DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 11-FM-1123
Cr. No. 2010-CPO-1973

IN RE Mr. J,

APPELLANT

BRIEF and APPENDIX OF AMICUS CURIAE DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT (DV LEAP) IN SUPPORT OF NEITHER PARTY

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SUMMARY OF ARGUMENT

Amicus Curiae, the Domestic Violence Legal Empowerment and Appeals Project, respectfully submits this brief to offer the Court a broader perspective on the use of judicially-initiated compliance monitoring of civil protection orders ("CPOs"). While Amicus takes no position on the lawfulness of the particular hearing held below, we seek to ensure that this Court is cognizant of the broad policy concerns at stake before ruling on this case. Should this Court choose to reverse the order below in whole or in part, we ask that the Court limit its ruling so as to ensure that judicially-initiated compliance hearings with appropriate constitutional protections remain a viable means of enforcement of CPOs available to the District's trial courts, as it is in other jurisdictions. This is especially critical and necessary for "technical" violations of system requirements such as batterer's counseling, which petitioners may either not know about or choose to pursue.

ARGUMENT

Within the domestic violence context, as well as other civil settings, judicially-initiated show cause hearings are an essential judicial tool to ensure compliance with and enforcement of civil protection orders ("CPO"s). The power of a judge to enforce his or her own orders is intrinsic to the effectiveness of all court orders; this is especially true for CPOs. In some situations subsequent to entry of a CPO, where there are known violations of system requirements, prosecutorial involvement is both impractical and unnecessary. Swift and lawful accountability through the legal system's compliance-monitoring is a critical aspect of best practices in several leading domestic violence courts around the country.

I. SYSTEM INITIATED COMPLIANCE MONITORING IS ESSENTIAL TO THE EFFECTIVENESS OF CIVIL PROTECTION ORDERS.

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

Since contempt is a power inherent to all courts, *Bloom v. Illinois*, 391 U.S. 194 (1968), neither the Executive nor the Legislature may remove it. The Supreme Court has thus ruled that federal courts may not be deprived of the inherent power to enforce their own court orders through contempt, even where a public prosecutor declines to prosecute. *Young v. Vuitton*, 481 U.S. 787 (1997).

While many violations of CPOs go un-reported, and others are brought to the court's attention by petitioners, there is a class of violations, colloquially known as "technical" violations, of which petitioners often lack knowledge, or the motivation to enforce. These violations involve orders to participate in counseling, drug testing, and the like, i.e., required activities which do not involve the petitioner, although they may impact her safety. For such violations, the *system* must report the violation to the court, because only the system (e.g., the probation department, or batterers' counseling program) knows of the violation. In such cases

proof of the violation is typically straightforward, as it was here, entailing only documentation and/or testimony as to the respondent's failure to attend the program or comply with other requirements. Courts must be able to enforce these provisions as reliably as any others, lest their orders become meaningless and the provisions which aim to help the respondent change his destructive behavior impotent.

In fact, this Court has repeatedly affirmed that a court may *sua sponte* hold an evidentiary hearing and find a defendant in contempt for violating a CPO, even where there has "not been any indication of interest in further proceedings by . . . the beneficiary of the protection order." *In re Herschel D. Shirley*, 28 A.3d 506, 512 (2011) (quoting *Adams v. Ferreira*, 741 A.2d 1046, 1047 (D.C. 1999)); See also Appellant's Brief and Record at 47-48, *In Re Mr. J* (2011) (11-FM-1123), Tr. 5:13-6:13 (citing *Adams*).

A. Enforcement is the Critical Weakness in the CPO System

While CPOs have proven surprisingly effective interventions in some respects, there is "considerable anecdotal evidence . . . that some batterers flout civil protection orders with impunity." Peter Finn & Sarah Colson, U.S. Dept. of Justice, *Civil Protection Orders: Legislation, Current Court Practice and Enforcement* 49 (1990);[1] s*ee also* David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 Ohio St. L.J. 1153, 1194 (1995) ("lack of enforcement is still cited as the principal weakness of protection orders"). Research has consistently shown that CPOs are violated approximately half the time. *See, e.g.*, T.K. Logan et al, *The Kentucky Civil Protection Order Study: A Rural and Urban Multiple Perspective Study of Protection Order Violation Consequences, Responses, and Costs* 97 (2009)(hereafter "Kentucky CPO Study")(*see*

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

Appendix), https://www.ncjrs.gov/pdffiles1/nij/grants/228350.pdf (finding that during the six-month follow-up period after women obtained a protective order, half reported a violation of the protective order); 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 the largest recent in-depth study of CPO enforcement**,** the majority of recipients of protection orders indicated that the orders' effectiveness depended on the perpetrator's fear of legal repercussions. The study concluded, "if protective orders are violated without consequences, this fear would be eliminated." Kentucky CPO Study, *supra* at 156. Other studies emphasize the same point. *See* Office for Victims of Crime, U.S. Dep't of Justice, NCJ 189190, Enforcement of Protective Orders (2002), available at https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin4/welcome.html.

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

they are the sole agent of an enforcement action. *See Quincy Domestic Violence Community Response Manual* 41 (1997)(*see* Appendix).

Regular compliance review hearings for respondents have been shown to benefit overall compliance. *See* Nat'l Council of Juvenile & Family Court Judges, *A Guide for Effective Issuance & Enforcement of Protection Orders* 66, 71 (2005)(*see* Appendix). In a study performed in Dade County, Florida, the highest rates of recidivism, as measured by re-arrest rates, were generated by defendants who had also failed to complete court-ordered batterer intervention programs. Nat'l Council of Juvenile & Family Court Judges, Dade County Domestic Violence Division, *Family Violence: Emerging Programs* 114 (1998)(*see* Appendix). In short, as common sense suggests, if batterers violate a counseling provision without consequence, they are also more likely to violate other more serious provisions, such as non-abuse of the victim. *Id.*

B. Public or Disinterested Prosecutors Cannot be Expected to Prosecute All Non-Violent Violations of Civil Protection Orders.

While it might be suggested that enforcement can be accomplished through other means, e.g., with independent prosecutors, with respect to technical violations at least, this is both unrealistic and *Amicus* suggests, unnecessary.

1. Public Prosecutors

As one former DC 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.

David Zlotnick, *Empowering the Battered, supra at* 1209-10. *See also Gordon v. State*, 960 So. 2d 31, 39 (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"). If this is true even where the defendant has re-assaulted the victim or violated a stay-away, it is far more true where the defendant has merely failed to appear at a drug test or batterer's counseling, which neither constitutes independent criminal behavior nor directly threatens the victim. It is thus unrealistic to expect a busy prosecutor's office to be willing and able to prosecute a substantial number of such violations. At root, the criminal contempt label does not change the fact that enforcement of a *civil* order is simply not viewed by prosecutors – or anyone - as a "crime" worthy of prosecution like other crimes. Such violations are understandably viewed by law enforcement as minor "law violations" rather than "real crimes" requiring a criminal justice response.

2. Disinterested Prosecutors

Although the Supreme Court in *Young v. Vuitton,* 481 U.S. 787 (1997) speculated that, where the Executive declines to prosecute a contempt, disinterested private prosecutors could be appointed by federal courts, both state and federal courts have found that there is no such fund for "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,* Joan Meier, *The Right to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests,* 70 Wash. U. Quarterly 85, 90 (1992).

It is also unlikely that such cases will attract *pro bono* counsel. In *Amicus's* experience, *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* 12 (Fall 1992) (finding that the majority of people who seek legal assistance from legal service providers are not receiving it); D.C. Access to Justice Commission and D.C. Consortium of Legal Services Providers, *Rationing Justice: The Effect of the Recession on Access to Justice in the District of Columbia*, (Sept. 2009) in the District of Columbia Access to Justice Commission Annual Report for the Year Ending February 28, 2010 (Attachment 3) http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf, p. 11. 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 in cases they seek help with, rather than to enforce "technical" system requirements embedded in a CPO.[2]

For all these reasons, when respondents commit non-violent violations, it is simply not sufficient for a court's options to be limited to the willingness and availability of a public or disinterested prosecutor to step in. Public prosecutors' offices' core missions do not include enforcement of civil court orders, particularly when there is no direct harm to the victim. Telephone Interview with Liberty Aldrich, Director of Domestic Violence & Family Court Programs, Center for Court Innovation (Jan. 20, 2012); Telephone Interview with Judge Jerry Bowles, Family Court Judge, Jefferson County Judicial Center (Feb. 14, 2012). Show-cause hearings are traditionally conducted by the court as part of the larger matter. *See, e.g.*, Friend of the Court Bureau/SCAO, Michigan Supreme Court, *Show Cause Proceedings*, http://www.courts.michigan.gov/scao, (describing show cause orders and hearings in family law

[2] While *pro bono* representation is sometimes available for victims of abuse seeking contempt enforcement, *Amicus* can attest that *pro bono* lawyers are already very difficult to find. If the representation were on behalf of the court or the U.S. Attorney's Office, rather than on behalf of a sympathetic victim of abuse, with all due respect, it is likely that it would attract even fewer volunteers.

proceedings, and including jail as one possible consequence of violating a parenting time order) (last visited Feb. 27, 2012) (*see* Appendix). Judges are understandably motivated to enforce their own orders - thus show-cause hearings are a long-established procedure for inviting a respondent to show why s/he should not be held in contempt. Judicial show-cause hearings for violation of court-ordered CPO conditions are widely recognized as essential to effective judicial practice in this field. *See Promising Practices,* 225-26 *supra;* Adele Harrell, *The Impact of Court-ordered Treatment for Domestic Violence Offenders, in* Legal Interventions in Family Violence: Research Findings & Policy Implications 73-74 (U.S. DOJ 1998)(*see* Appendix).

Without routine and effective enforcement of orders from all parts of the legal system, the credibility and foundation of the legal process is undermined. *See* Nat'l Council of Juvenile & Family Court Judges, *A Guide for Effective Issuance & Enforcement of Protection Orders, supra* 66, 71. The inherent authority of all courts to enforce their own orders through show-cause or contempt hearings, thus cannot be compromised or constrained by prosecutors' limited resources or understandable lack of commitment to enforcing civil orders.

II. COURTS AROUND THE COUNTRY UTILIZE SYSTEM-INITIATED COMPLIANCE HEARINGS AT WHICH RESPONDENTS MAY BE HELD IN CONTEMPT WITHOUT AN INDEPENDENT PROSECUTOR.

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

A. Florida

Florida was one of the very first jurisdictions to establish a domestic violence court; Amicus recalls that Florida was also the court which provided in-depth consultation to the D.C. Superior Court during the development of its Domestic Violence Court. Florida's courts and legislature have grappled with the question of how courts may or may not enforce their orders,

and have resolved it by affirming the judicial power to hold parties in contempt, with or without the assistance of a prosecutor.

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

The Court held:

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

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

Now, after an initial CPO disposition hearing, Florida court coordinators monitor all court orders and treatment referrals for compliance, and bring non-complying parties back before the court for appropriate sanctions if necessary. See *Family Violence: Emerging Programs*, *supra* 112. *Amicus* is informed that when a violation is reported, the judge either leads the

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

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

B. Kentucky

Courts in Louisville, Kentucky use a similar procedure. Judge Jerry Bowles, a leader in the domestic violence field, has described his use of the following procedure as follows: After the

full due process hearing for a Civil Protective Order, an automatic "show cause" hearing is set for several weeks later and the Respondent is served with the Order, which he signs, to appear and demonstrate his compliance with the Order. The Show Cause Hearing is an opportunity for the Respondent to demonstrate that he is attending the Batterer's Intervention Program ("BIP"), paying his child support, and has vacated the residence or any other affirmative duty under the Order. If the Respondent is not in compliance with the BIP, the provider will have already filed a sworn affidavit to that effect with the Court. At the compliance hearing, the judge engages the Respondent regarding his reasons for non-compliance. Respondents are typically re- referred to the program and again advised of the implications of continuing to ignore the Orders of the Court. The case is then scheduled for additional show cause hearings for the Respondent to show cause why he should not be held in contempt. While the Respondent is given several chances to comply with the court's order if, the Respondent repeatedly fails to comply, the Judge will find the Respondent in contempt and impose a sentence. Throughout the entire show cause process, no prosecutor is involved in the Court's enforcement of the civil judgment. The judge places the Respondent under oath and then allows him to make any statements regarding his continued refusal to comply with the judgment of the court so that the Court can make a fully informed decision as the fact-finder. Email from Judge Jerry Bowles, Family Court Judge, Jefferson County Judicial Center to Corrie Brite, DV LEAP Intern (Feb. 24, 2012, 11:08 EST)(on file with author).

Judge Bowles notes that the Court is not only charged with entering Orders and Judgments in the Family Court but is also charged with their enforcement, to make sure the order is not a meaningless process. In explaining his view of the Court's role, Judge Bowles states the following: "A court enters an order with the expectation that it will be followed and enforced. To

the extent that we continue to hear in the media that a Civil Protection Order is 'only a piece of paper, and will not stop violence,' that presupposes that it is not an enforceable judgment. In the jurisdictions where courts are not only entering judgments of protection but also enforcing them, petitioners are being protected. No civil court judgment would be perceived by the public as worthwhile or valued if there is an accepted expectation that it is unenforceable 'by the issuing authority.' Many accommodations and indulgences are provided along the way, including multiple schedules, sliding fees, indigent slots [for counseling], and repeated re-referrals. In the end, contempt is the only ability judges have to enforce their court orders. It does no good to courts or batterers to legislate a judge to enter an order and then forbid them from properly enforcing it." Email from Jerry Bowles, Family Court Judge, Jefferson County Judicial Center, to Corrie Brite, DV LEAP intern (Feb. 24, 2012, 11:08 EST) (on file with author). In addition, Judge Bowles stresses the importance of judicial involvement in engaging the parties in questions and answers, either after counsels' questions, or where parties lack representation, as a "best practice" which allows the fact finder to make the most informed decision. *Id.*

C. Other Jurisdictions

While Amicus' research has not been exhaustive, we have identified several other jurisdictions which also expressly permit courts to hold contempt hearings themselves, with no prosecutor present. For instance, in Michigan, the family court utilizes show cause orders to hold litigants accountable for violations of family court orders, particularly those involving parenting time, custody, or child support. Friend of the Court Bureau/SCAO, Michigan Supreme Court, *Show Cause Proceedings*, http://www.courts.michigan.gov/scao, (pro se publication describing show cause orders, procedures and remedies) (last visited Feb. 27, 2012) (*see* Appendix). The outcome of such a show cause hearing can include new orders or contempt

sentences, including an array of penalties including jail or fines. *Id. See also* Wyo. R. Crim. Pro. 42 (Contempt)("[t]he judge may conduct a hearing without assistance of counsel or may be assisted by the attorney for the state or by an attorney appointed by the court for that purpose"); Kan. Stat. Ann. Sec. 20-1204a (2009) (court may issue order to show cause after a motion alleging violations has been filed, and then conduct hearing). Kansas advocates who responded to Amicus' query, however, have not seen Kansas courts utilize this procedure. Email from Stephine Bowman, Protection Order Attorney, Kansas Coalition Against Sexual and Domestic Violence, to Joan Meier (Feb. 23, 2012, 4:00 p.m. EST); Email from Gary West, Protection Order Attorney, Kansas Coalition Against Sexual and Domestic Violence, to Joan Meier (Feb. 23, 2012, 6:04 EST).

CONCLUSION

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

rights are protected, we also ask this Court to preserve a meaningful avenue for courts to enforce all provisions of their civil orders.

Respectfully Submitted,

By: _____

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CERTIFICATE OF SERVICE

I, Joan Meier, hereby certify that I caused the foregoing Brief of *Amicus Curiae* to be served upon counsel for Appellant and counsel for the U.S. Attorney's Office by placing it in first-class mail, postage prepaid, on or before February 27, 2012, to:

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