foster*, 597 A.2d at 932 (noting that a trial court abuses its discretion unless it is apparent from the court's articulation of its reasoning that the trial considered the "entire mosaic" of the relevant circumstances).

ARGUMENT

I. APPLICABLE LEGAL STANDARD

The Intrafamily Offenses Act (the "Act") permits an individual to "file a petition for civil protection in the Domestic Violence Unit against a respondent who has allegedly committed or threatened to commit one or more criminal offenses against the petitioner." D.C. Code § 16-1003(a). "If, after hearing, the judicial officer finds that there is good cause to believe the respondent has committed or threatened to commit a criminal offense against the petitioner . . . , the judicial officer may issue a protection order." *Id.* § 16-1005(c). A protection order may incorporate a variety of requirements and restrictions, including, as relevant here,

- directing the respondent to refrain from committing or threatening to commit criminal offenses against the petitioner and other protected persons;
- awarding temporary custody of a minor child or children of the parties; and
- providing for visitation rights with appropriate restrictions to protect the safety of the petitioner.

Id.

To succeed on a petition for a CPO, the petitioner has the burden of showing good cause to believe the respondent has committed or threatened to commit a criminal offense against the petitioner, a burden of proof that is equivalent to a preponderance of the evidence. *Cruz-Foster*, 597 A.2d at 929. Although the issuance of a CPO is permissive even when good cause has been shown, *see* D.C. Code § 16-1005(c) (stating that the court "may issue" a CPO if good cause is shown), this Court has repeatedly emphasized that "[t]he paramount consideration concerning the Intrafamily Offenses Act is that it is remedial, and the Act must be liberally construed in furtherance of its remedial purpose." *Richardson v. Easterling*, 878 A.2d 1212, 1217 (D.C. 2005) (brackets omitted) (quoting *Cruz-Foster*, 597 A.2d at 929); *Maldonado v. Maldonado*, 631 A.2d 40, 42 (D.C. 1993) (explaining that the Act is a remedial statute that should be construed for the benefit of the class it is intended to protect).

II. THE TRIAL COURT'S CONCLUSION THAT IT LACKED GOOD CAUSE TO BELIEVE THAT [redacted] COMMITTED AN INTRAFAMILY OFFENSE IS UNSUSTAINABLE ON THIS RECORD AND MUST BE REVERSED.

The trial court abused its discretion by denying [redacted] petition for a CPO on the basis that there was no good cause to believe that [redacted] had committed an intrafamily offense. The record before the court established that [redacted] threatened to inflict bodily harm against [redacted] and her family, which violates D.C. Code § 22-407 and constitutes a

"criminal offense against the petitioner" within the meaning of the Act.[4] D.C. Code § 16-1005(c); *Richardson*, 878 A.2d at 1217 (concluding that "the Act applies, as its terms state, to any criminal offense committed by an offender upon a person" covered by the Act); *see also Robinson v. Robinson*, 886 A.2d 78, 86 (D.C. 2005) ("[T]he broad remedial purpose of the Intrafamily Offenses Act . . . is, to protect victims of family abuse from both acts *and threats* of violence." (emphasis added)).

[redacted] sworn testimony established that [redacted] threatened violence against her in violation of § 22-407.[5] Specifically, the record reflects that the trial court examined [redacted] phone and read two separate threatening messages that [redacted] had sent to [redacted], one in which [redacted] wrote "all of you will die and I will do my time in jail, bitch" and another in which [redacted] wrote ".762 come on, bro, right—." App. 15, 19.

Far from being disputed, [redacted] *admitted* to sending these threatening messages to [redacted] phone, and [redacted] testimony reveals his specific intent to threaten. [redacted] testified that he sent [redacted] both the picture of the bullets and the accompanying threat that he would "kill all you guys," referring to [redacted] and her alleged

[4] It is undisputed that [redacted] is the father of [redacted] two children, rendering [redacted] violation of D.C. Code § 22-407 an "intrafamily offense." *See* D.C. Code § 16-1001(6), (8), (9).

[5] This Court has recently stated that proving a threat under § 22-407 requires a showing that (1) the defendant uttered words to another person, (2) the words were of such a nature to cause the ordinary hearer to believe that the threatened harm would take place, and (3) the defendant intended to utter the words as a threat. *See Lewis v. United States*, 138 A.3d 1188, 1191 (D.C. 2016). As a result of this Court's *en banc* order vacating the decision in *Carrell v. United States*, 80 A.3d 163 (D.C. 2013), there is an open legal question regarding the precise level of intent required for a violation of § 22-407—specifically, whether the speaker must subjectively intend to utter the relevant words as a threat. *See Lewis*, 138 A.3d at 1190 n.2 (citing *Carrell v. United States*, No. 12-CM-523, 2015 WL 5725539, at *1 (D.C. order dated June 15, 2015)). But because [redacted] *admitted intending to threaten* [redacted] and her purported boyfriend, *mens rea* is not an issue in this case.

"boyfriend/pimp." App. 33. Likewise, [redacted] acknowledged that he sent the message to [redacted] phone that "all of you will die." In the context of both the messages themselves and [redacted] testimony, this statement "all of you" makes sense only as a reference to [redacted] and this third party.[6] [redacted] also admitted that he texted to [redacted] phone the message ".762 come on, bro, right—," describing the caliber of his weapon. App. 35.

Although [redacted] attempted to offer justifications for sending the messages, his explanations have no legal significance. For example, [redacted] claimed at the hearing that the message ".762 come on, bro, right—" was intended for another person, to whom he referred as [redacted] "boyfriend/pimp."[7] But regardless of who was the intended recipient of [redacted] messages, those messages still constitute intrafamily offenses under the law. [redacted] own testimony makes clear that he intended the picture of bullets, his statement about the caliber of his gun, and his statement that "all of you will die" to convey a threat. Even if [redacted] understood the word "bro" in the message about [redacted] gun to refer to her so-called "boyfriend/pimp," the message was *sent to* [redacted], and she would naturally fear

[6] [redacted] also testified that [redacted] threatened her family and, specifically, her mother. App. 12-13 ("He . . . told me he's going to kill me and my whole family. He's been threatening my mother—"); App. 13 ("He told me he was going to kill me. He was going to kill my mother—".). [redacted] did not refute that allegation in his own testimony.

[7] It bears noting that the factual predicate for this argument—*i.e.*, that such a person in fact exists and what, if any, relationship [redacted] may have had with him—was not fully aired during the hearing, because the trial court refused to permit [redacted] to rebut [redacted] claims on this point. App. 47. During her cross-examination of [redacted], however, [redacted] expressly disputed [redacted] allegations about her living situation, her relationship status, and her employment history. App. 45. The trial court did not make any factual findings about [redacted] so-called "boyfriend/pimp" or articulate any legal conclusions about the significance, if any, of [redacted] directing threats at such a person.

bodily harm—both to the intended victim and, collaterally, to herself—upon receiving such a message.[8]

Whether [redacted] intended to threaten [redacted] directly is, in any event, legally irrelevant. This Court has held that a threat under § 22-407 need not reach the intended "target" in order to constitute a criminal offense. For example, in *United States v. Baish*, 460 A.2d 38 (D.C. 1983), this Court explained that in order to be subject to criminal prosecution under the District of Columbia's threats statute, "the evidence must show that the threatening message was conveyed *to someone*—either to the object of the threat or to a third party." *Id.* at 42 ("[T]he government need not prove that the threatening words were conveyed directly to the potential victim; proof that the words were communicated to a third party suffice[s]."); *see, e.g*, *Gray v. United States*, 100 A.3d 129, 136 (D.C. 2014) ("A person can be guilty of threats without causing the target of the threats to fear serious bodily harm or injury."); *Beard v. United States*, 535 A.2d 1373, 1377-79 (D.C. 1988) (rejecting the argument that there was no threat because the appellant did not communicate his threats to the intended victim). Thus, even assuming that the threat ".762 come on, bro, right—" was intended for the alleged "boyfriend/pimp," [redacted] sent the threat to [redacted], and a reasonable person in [redacted] position would reasonably have been fearful that bodily harm would follow.

[redacted] only explanation for threatening [redacted] was that he sent the messages in response to other threats by [redacted] and her "boyfriend/pimp."[9] Again, however, even if

[8] [redacted] testified that he sent the message "I'm going to kill all you guys" because [redacted] alleged "boyfriend/pimp" had threatened him first and, according to [redacted], "I got a right to defend myself, you know." App. 34. [redacted] explanation demonstrates that he subjectively intended the message to constitute a threat to do harm. And the phrase "all of you" undeniably swept [redacted] into the threatened category.

[9] If anything, [redacted] reference to [redacted] alleged "boyfriend/pimp" and [redacted] allegations that [redacted] worked as an "escort on the internet" were intended to prejudice—

true—which the record by no means establishes—[redacted] explanation is irrelevant as to whether he committed an intrafamily offense. The undersigned are unaware of any case suggesting that it is a defense to the crime of threatening to do bodily harm that the threat was in response to another threat. Indeed, none of the many cases that set out the elements of the crime suggests that such a defense exists. Here, it is undisputed that [redacted] conveyed a threat to [redacted] that would have caused the ordinary hearer to fear bodily harm. That is all that is required to satisfy D.C. Code § 16-1005(c)'s good cause standard.

In sum, in denying [redacted] petition for a CPO, the trial court ignored [redacted] own admissions that he had made several threats, each of which constitute intrafamily offenses. Oddly, the trial court made no mention of those threats in its findings. Rather, the court issued only a single, conclusory statement that the court did not "find that there's a good cause to believe that there's been an intrafamily offense in this case." App. 51. On this record, such a conclusion cannot be sustained. *See Cruz-Foster*, 597 A.2d at 931-32 ("Although the judge's discretion is broad, we are uncertain from the judge's brief articulation of her reasons whether its exercise rested on correct legal principles, for it is not apparent that the judge took into consideration the 'entire mosaic.'" (citations omitted)); *J.O.*, 100 A.3d at 482-83 (vacating the trial court's decision because the trial court's explanations left doubt as to whether its decision rested on a sufficient factual basis and correct legal principles); *Wilkins*, 928 A.2d at 670

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and may have succeeded in prejudicing—the trial court against [redacted] by making insinuations that were irrelevant to whether a CPO is warranted. *See, e.g.*, Andrea Vollans, *Court-Related Abuse and Harassment* at 8 (YMCA Vancouver 2010) (detailing abusers' use of the court system to humiliate their victims), https://www.ywcavan.org/sites/default/files/resources/downloads/Litigation%20Abuse%20FINAL.pdf; Susan L. Miller and Nicole L. Smolter, *"Paper Abuse": When all Else Fails, Batterers Use Procedural Stalking*, 17 Violence Against Women 637, 640-43 (2011) (describing continued abuse of domestic violence victims through the court system), http://vaw.sagepub.com/content/17/5/637.abstract.

(concluding that the trial court abused its discretion in granting unsupervised visitation to a father with previously adjudicated intrafamily offenses because the order "not only contains no reference to applicable statutory provisions and case law, but also does not accurately reflect the reports and testimony of the health professionals involved in this case"). The court's ruling denying [redacted] petition should therefore be reversed.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY RELYING ON THE EXISTENCE OF A CUSTODY DISPUTE AS GROUNDS FOR DENYING A CPO.

The trial court also committed reversible error by denying [redacted] petition based on its conclusion that "this is primarily a custody case." App. 51; *see J.O.*, 100 A.3d at 481 (explaining that a trial court must "rest its decision on correct legal principles" and that the failure to do so constitutes an abuse of discretion (internal quotation marks omitted)). The only predicate for issuance of a CPO under the Act is a finding that "good cause [exists] to believe the respondent has committed or threatened to commit a criminal offense against the petitioner." D.C. Code § 16-1005(c). As noted above, the trial court provided no explanation as to why [redacted] admitted threats did not constitute intrafamily offenses. Rather, the court's ruling focused almost exclusively on the issue of custody. *See* App. 51 ("Based on everything that I heard from [redacted] and [redacted], this is primarily a custody case. That's really what this is. It's really a custody case with respect to the children in the case. That is the testimony is about custody."). This was error. Denying a CPO solely because a custody dispute exists between the parties, as the trial court did here, prioritizes questions of custody over the safety of the petitioner—an approach that is both unwise and inconsistent with the statutory standard for granting a CPO. The existence of a custody dispute has no bearing on whether there is good cause to believe that a crime against a petitioner has been committed or threatened.

As the trial court acknowledged, a court entering a CPO *may* also, as part of that order, award temporary custody of a minor child or children of the parties. D.C. Code § 16-1005(6); *see* App. 51. But a temporary custody award is merely one among many remedies that the trial court may include in a CPO upon a finding that a criminal offense has been committed or threatened. D.C. Code § 16-1005(c)(1)-(12). Nothing in the Act suggests that the trial court need not address the central question of whether there is good cause to believe that a crime against the petitioner has been committed or threatened, and whether a CPO is necessary to protect the petitioner, merely because a child custody dispute exists between the parties. To the contrary, the fact that courts have the option of awarding temporary custody *as part of* a CPO necessarily implies that the legislature never intended custody contests to mitigate *against* issuance of a CPO. The inclusion of a temporary custody award in the list of possible remedies available as part of a CPO represents a legislative policy determination that temporarily settling custody may reduce a common source of friction and prevent further criminal acts or threats against the petitioner.[10]

In this case, the undisputed testimony made clear that [redacted] was afraid for herself and secondarily, for her family. Indeed, the court asked her directly whether her primary

[10] Indeed, there is research suggesting that the existence of a custody contest is sometimes associated with a *greater* risk of violence to litigants and children. *See* American Bar Association, Commission on Domestic Violence, 10 Myths about Custody and Domestic Violence and How to Counter Them (2006), http://leadershipcouncil.org/docs/ABA_custody_myths.pdf (citing research sources in support of the proposition that "[m]any batterers' motivation to intimidate and control their victims through the children *increases* after separation, due to the loss of other methods of exerting control"); *cf.* Center for Judicial Excellence, CJE's Child Murder Database (2008-2016), http://www.centerforjudicialexcellence.org/2016/09/05/cjes-child-murder-database-2008-2016/ (last visited Oct. 25, 2016) (collecting cases reported in the media of children in the United States who were killed by a parent in circumstances involving divorce, separation, custody, visitation, and/or child support, with numerous cases involving ongoing custody contests). If anything, then, the presence of a custody battle should weigh *in favor* of the issuance of a CPO.

concern was for herself or her children, and [redacted] responded, "It's mostly me," explaining that she wanted a CPO "so that I won't have to be worried about my life." App. 23. Moreover, even if issues of child custody partially (or even primarily) motivated [redacted], it would be an abuse of discretion to deny [redacted] petition on that basis. In *Karim v. Gunn*, 999 A.2d 888 (D.C. 2010), the appellant challenged the trial court's entry of a CPO, arguing that the appellee "was utilizing the CPO procedure primarily to strengthen her position with respect to issues relating to custody and child support, rather than to secure protection from domestic violence." *Id.* at 890. The court found the appellant's claim regarding the appellee's motivation "not altogether implausible," remarking that the focus of the appellee's petition was "on issues other than domestic violence [and] the cross-examination of the [appellant] by the [appellee's] counsel was addressed almost entirely to the [appellant's] fitness to be the child's custodian and his financial ability to make child support payments." *Id.* Even so, however, the court affirmed the entry of the CPO, concluding that "[t]he motive of a party in bringing an action generally is immaterial to the question of whether the action may be maintained." *Id.* (quotation marks omitted).

Here, there is no evidence in the record that [redacted] herself was motivated by custody rather than by her own safety and the safety of her children.[11] Even so, *Karim* makes clear that any such motivation would have been beside the point. The parties' testimony regarding custody did nothing to negate the undisputed evidence of threats made by [redacted]

[11] Rather, it was [redacted] who focused on custody, served her with custody papers, and testified at length about custody. App. 32, 35-38, 41-43. [redacted] testimony was primarily about the threats [redacted] made against her and her fear of him. App. 12-20, 22-23. Although [redacted] also testified about [redacted] abuse of their son and her desire to protect her children, App. 12, 20-21, and while custody may have been part of her means of seeking to protect them, it was incidental to her desire for safety for herself and her family—the core purpose of the Act.

and the fear they engendered in [redacted]. By characterizing all of the testimony at the hearing as "about custody" in its factual findings, App. 51, the trial court wholly ignored the evidence that [redacted] threatened [redacted] with bodily harm and that she feared him. In doing so, the trial court missed the forest for the trees, and abused its discretion by focusing on a peripheral factor (custody) and failing to take into account the central evidence in this case. *See Cruz-Foster*, 597 A.2d at 931-32; *In re J.D.C.*, 594 A.2d at 75; *see also Maldonado*, 631 A.2d at 42 (concluding that the trial court abused its discretion by relying on a single factor in denying the extension of a CPO).

CONCLUSION

For the forgoing reasons, this Court should reverse the trial court's ruling and grant [redacted] petition for a CPO. In the alternative, the Court should remand the case to the trial court for consideration of the facts consistent with the proper standard under the Act.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on the 26th of October, 2016, a copy of the foregoing brief was filed with the Clerk of the Court for the District of Columbia Court of Appeals and sent via U.S. Mail to the following:

[redacted]

/s/ Leah J. Tulin
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