No. 91-1231

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

UNITED STATES OF AMERICA,
Petitioner,
v.
MICHAEL FOSTER,
Respondent.

On Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF OF AYUDA, WOMEN'S LEGAL DEFENSE FUND, ARIZONA COALITION AGAINST DOMESTIC VIOLENCE, CALIFORNIA WOMEN'S LAW CENTER, CATHOLIC UNIVERSITY LAW SCHOOL'S FAMILY ABUSE PROJECT, CENTRO DE AMISTAD, CHICANOS FOR LA CAUSA, COLORADO DOMESTIC VIOLENCE COALITION, D.C. COALITION AGAINST DOMESTIC VIOLENCE, FAMILY VIOLENCE PREVENTION FUND, FRIENDLY HOUSE, GEORGE WASHINGTON

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INTERESTS OF AMICI CURIAE

This brief amici curiae is submitted on behalf of numerous interested organizations which provide assistance to victims of domestic violence like Ms. Ana Foster, a battered woman whose attempt to avail herself of civil legal protection was held by the court below to immunize her abuser from criminal prosecution. These organizations include legal service providers, law school clinical programs, women's legal advocacy organizations, domestic violence shelters, and state and national domestic violence coalitions. All amici have substantial knowledge of the problem of domestic violence and the procedures for combatting it in the District of Columbia and nationwide. Amici are gravely concerned that the decision of the D.C. Court of Appeals, if sustained, will deal a fatal blow to the effectiveness of remedial schemes in the District of Columbia and nationally, and thereby hinder society's efforts to protect battered women from abuse.[1] A statement of the interest of each amicus is included as Appendix A.[2]

STATEMENT OF THE CASE

Shortly after Ana Foster married Michael Foster [hereinafter Respondent] in March 1987, Ms. Foster became the victim of serious physical and emotional abuse at the hands of her husband. Respondent repeatedly assaulted, threatened and harassed Ms. Foster. Respondent's violence included choking Ms. Foster, twice throwing her to the floor, putting his fist through the wall, and refusing to allow her to leave the house. Respondent threatened to kill Ms. Foster on several occasions, telling

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[1] This brief refers to domestic violence victims as women (although it acknowledges that there are male victims) because ninety-five percent of adult victims of domestic violence are women. Bureau of Justice Statistics, U.S. Dep't of Justice, *Report to the Nation on Crime and Justice: The Data* 21 (1983).

[2] Pursuant to Sup. Ct. R. 37.3, the parties' letters of consent to the filing of this brief have been filed with the clerk.

her that he had purchased a Magnum 45 revolver and that he would "blow [her] brains out." [3]

After months of abuse, Ms. Foster applied for and obtained emergency protection under the District of Columbia's civil statutory scheme for addressing domestic violence, the Intrafamily Offenses Act. D.C. Code Ann. §§ 16-1001 to -1005 (1989). The Family Division of the D.C. Superior Court issued a Temporary Civil Protection Order, finding that Respondent presented an "immediate danger to the welfare or safety of a family member." [4] In August 1987, this order was converted to a Civil Protection Order of one-year duration requiring that Respondent "not molest, assault, or in any manner threaten or physically abuse" Ms. Foster.[5]

Despite the court order, Respondent continued his pattern of physical violence, intimidation and threats against Ms. Foster. Respondent's abuse included threats such as "I'm going to beat your ass," and, "Tomorrow, when you leave the house, be careful." (Joint Appendix 23) [hereinafter J.A.]. On one occasion, Respondent followed Ms. Foster from her workplace, grabbed her, and threw her against a parked car. She hit the car with such force that she lost consciousness. She also sustained contusions on her forehead, a gash on her upper lip, and a loosened upper tooth, and was rushed by ambulance to the hospital (J.A. 24). On another occasion, Respondent threw Ms. Foster down a flight of stairs, kicking her as she fell, and slamming her head into the floor, causing her to lose consciousness. (J.A. 28).

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[3] See Petition and Affidavit for Civil Protection Order, *Ana V. Foster v. Michael Foster*, (IF. No. 630-87) (D.C. Super. Ct. filed July 29, 1987), which is lodged with the Court [hereinafter Pet. & Aff. for Civ. Prot. Order].

[4] See Temporary Civil Protection Order, *Ana V. Foster v. Michael Foster*, (IF. No. 630-87) (D.C. Super. Ct. signed July 29, 1987), which is lodged with the Court.

[5] *United States v. Dixon*, 598 A.2d 724, 725-26 (D.C. 1991).

On September 22 and November 19, 1987, and on May 24, 1988, Ms. Foster filed Motions to Adjudicate Contempt of the Civil Protection Order. For a lengthy period, while the abuse continued, Ms. Foster was not able to accomplish personal service on Respondent as required by the Intrafamily Court Rules.[6] In August 1988, after service was completed, the Family Division of the D.C. Superior Court held a hearing on the contempt motions.[7] Ms. Foster was represented by a *pro bono* attorney from the public interest organization AYUDA. and Respondent was provided with court-appointed counsel. The United States Attorney did not participate in any way. After an evidentiary hearing, the court made findings of contempt with respect to four incidents, and found that Ms. Foster failed to sustain her burden of proof with respect to several other incidents. It then sentenced Respondent to consecutive sentences of 150 days of imprisonment for each of the four incidents of contempt.[8]

Ten months after Ms. Foster filed her first contempt motion, but just prior to the contempt hearing, the U.S. Attorney for the District of Columbia charged Respondent with assault with intent to kill while armed based on

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[6] The Intrafamily Rules require personal service by a person who is not a party to and is not otherwise interested in the action. Superior Court of D.C.-Intrafamily Rule 3(b), 7(c) [hereinafter D.C. Ct. IF. R.]. The Intrafamily Rules are included as Appendix B.

[7] While it took Ms. Foster almost one year for her motions to be heard because of service of process problems, usually a hearing occurs about one month after the motion is filed.

[8] *Dixon*, 598 A.2d at 725. Respondent's consecutive sentences were atypical. Usually contempt sentences are significantly shorter than the statutory maximum of 180 days imprisonment and/or a $300 fine, as set out in D.C. Ct. IF. R. 12(c). Most jail sentences are suspended, or execution is stayed. District of Columbia Courts, *Final Report of the Task Force on Racial and Ethnic Bias and Task Force on Gender Bias in the Courts* 152 (1992) [hereinafter *D.C. Court Report*].

one of his attacks on Ms. Foster.[9] Six months later, a grand jury returned a five-count indictment charging him with assault, threats, and assault with intent to kill, based on two assaults for which he had been found in contempt and three threats for which he had not. (J.A. 43-44). Respondent moved to dismiss the indictment on double jeopardy grounds, but the D.C. Superior Court Criminal Division held that the criminal offenses before it differed from the contempt motions brought in the Family Division. *United States v. Foster*, No. F. 8415-88, Pet. App. 23a (D.C. Super. Ct. Apr. 13, 1989). The court also analyzed the legislative history of the Intrafamily Offenses Act and found,

> clearly an intent by the legislature to allow two different remedies for violation of Civil Protection Orders[:] One for contempt after wilful violation of the order to protect the petitioner and the ability of the Court to enforce its orders and additional proceedings in the Criminal Division to protect the community.

Id. at Pet. App. 24a.

Respondent appealed the denial of his motion to dismiss the indictment, reiterating his double jeopardy claims. After oral argument before a panel of the District of Columbia Court of Appeals, the court *sua sponte* consolidated the case with another pending case, *United States v. Dixon.* The court of appeals then heard reargument *en banc*, and issued the decision on review before this Court.

SUMMARY OF ARGUMENT

The District of Columbia Court of Appeals held that a battered woman's contempt motion to enforce her civil protection order barred the United States Attorney from prosecuting the respondent for statutory criminal offenses which stemmed from the same incident. In so holding, the court adopted a novel theory of double jeopardy

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[9] *Dixon*, 598 A.2d at 727.

which for the first time extended the protection of the Double Jeopardy Clause to the system of privately maintained civil proceedings. That extension of double jeopardy protection takes the Clause far beyond its purpose and its scope as defined by the cases of this Court.

The D.C. Intrafamily Offenses Act reflects a well-conceived legislative judgment that the problem of domestic violence requires that victims of such violence have access to a particular form of relief: the equity powers of the family court. The relief available from that court would be rendered ineffectual if that court could not issue orders which were enforceable by victims of violence as necessity dictates. At the same time, the Act expressly recognizes that the rights of the victim to pursue her individual remedies should not limit or affect the prerogative of the State to vindicate the rights of the community at large through the enforcement of the criminal laws. Just as it is vital that the victim of domestic violence have an effective remedy at her disposal, it is necessary that the State have the power to demonstrate its disapproval of domestic violence through criminal prosecution. If sustained by this Court, the decision below—which allows the actions of a private party to immunize persons in the position of Respondent from criminal prosecution—would destroy a carefully conceived legislative strategy for dealing with a problem of enormous proportions, the problem of domestic violence.

"The protections of the Double Jeopardy Clause are not triggered by litigation between private parties." *United States v. Halper*, 490 U.S. 435 (1989). This is clear even where the private litigation involves the kind of punishment that, if sought by the government, would undoubtedly give rise to double jeopardy concerns. This Court has neither held nor implied that a motion to enforce a civil judgment between private parties would bar a subsequent criminal action arising from the same incident.

The principle that the Double Jeopardy Clause has no application to proceedings between private parties reflects the basic purposes of the constitutional prohibition. The Clause was designed to prevent the State, with "all its resources and power," *Green v. United States*, 355 U.S. 184, 187-88 (1957), from prosecuting a defendant twice for the same offense. Abuse of prosecutorial power is the core concern of the Double Jeopardy Clause, and the law of double jeopardy has been shaped by this Court to reflect that concern.

Ms. Foster's contempt motion presented no risk of prosecutorial overreaching. Unlike the U.S. Attorney on the criminal side, the victim of domestic violence, invoking her rights under the Act, does not command the resources and power of the State's criminal prosecutor. She has no access to police investigators, police files, or search warrants to support her investigation. She may not enlist the grand jury, with its subpoena power, to aid her investigation. She has no power to arrest or detain the respondent upon the filing of her motion. Indeed, under the D.C. Intrafamily Offenses Act, she is not even provided with the ordinary discovery rights of a civil litigant. The respondent, in contrast, is afforded broad due process procedural protections, including a court-appointed attorney if indigent, while his victim usually appears *pro se*.

Moreover, unlike the U.S. Attorney, a battered woman appears in court as someone who deeply fears that her safety and life will not be protected. She knows that her last court appearance, in which she obtained an order for her protection, did not end the violence against her. To liken her situation, and her motion to enforce the order entered for her protection, to the actions of the State as prosecutor is to trivialize the important function of the Double Jeopardy Clause.

The court below proceeded as if the defendant's interest was the only interest to be considered in addressing

the scope of double jeopardy protection. Under this Court's cases, however, a defendant's interest in finality has never been sufficient to bar a prosecution absent the risk of prosecutorial overreaching. The defendant's interest in finality cannot negate or override society's interest in eliminating domestic violence (which the legislature correctly determined requires a two-track, criminal and civil, legal approach), the State's right to one "full and fair opportunity" to obtain a criminal conviction, or a victim's right to employ available legal processes in an effort to save her own life.

If the Court finds that the Double Jeopardy Clause does apply to a private litigant's motion for contempt in a civil case, the proper test for determining whether both cases involve the "same offense" is that set forth in *Blockburger v. U.S.*, 284 U.S. 299 (1932). Under the *Blockburger* test, which focuses on the statutory elements of each offense in order to determine whether, as a matter of commonsense, both should be regarded as the "same" the violation of a court order is clearly not the "same offense" as assault with intent to kill, assault, or threats. The broader standard for judging the "same offense" applied in *Grady v. Corbin*, 495 U.S. 508 (1990), is simply inapplicable to this case, for that standard is triggered only where the successive prosecutions raise a concern about prosecutorial overreaching—the very concern which is absent in this case.

At issue in this case is a carefully conceived legislative approach to assist domestic violence victims. If the judgment in *Foster* is affirmed, the result will be the destruction of that approach, with the certain consequence of greater injury and loss of life. As shown below, the Double Jeopardy Clause and this Court's precedents neither require nor permit that result.

ARGUMENT

I. THE DECISION BELOW UNDERMINES THE DISTRICT OF COLUMBIA'S INTRAFAMILY OFFENSES ACT WHICH PROVIDES AN IMPORTANT REMEDY TO VICTIMS OF DOMESTIC VIOLENCE.

A. The Problem Of Domestic Violence In America Is One of Crisis Proportions.

Domestic violence is a social problem of extraordinary proportions. National estimates on the number of domestic violence victims vary from 626,000 a year [10] to four million a year.[11] Battering "is the single largest cause of injury to women," [12] resulting in one-fifth of women's hospital emergency room visits,[13] at a cost of $44 million in medical expenses each year.[14] Battering may involve extremely severe violence, including punching, kicking, and attacks with knives, guns, and broken bottles. Injuries include lacerations, fractures, dislocations, unconsciousness, internal bleeding and death.[15]

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[10] Caroline W. Harlow, U.S. Dep't of Justice, *Female Victims of Violent Crime* 1 (1991).

[11] *Violence Against Women: Victims of the System. Hearings on S. 15 Before the Senate Comm. on Judiciary*, 102d Cong., 1st Sess. 37 (1991) (resolution adopted by the National Association of Attorneys General) [hereinafter *Senate Judiciary's Violence Against Women Hearings*].

[12] American Medical Association, *Five Issues in American Health* 5 (1991).

[13] Susan A. MacManus & Nikki R. Van Hightower, *Limits of State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies*, 49 Pub. Admin. Rev. 269 (May/June 1989).

[14] Susan V. McLeer & Rebecca Anwor, *A Study of Battered Women Presenting in an Emergency Department*, 79 Am. J. Pub. Health 65 (1989).

[15] Charles P. Ewing, *Battered Women Who Kill* 8 (1987) (reviewing several studies).

Domestic violence usually escalates in frequency and severity over time.[16] Nearly one-third of all female murder victims are killed by their husbands or boyfriends,[17] often as the culmination of a history of domestic violence.[18] Violence within an intimate relationship is especially difficult for victims to avoid: women face the greatest risk of violence when trying to escape from their batterers.[19]

The tragedy for battered women does not reflect the hidden psychological injury that the 3.3 million children who live in households with domestic violence experience each year.[20] According to the Attorney General's Task Force on Family Violence, "[c]hildren . . . who live in homes where parents are battered carry the terrible lessons of violence with them into adulthood . . . . [T]o tolerate family violence is to allow the seeds of violence to be sown into the next generation." [21]

B. The Criminal Justice System Alone Cannot Ensure Victims' Safety

The criminal justice system by itself has proven sadly ineffective in responding to the problem of domestic violence. Police have treated intrafamily violence less seri-

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[16] R. Emerson Dobash and Russell Dobash, *Violence Against Wives* 124 (1979).

[17] Federal Bureau of Investigation, *Uniform Crime Reports: Crime in the United States* 13 (1990).

[18] Police Foundation, *Domestic Violence and the Police* iv (1977).

[19] Angela Browne, *When Battered Women Kill* 110-22 (1987). If a man does not expect to be punished for his violent conduct, the likelihood of post-separation violence is highest. Desmond Ellis, *Post-Separation Woman Abuse: The Contribution of Lawyers as "Barracudas," "Advocates," and "Counsellors"*, 10 Int'l J. L. & Psychiatry 403, 408 (1987).

[20] *Senate Judiciary's Violence Against Women Hearings* at 37.

[21] Atty's General's Task Force on Family Violence, *Final Report* iii (1984) [hereinafter *Att'y Gen. Report*].

ously than other crimes,[22] and criminal prosecutions are very rare.[23] Moreover, even when the criminal justice system responds, its delays have a profound impact on victims, who typically experience additional violence while waiting for the system to work.

The facts in Ms. Foster's case illustrate the delay and unresponsiveness of the criminal justice system. The U.S. Attorney filed five criminal charges against Respondent for the incidents that led Ms. Foster *initially* to petition for civil protection on July 29, 1987, but not one of those charges was prosecuted.[24] Even though the grand jury eventually returned an indictment for some of the violence underlying the contempt motions, the grand jury action did not take place until January 19, 1989—almost eight months after the *last* incident.[25] Respondent's motion to dismiss was not resolved by the trial court until April 7, 1989, more than two years after the pattern of abuse began.[26]

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[22] *See, e.g., Balistreri v. Pacifica Police Dep't*, 855 F.2d 1421 (9th Cir.), *amended by* 901 F.2d 969 (1988); *Watson v. Kansas City*, 857 F.2d 690 (10th Cir. 1988); *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984); *Bruno v. Codd*, 393 N.E. 2d 976, 980 (N.Y.), *appeal denied*, 48 N.Y.2d 656 (1979).

[23] "Law enforcement personnel have been reluctant to prosecute domestic violence cases, which many consider to be private matters between spouses and thus inappropriate for government intervention." Dale H. Robinson, Congressional Research Service, *Report for Congress. Family Violence: Background, Issues, and the State and Federal Response* 22 (1992). *See also* Catherine F. Klein, *Domestic Violence: D.C.'s New Mandatory Arrest Law*, Washington Lawyer 24 (Nov./Dec. 1991).

[24] *See* Superior Court of D.C., Criminal Information System, Summary by PDID for Michael Foster (June 4, 1992) (lodged with Court); Pet. & Aff. for Civ. Prot. Order.

[25] *See Dixon*, 598 A.2d at 727; J.A. 28.

[26] *See* Pet. & Aff. for Civ. Prot. Order (describing onset of abuse).

C. The Intrafamily Offenses Act Is An Important Legal Remedy For Victims Of Domestic Violence

The inadequacy of the criminal justice system's response led Congress to pass the D.C. Intrafamily Offenses Act in 1970.[27] The Act authorizes the courts to issue civil injunctions against familial violence and to enforce the orders by holding respondents in contempt for violations of them. Proceedings under the Act were expressly intended to "coexist legally along side criminal prosecutions against the same person." [28]

Four aspects of the Act deserve particular attention. First, the scheme is civil and remedial. Before passage of the Act, the legislature reported that criminal offenses between family members were "often left unresolved or otherwise [fell] within the jurisdiction of the criminal court, both being unsatisfactory solutions." [29] As the D.C. Court of Appeals has recognized, the Act "provides for the civil treatment of intra-family offenses, and thus gives the court 'a wider range of dispositional powers than criminal courts to effect rehabilitation rather than retribution. . . .' " [30]

Second, the vast majority of individuals who proceed under the Act appear *pro se*, which was expressly intended when the legislature amended the statute in 1982

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[27] D.C. Court Reform and Criminal Procedure Act. ch. 10, 84 Stat. 473, 546 (1970) (*codified as amended* at D.C. Code Ann. §§ 16-1001 to -1005 (1989)).

[28] *Intrafamily Offenses Amendment Act of 1982: Hearings on Bill 4-195 Before Members of the Council of the District of Columbia* 3 (1982) (report of Committee on the Judiciary) [hereinafter *D.C. Comm. Report*].

[29] H.R. Rep. No. 907, 91st Cong., 2d Sess. 60 (1970).

[30] *Cruz v. Foster*, 597 A.2d 927, 929 (D.C. 1991) (citation omitted). Examples of such remedial options include ordering child custody, visitation, and child support, so that the parties can live apart without violence, and court-mandated counseling for batterers. D.C. Code Ann. § 16-1005(c)(2), (6), (7), (10).

to authorize private rights of action.[31] To facilitate *pro se* access to the system, simple forms exist for both Civil Protection Order Petitions and Motions for Contempt, and no filing fee is charged for either. In the District, sixty-six percent of battered women file for Civil Protection Orders *pro se*, and seventy-five percent bring their Motions for Contempt *pro se*.[32]

Third, the Act provides for private enforcement of the civil injunctive orders by motion for contempt.[33] "[I]t was the intention of the Council that the provi-

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[31] *See* D.C. Code Ann. § 16-1003(a); *D.C. Comm. Report* at 108.

[32] *D.C. Court Report* at 143, 153.

[33] D.C. Code Ann. § 16-1005(f). *Young v. United States ex rel Vuitton et Fils S.A.*, 481 U.S. 787 (1987), involving an exercise of this Court's supervisory power over the federal courts, has no application to this case. There has been no claim of disqualification of the "private prosecutor" in this case; indeed, only the government's criminal prosecution is before this Court, and not the contempt motions filed by Ms. Foster. Moreover, this Court's supervisory power does not govern the D.C. courts, which are comparable to state courts. *Jaycees v. Superior Court*, 491 F. Supp. 579, 581-582 (D.D.C. 1980). The District of Columbia courts have considered *Vuitton* in relation to contempt proceedings in domestic violence cases and have rejected *Vuitton's* applicability. *Castellanos v. Novoa*, 127 Daily Wash. L. Rptr. 1192, 1193-1194 (D.C. Super. Ct. July 9, 1987).

In *Vuitton*, the private party stood to gain $750,000 liquidated damages for violation of the injunction, and the Court was concerned with prosecutors who " 'have available a terrible array of coercive methods to obtain information,' such as 'police investigation and interrogation, warrants, informers and agents whose activities are immunized, authorized wiretapping, civil investigatory demands, [and] enhanced subpoena power,' " *Vuitton*, 481 U.S. at 811 (quoting C. Wolfram, *Modern Legal Ethics* 460 (1986)) (plurality part). Unlike the private prosecutor in *Vuitton*, Ms. Foster was not appointed as counsel by the Court under Federal Rule of Criminal Procedure 42, she had no prosecutorial powers (indeed, her discovery rights were inferior to those of most civil litigants), *see infra* pages 20-21, and her interest was saving her own life. *See* Joan Meier, *The 'Right' to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 Wash. U.L.Q. 85 (1982).

sions of civil protection orders be enforceable by privately filed contempt motions." [34] The D.C. City Council acted in recognition of the importance of privately-initiated contempt motions to a workable remedial scheme. Witnesses before the Council testified that, "the same problems of administrative delay and dependence on prosecutorial discretion that limit a complainant's ability to petition for a CPO [Civil Protection Order] also limit her ability to have that CPO enforced." [35]

Fourth, the legislature appreciated, and expressly stated, that contempt motions filed in civil actions in the Family Division must be in addition to criminal prosecution in the Criminal Division by the U.S. Attorney for the criminal offense: "The institution of criminal charges by the United States Attorney shall be *in addition to*, and shall not affect the rights of the complainant to seek any other relief under this chapter." [36]

While D.C. was one of the first jurisdictions to adopt a civil remedial scheme for domestic violence victims, as of 1990 forty-eight states had legislation allowing a petitioner to apply for a civil protection order; and in thirty states, the victim may file *pro se*.[37] Forty-one states provide for enforcement of protection orders through motions for contempt, an indispensable remedy if the underlying order is to have meaning.[38]

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[34] *Castellanos*, 127 Daily Wash. L. Rptr. at 1194.

[35] *IntraFamily Offenses Amendment Act of 1981: Hearings on Bill 4-195 Before a Public Roundtable of the Judiciary Committee of the D.C. City Council* 28 (1981) (statement on behalf of the Women's Legal Defense Fund).

[36] D.C. Ann. Code § 16-1002(c) (emphasis added). *See also D.C. Comm. Report* at 4.

[37] Peter Finn and Sarah Colson, U.S. Dep't of Justice, *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement* 8-9 (1990).

[38] *Id.* at 50-51. *See, e.g.*, Miss Code Ann. § 93.21.21 (Supp. 1991); 23 Pa. Cons. Stat. Ann. § 6114 (1991).

D. The Separate And Independent Civil And Criminal Legal Responses Are Both Necessary To End Domestic Violence.

The National Council for Juvenile and Family Court Judges,[39] the Attorney General's Task Force on Family Violence,[40] legal scholars,[41] and the District of Columbia's legislature, all recognize that the combination of both civil and criminal approaches is vital to stop domestic violence.

> Requiring victims to choose between civil and criminal processes deprives them and the state the ability to fully protect victims. . . . The denial of criminal prosecution reinforces the rationalization of abusers that family violence does not constitute a crime, and worse, is the fault of the victim. The denial of civil processes leaves victims extremely vulnerable while awaiting trial.[42]

The decision below undermines an important structure for ending domestic violence. That decision allows a respondent to escape punishment under the criminal law because his victim turns to a civil court to enforce her civil injunction against personal violence. The decision below sabotages the systems adopted by legislatures nationally to fight domestic violence, thereby guaranteeing the perpetuation of such violence intergenerationally.

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[39] National Council of Juvenile and Family Court Judges, *Family Violence: Improving Court Practice* 19 (1990).

[40] *Att'y Gen. Report* at 10.

[41] *See, e.g.*, Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 Wash. L. Rev. 267, 303-04 (1985).

[42] National Council of Juvenile and Family Court Judges, *supra*, at 10.

II. JEOPARDY DOES NOT ATTACH WHEN A BATTERED WOMAN ENFORCES HER CIVIL PROTECTION ORDER WITHOUT THE INVOLVEMENT OF THE STATE'S CRIMINAL PROSECUTOR.

This Court has never held that the Double Jeopardy Clause bars a criminal action by the State arising out of the same conduct that underlies a civil action between private litigants. Those two systems, one of private remedies and the other of state criminal actions, serve different functions. This Court has never even implied that a contempt motion to enforce a civil judgment entered by a court of equity would bar a subsequent criminal action arising from the same incident.[43]

As this Court said very recently, "The protections of the Double Jeopardy Clause are not triggered by litigation between private parties." *United States v. Halper*, 490 U.S. 435 (1989). *Halper* held that because the Government brought both actions, the Double Jeopardy Clause barred the Government from suing Halper civilly for a non-remedial award after it had already prosecuted him criminally. However, when a government prosecution follows a private suit—even a private suit in which punishment was unmistakably imposed—or where the private suit follows the government prosecution, *id.* at 451, no double jeopardy issue arises.

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[43] In the cases where this Court has indicated that a criminal contempt finding might bar a subsequent criminal prosecution, the contempt motion did not arise in the context of private litigation. *See Menna v. New York*, 423 U.S. 61 (1975) (contempt based on defendant's refusal to answer questions before the grand jury); *Colombo v. New York*, 405 U.S. 9 (1972) (same). The two district court cases holding that a contempt adjudication will bar separate prosecution for a substantive criminal offense have involved not only the government as *prosecutor* in each of the successive proceedings, but also the government as the party in interest in the underlying civil action giving rise to the contempt. *See United States v. Haggerty*, 528 F. Supp. 1286, 1295-98 (D. Colo. 1981); *United States v. United States Gypsum Co.*, 404 F. Supp. 619 (D.D.C. 1975).

In *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257 (1989), this Court elaborated on the constitutional significance of the government *qua* prosecutor in addressing whether the Eighth Amendment's Excessive Fines Clause applied to a private civil action in which punitive damages were awarded. Again the Court focused on *who* was pursuing the action, and held that the Excessive Fines Clause does not apply to "a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." *Id.* at 264. Because the central purpose of the Excessive Fines Clause, like the Double Jeopardy Clause, is to limit the "ability of the sovereign to use its prosecutorial power," *id.* at 267, the Court found the constitutional provision " 'clearly inapposite in a case where a private party receives exemplary damages from another party, and the government has no share in the recovery.' " *Id.* at 272 (citing *Halper*, 490 U.S. 435).[44] The result was dictated, in part, by "the nature of our constitutional framework," which "places limits on the steps a government may take against an individual. . . ." *Id.* at 275.[45]

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[44] While the Court noted that the private action for punitive damages indirectly "advance[s] the interests of punishment and deterrence, which are also among the interests advanced by criminal law," and is imposed through "the aegis of the courts and serve[s] to advance governmental interests," *Browning-Ferris*, 490 U.S. at 275, the Court treated as decisive the absence of the government's participation as prosecutor.

[45] In *Halper*, 490 U.S. at 447, this Court made it clear that the denomination of the proceeding as "civil" or "criminal" was not relevant to the double jeopardy question. *See also Browning-Ferris*, 492 U.S. at 263-64. Thus, the court below erred when it found the label "criminal" (attached to the contempt proceeding for purposes of a due process analysis) dispositive of the double jeopardy question. *Dixon*, 598 A.2d at 732 (citing *Bloom v. Illinois*, 391 U.S. 194 (1968)). Moreover, whether procedural due process protection is required does not determine whether double jeopardy attaches to a proceeding. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 764 (1981) (significant procedural due process necessary in termination of parental rights proceeding although no jeopardy attaches). Finally,

As a matter of basic constitutional principle, the Double Jeopardy Clause should not have been applied to the adjudication of Respondent's contempt as it did not involve a state criminal prosecutor. The legislature intended that these motions exist within civil proceedings instituted by the victim, alongside criminal prosecution for the criminal offense. The contempt motions here indeed were instituted, entitled, and tried as part of a civil action, in which Ms. Foster was both the nominal and actual party. She was the complainant in charge, and it was at all times her decision that the litigation move forward. The enforcement of the order was for her benefit, to end the violence she suffered. Throughout she proceeded in her own right in an equity cause, not as a representative of the U.S. Attorney prosecuting a crime. The state prosecutor (here the U.S. Attorney) was not a party and was not represented at the August 1988 hearing. The fact that the contempt motion was brought by a private party in a civil proceeding is determinative of the double jeopardy question.[46]

In seeking to expand the scope of double jeopardy protection to a contempt motion brought by a private citizen, the court below adopted an approach to the Double Jeop-

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the contempt proceeding in *Bloom* differs from the one here, as there it was the State's Attorney who initiated the contempt proceeding. 391 U.S. at 210.

[46] The result would not be different if D.C.'s Corporation Counsel, acting for the victim *parens patriae*, brought the motion. Corporation Counsel, while authorized by the Intrafamily Offenses Act to file either a Petition for a Civil Protection Order or a Motion for Contempt, only represents the private petitioner and not the public interest (*see* D.C. Code Ann. §§ 16-1001(1) ("'complainant' means an individual who files or *for whom is filed* a petition. . . .") (emphasis added), 16-1003(a); D.C. Ct. IF. R. 9(a)(2), 12(c)(2)), and has the same limited rights as the victim. *See infra* page 21. The scenario where Corporation Counsel proceeds *parens patriae* on behalf of the victim is not presented in this case. Corporation Counsel did not represent Ms. Foster. In fact, Corporation Counsel files very few contempt motions: approximately nine per year. *D.C. Court Report*, at 153, H-1-12.

ardy Clause that focused exclusively on the interests of the defendant. *Dixon*, 598 A.2d at 732. While acknowledging that the "cases speak in terms of the state or the sovereign as the prosecuting authority," the court simply declared, without explanation or support, that "their emphasis is plainly . . . on the impact of the trial on the defendant." *Id.*

This Court has never focused exclusively on the impact of the trial on the defendant. (See discussion under Section III.B.) Moreover, if adopted by this Court, the lower court's exclusive focus on "defendant impact" would require that a private punitive damages action bar a subsequent criminal prosecution, or even a subsequent private action for punitive damages, a result wholly at odds with *Halper*. It would also require a reevaluation of the long-established "dual sovereignty" doctrine, under which neither successive state and federal prosecutions for the same conduct,[47] nor successive prosecutions by two states for the same conduct,[48] violate the Double Jeopardy Clause, despite the obvious impact of the two prosecutions on the defendant.

Finally, the requirement of a governmental criminal prosecutor to trigger the Double Jeopardy Clause is in no way diminished by this Court's decision in *Grady v. Corbin*, 495 U.S. 508 (1990).[49] *Grady* did not involve a

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[47] *Cross v. North Carolina*, 132 U.S. 131, 139 (1889); *Bartkus v. Illinois*, 359 U.S. 121 (1959). *Cf. United States v. Wheeler*, 435 U.S. 313, 328 (1978) (Navajo Tribe is an independent sovereign from the Federal Government for purposes of the dual sovereignty doctrine).

[48] *Heath v. Alabama*, 474 U.S. 82 (1985).

[49] This was the court's ruling in *Ex parte Williams*, 799 S.W.2d 304 (Tex. Crim. App. 1990) (en banc), a case which is virtually identical to *Foster*. There the court dismissed defendant's double jeopardy claim because of the absence of the State as prosectuor on the contempt motion. The D.C. Court of Appeals criticized *Williams* for not discussing *Grady*. 578 A.2d at 731-32. In fact,

private litigant enforcing her civil injunction; in fact, *Grady* contains repeated references to the State's potential to abuse its prosecutorial authority.[50] In addition, this Court recently indicated that *Grady's* broad language was not intended to overrule "long established precedent" defining the reach of the Double Jeopardy Clause in particular settings. *United States v. Felix*, 112 S. Ct. 1377, 1383 (1992). Just as nothing in *Grady* supplanted the well-estabished principle that a substantive crime and a conspiracy to commit that crime are not the same offense for double jeopardy purposes, *id.* at 1384, nothing in *Grady* was meant to upset the settled rule that jeopardy does not attach to a proceeding in which the State has not acted as prosecutor.[51]

III. THE PURPOSES UNDERLYING THE DOUBLE JEOPARDY CLAUSE DO NOT WARRANT ITS EXTENSION TO A BATTERED WOMAN'S ENFORCEMENT OF HER CIVIL PROTECTION ORDER.

A. No Risk Of Prosecutorial Overreaching Arises When A Battered Woman Files A Contempt Motion Under The Intrafamily Offenses Act.

The Double Jeopardy Clause protects against the abuse of prosecutorial authority by the State, with "all its resources and power." *Grady*, 495 U.S. at 518 (quoting

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however, *Williams* cited *Grady*, but clearly found it inapplicable because of the decisive issue before it: the absence of the State's criminal prosecutor.

[50] *Grady*, 495 U.S. at 518-24 (*see, e.g.*, "Multiple prosecutions also give the State an opportunity to rehearse its presentation of proof. . . ." *id.* at 518; "The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct," *id.* at 521.).

[51] *See Hansen v. Johns-Manville Prod. Corp.*, 734 F.2d 1036, 1042 (5th Cir. 1984) ("We have uncovered no cases . . . in which a court has afforded double jeopardy protection as to any proceeding that was not initiated by the state."). *But see Burge v. Commonwealth*, 1992 WL 57138 (Ky. Ct. App. Mar. 27, 1992).

Green v. United States, 355 U.S. 184, 187-88 (1957)). *See also United States v. Scott*, 437 U.S. 82, 87 (1978); *Breed v. Jones*, 421 U.S. 519, 529-30 (1975). Only when the government—indeed the same sovereign—is a party to *both* of the proceedings involved are the concerns underlying the Double Jeopardy Clause raised.

A victim's enforcement of her civil protection order in the Superior Court's Family Division, and the U.S. Attorney's prosecution of the respondent's crimes in the Superior Court's Criminal Division, are pursued by completely separate entities.[52] Like two states, or a state and a federal prosecutor, contempt litigators and criminal prosecutors seek to further different interests. A battered woman seeks to enforce her private order to end the violence against her. In contrast, the criminal prosecutor is vindicating *society's* interest in enforcing its criminal law. The two interests are not the same, and to consider the contempt litigator and the criminal prosecutor as one and the same would be to adopt an absurd fiction.

Moreover, in no sense can a private party's contempt motion under the Intrafamily Offenses Act be equated with a criminal prosecution in which the State may bring to bear "all its resources and power" against the respondent.[53] Indeed, contempt proceedings in the Family Division are structured so as to place the respondent in the advantaged position at the hearing, and to limit the power of the petitioner. A respondent to an Intrafamily contempt motion in the Family Division is guaranteed an attorney provided by the District if he is indigent;[54] in fact, Respondent received one here. Indeed, the respond-

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[52] Corporation Counsel, which represents a victim *parens patriae*, is also a separate entity from the U.S. Attorney.

[53] *See* Meier, *supra*, at 89, 99 & n.70.

[54] *Cloutterbuck v. Cloutterbuck*, 556 A.2d 1082, 1084 (D.C. 1989); *cf.* D.C. Ct. IF. R. 12(c)(2).

ent in the contempt proceedings enjoys broad due process protections.[55] In contrast, the petitioner has no right to a state-paid attorney and usually appears *pro se*.

The Intrafamily Rules also circumscribe a battered woman's investigatory power, even more than in an ordinary civil proceeding.[56] Discovery is only available upon motion.[57] Most parties do not seek discovery, nor is it routinely awarded upon request.[58] Even if granted, the scope is sharply limited.[59] Moreover, the victim cannot arrest the respondent, nor can she incarcerate him pending the adjudication of her motion even if he poses a danger to her in the interim.[60] Thus, after Ms. Foster filed her initial contempt motion on September 22, 1987, she was subject to severe violence by Respondent while he remained free.

In short, the battered woman usually must litigate her contempt motion without an attorney, without normal discovery tools, without a grand jury to help her obtain evidence, without search warrants to support her investigation, and without the power of the police behind her. There is simply no sense in which the State brings its prosecutorial power and resources to bear against a respondent when a battered woman files her motion.

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[55] *See* D.C. Ct. IF. R. 12; *Castellanos*, 127 Daily Wash. L. Rptr. at 1194.

[56] All the restrictions placed on the petitioner apply equally to the *pro se* petitioner, the petitioner represented by counsel, or the petitioner represented by Corporation Counsel.

[57] D.C. Ct. IF. R. 8(a).

[58] *Williams v. Williams*, IF. No. 795-89 (D.C. Super. Ct. Nov. 6, 1989).

[59] D.C. Ct. IF. R. 8(b).

[60] *Compare* D.C. Code Ann. § 23-1322(a) (1989) (criminal pretrial detention provision).

Finally, the fundamental idea of the Constitution as a shield from the overwhelming power of the State scarcely applies to a battered woman's effort to save her life by invoking the ordinary processes of civil law. In fact, in a battering relationship, it is the batterer who has the power and the control.[61] This led the United States Commission on Civil Rights to recommend against even mediating domestic violence cases because the abused victim fears her batterer and faces coercion.[62] It requires a great deal of personal courage for the victim in such a relationship to break free of her oppressor and seek recourse in the courts.[63] The State, as prosecutor, is not similarly inhibited.

Thus, the concerns with prosecutorial overreaching that justify application of double jeopardy analysis do not apply here, where the battered woman is a separate entity from the government, lacks "sovereign resources and power," and needs protection from the respondent.

B. No Interest In Finality Bars Successive Proceedings Against A Respondent Whose Violent Acts Constitute A Crime Separate From His Violations Of A Civil Protection Order.

The primary basis cited by the D.C. Court of Appeals to justify its application of the Double Jeopardy Clause to this case is "the impact on the defendant" of two proceedings. *Dixon*, 598 A.2d at 732. The defendant's in-

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[61] Within a battering relationship "the major control and power seemed to be vested in the man." Lenore E. Walker, *The Battered Woman Syndrome* 147 (1984).

[62] United States Commission on Civil Rights, *Under the Rule of Thumb: Battered Women and the Administration of Justice* 75 (January 1982).

[63] *See* Leslye E. Orloff, *Manual on Intrafamily Cases for D.C. Superior Court Judges* 106 (1991) (the fear of further abuse or the fear that the justice system will not halt the violence inhibits many domestic violence victims from filing contempt motions).

terest alone does not determine a double jeopardy claim.[64] Here any such interest certainly did not outweigh the District's interest in its legislative approach to ending domestic violence, the District's right to enforce the criminal laws, and Ms. Foster's right to use the civil legal processes to help guarantee her personal safety.

First, a respondent's expectation of finality must be a legitimate expectation, *see United States v. DiFrancesco*, 449 U.S. 117, 136-37 (1980), and here it is not. In the District of Columbia, the legislature has determined that a respondent should be held accountable for his violation of a Civil Protection Order through a contempt motion in the Family Division; indeed, his Civil Protection Order informs him of that fact.[65] The legislative scheme explicitly *also* permits criminal prosecution for the violence. A respondent can anticipate both consequences, so he has no legitimate expectation of finality.[66]

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[64] *See, e.g., Wade v. Hunter*, 336 U.S. 684, 688-89 (1949) (A rule allowing a defendant to go free if the trial fails to end in a final judgment "would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. . . . [T]he purpose of the law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again."); *United States v. Jorn*, 400 U.S. 470, 480 (1971) (plurality opinion) ("[A] mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide.").

[65] D.C. Ct. IF. R. 11(a). The court's form Order states, "FAILURE TO COMPLY WITH THIS ORDER MAY RESULT IN FINE OR IMPRISONMENT." J.A. 18.

[66] Our legal system has always recognized that private civil remedies exist separate and apart from the criminal law. It is not at all unusual that an individual who has violated the basic norms of our social order will be held separately accountable under both the public criminal law and the private civil law. Therefore, it can come as no

Second, the Double Jeopardy Clause has never been interpreted so broadly as to deprive the community of its "one full and fair opportunity to convict those who have violated its laws." *Ohio v. Johnson*, 467 U.S. 493, 502 (1984); *Arizona v. Washington*, 434 U.S. 497, 509 (1978); *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959). In fact, the "finality guaranteed by the Double Jeopardy Clause is not absolute, but instead must accommodate the societal interest in prosecuting and convicting those who violate the law." [67]

The holding below allows private parties pursuing their own individual interests, often ill-prepared and ill-equipped to make decisions on behalf of society at large, to immunize from prosecution persons guilty of serious crimes against the community—rendering them subject only to the modest penalties which can be imposed for a finding of contempt.[68] Indeed, while Ms. Foster *partially*

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surprise to Respondent that the U.S. Attorney's office would act on behalf of the community at large, and his victim would act to protect her interests.

[67] *Garrett v. United States*, 471 U.S. 773, 796 (1985) (O'Connor, J., concurring). *See also United States v. Tateo*, 377 U.S. 463, 466 (1964); *cf. Breed*, 421 U.S. at 534-35 (societal interest in its juvenile court system recognized).

[68] Contempt may be punished by not more than $300 and/or six months imprisonment. D.C. Ct. IF. R. 12(e). The more severe punishment under the criminal law is undercut in every state that has applied *Grady* to determine whether a respondent's contempt of a domestic violence protection order bars his later criminal prosecution. *Burge v. Commonwealth*, 1992 WL 57138 (Ky. Ct. App. Mar. 27, 1992) (ten year sentence for burglary barred by contempt finding of restraining order which resulted in sentence of ninety days imprisonment); *State v. Magazine*, 393 S.E.2d 385 (S.C. 1990) (sentence of five years imprisonment and $1,188 restitution barred by prior contempt of restraining order which resulted in sentence of one year imprisonment suspended upon payment of fine of $1,500 and compliance with the order); *State v. Kipi*, 811 P.2d 815 (Haw. 1991), *cert. denied*, 112 S. Ct. 194 (1991) (prosecution for burglary in the first degree, with a maximum penalty of ten years imprisonment, and three counts of terroristic threatening in the second de-

succeeded on her contempt motion, an individual petitioner who loses the motion, perhaps because her inadequate private resources precluded her from obtaining necessary testimony, will still bar the State's subsequent criminal suit. Thus, the government's interests in enforcing its criminal laws would be subject to the whims and weaknesses of individual plaintiffs and their counsel.[69]

The decision below also opens up the criminal law system to abuse. A victim might file the contempt motion and, after a minimal amount of evidence is heard, be coerced or convinced to drop the matter—nonetheless precluding subsequent prosecution by the State.[70] Moreover, the double jeopardy theory propounded by the court below allows an abuser's active defiance of a court order and repeated acts of terror to work to his advantage.

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gree, with a maximum penalty of one year imprisonment for each count, barred by no contest plea on contempt of restraining order which resulted in five months incarceration).

[69] As Justice Stewart once warned, "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law." *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring). At least one study found that sixty-three percent of the young males between the ages of eleven and twenty who are incarcerated for homicide killed their mother's batterer. *Women and Violence, Hearings before the Senate Committee on the Judiciary*, 101st Cong., 2d Sess. (1990) (testimony of Sarah M. Buel) (citing Hal Ackerman, *The War Against Women: Overcoming Female Abuse* 2 (1985)). Similarly another study found that forty percent of women held in Cook County, Illinois on homicide charges are accused of killing their batterer. Note, *Defense Strategies for Battered Women Who Assault Their Mates: State v. Curry*, 4 Harv. Women's L. J. 161, 161 (1981). Those concerns underscore the need for an effective legal response.

[70] *Cf. Wheeler*, 435 U.S. at 330-31 (recognizing a defendant's motive to have the first case adjudicated in tribal court, with its limited available punishments, and thereby frustrate federal interests in the prosecution of major offenses if double jeopardy applied to the first adjudication).

The more aggressively he terrorizes, the greater the victim's need to seek immediate enforcement of the order of protection, and the more likely his acts will be immunized from more severe criminal penalties.[71]

Cognizant of the effect its decision would have on the statutory scheme, and on criminal law enforcement specifically, the D.C. Court of Appeals suggested that the problem it was creating by extending double jeopardy protection to private contempt motions might be mitigated if women carefully worded their contempt motions. *Dixon*, 598 A.2d at 732-33. It opined, for example, that the victim could file for contempt on the breach of the stay away portion of her order, without jeopardizing a later criminal prosecution for an associated assault. This strategy ignores the fact that most motions are pursued *pro se*. *Pro se* litigants cannot be expected to know the fine points of double jeopardy law; nor will they carefully word their testimony to avoid bringing information that might be prosecuted as criminal to the court's attention. Moreover, this artful approach fails to vindicate the woman's interest in having all the contemptuous behavior brought to the court's attention, so that the court understands the seriousness of the danger she encounters and the nature of the respondent's actions. While the D.C. Court of Appeals has recognized in a related context that courts should consider the "entire mosaic" of abuse in order to fashion an appropriate response to domestic violence,[72] its suggestion in this case that the contempt motion be narrowly tailored undermines that theory. Indeed, it invites the victim to engage in a charade, hinting at the nature of the violence without speaking the prohibited words, leaving the court to guess at the seriousness of the abuse she confronts.

Finally, the lower court's emphasis on the defendant's interest ignores the battered woman's equal right to pro-

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[71] *Cf. Commonwealth v. Allen*, 486 A.2d 363, 370 (Pa. 1984), *cert. denied*, 474 U.S. 842 (1985).

[72] *Cruz v. Foster*, 597 A.2d 927, 931 (D.C. 1991).

tect her own life, and her need for an effective civil remedy. The decision below makes the victim choose between enforcing her order to protect her life (thereby cutting off the State's ability to prosecute her batterer criminally) or foregoing her personal protection in the hope (often not realized) that the State will enforce its criminal laws. Yet both avenues must be maintained for victims of domestic violence if such violence is to be stopped. The Constitution does not require or permit otherwise.

IV. EVEN IF JEOPARDY ATTACHES TO THE ENFORCEMENT OF A CIVIL PROTECTION ORDER, THE CRIMINAL CHARGES ARE OFFENSES DISTINCT FROM RESPONDENT'S VIOLATIONS OF THE CIVIL PROTECTION ORDER.

If this Court were to hold that jeopardy may attach to a battered woman's enforcement of her civil protection order, the correct test to apply in determining whether there have been successive prosecutions for the "same offense" would be that enunciated in *Blockburger v. United States*, 284 U.S. 299 (1932). In *Grady*, this Court held that the "same offense" analysis does not stop with *Blockburger* where successive prosecutions raise serious concerns about the kind of governmental overreaching and abuse that the Double Jeopardy Clause guards against. 495 U.S. at 518. As explained above, those are precisely the concerns that are not present in this case. Thus, the *Blockburger* test, rather than the *Grady* "same conduct" analysis, is controlling.

Under *Blockburger*, where there are "two distinct statutory provisions," the Court determines "whether there are two offenses," by examining the elements of each statute. *Blockburger*, 284 U.S. at 304. Where those elements are so different, as they are here, then it becomes clear that the two statutory provisions were designed by the legislature to serve different functions, and it becomes impossible to say they are the "same"

offense. Only where the two offenses have "identical statutory elements or . . . one is a lesser included offense of the other," *Grady*, 496 U.S. at 516, is there a double jeopardy bar. *See Felix*, 112 S. Ct. at 1384 ("*Blockburger* . . . bars a subsequent prosecution if one of the two offenses is a lesser included offense of the other.").

Thus, the issue is whether the elements of contempt of the Civil Protection Order, on the one hand, and the statutory crimes of assault, threats and assault with intent to kill, on the other, are the same or different. The conclusion of the D.C. Superior Court below was that they were indeed different.[73] The D.C. Court of Appeals also implicitly reached the same conclusion when it addressed the second prong of the double jeopardy analysis announced in *Grady*, the "same conduct" test, which by its terms may be reached only if the *Blockburger* analysis shows that there are indeed two distinct offenses. *Grady*, 496 U.S. at 516.

The findings necessary to convict for contempt are the existence of a court order and the willful violation of it. *See In re Thompson*, 454 A.2d 1324, 1326 (D.C. 1982); *In re Gorfkle*, 444 A.2d 934, 939 (D.C. 1982). Quite obviously, the elements of contempt bear no similarity to *any* of the statutory elements of the substantive crimes—"Assault with Intent to Kill," "Assault or Threatened Assault in a Menacing Manner," and "Threats to do Bodily Harm"—with which Respondent was charged.[74]

Only by taking the unprecedented step of injecting the terms of the civil protection order into the analysis of contempt can one create any similarity at all

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[73] *United States v. Foster*, No. F-8415-88, Pet. App. 23a (D.C. Super. Ct. Apr. 13, 1989).

[74] The five-count indictment in this case sets forth violations of the following D.C. Criminal Code provisions: assault with intent to kill, § 22-501; assault or threatened assault in a menacing manner, § 22-504; and threats to do bodily harm, § 22-507. J.A. 43-44.

between the contempt and the substantive crimes in the *Blockburger* sense. But even then, the *Blockburger* test still would not result in a finding of double jeopardy here.

The Civil Protection Order at issue here directed Respondent not to "molest, assault, or in any matter threaten or physically abuse" his wife Ana Foster. The general prohibition on "assault" in the protection Order at issue here no more invoked all of the elements of a crime than do the other commonly used terms on the court's form Order requiring that a respondent "stay away" and not "molest" his victim, for which there is no criminal statutory counterpart.[75] The legislature never specified that enforcement of protection orders entered in these private civil proceedings required the victim to prove the elements of particular statutory crimes.[76] All of the statutory offenses with which Respondent is charged entail an element of specific intent. In contrast, contempt itself is not a specific intent crime, *In re Hunt*, 367 A.2d 155, 157 (D.C. 1976), *cert. denied*, 434 U.S. 817 (1977), but does require proof of willfulness. Accordingly, the elements of the offenses are not the same and in no sense is one offense the lesser included offense of another.

In this case, whether one looks at the elements of each offense or takes the unprecedented step of incorporating

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[75] *See* J.A. 18.

[76] *Compare Harris v. Oklahoma*, 433 U.S. 682 (1977) (per curiam) ("[i]n a felony murder case, the proof of the underlying felony [here robbery with firearms] is needed to prove the intent necessary for a felony murder conviction.").

Moreover, it would be remarkable indeed for the D.C. Council to have regarded the statutory crimes as lesser included offenses of contempt (which at a minimum would involve violation of the statute *compounded* with willful violation of a court order) and yet subject the contemnor to only the minimal punishments applicable to contempts. This anomaly only highlights the inherent difficulty in attempting to extend double jeopardy law to the enforcement of an order entered for the benefit of a private party in civil litigation.

the terms of the Civil Protection Order into the "elements" analysis, the "offenses" were distinct and the criminal prosecution in this case was permissible.

CONCLUSION

The judgment in *United States of America v. Foster*, No. 91-1231, should be reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

ARIZONA COALITION AGAINST DOMESTIC VIOLENCE

The Arizona Coalition Against Domestic Violence (ACADV) is a non-profit organization formed in 1980 to develop a system of networking among domestic violence programs, professionals, and interested citizens throughout Arizona. The goal of ACADV is to increase awareness of domestic violence, to improve the care and treatment of those affected by domestic violence, and to reduce violence in our state.

AYUDA, INC.

AYUDA, Inc. is a non-profit tax exempt organization founded in 1971 which offers legal representation to indigent Spanish-speaking and foreign born residents of the District of Columbia. Since 1985, AYUDA has represented 98% of all Spanish-speaking victims of domestic violence in the District who turn to the D.C. courts for protection. AYUDA represented Ms. Ana Foster in the proceeding to enforce her civil protection order. AYUDA also serves as a national advocate for battered women, with expertise in serving immigrant and refugee women and children and training judges, policy and health professionals on domestic violence.

CALIFORNIA WOMEN'S LAW CENTER

The California Women's Law Center was established in 1989 as the first law center in Southern California solely devoted to addressing the civil rights of women and girls. The Law Center's priorities for its legal work include addressing violence against women, including domestic violence and sexual assault. The Law Center's primary efforts emphasize support and technical and legal assistance to legal service agencies, community based organizations, attorneys and policy makers.

The protection of women and girls from the ravages of domestic violence is one of the most critical issues facing women in California, as well as the rest of the country. Since many of the most effective ways our society has identified for aiding these millions of victims is through greater access to the civil and criminal law systems, the Women's Law Center is deeply involved in making the courts and agencies more accessible and more responsive. A decision, such as the one in question, that essentially robs a victim of one of her most effective remedies is extremely dangerous and one in which we take a great deal of interest, and have extensive background and expertise.

CATHOLIC UNIVERSITY LAW SCHOOL'S FAMILY ABUSE PROJECT

The Family Abuse Project is part of the Columbus Community Legal Services, operated by the Columbus School of Law, the Catholic University of America. Since 1978, the Family Abuse Project has provided legal representation to victims of domestic violence, trained law students and lawyers about remedies for domestic violence, and provided advocacy to improve the community's response to domestic violence. Each year, the Project assists women in obtaining Civil Protection Orders and in ensuring compliance with those orders in contempt proceedings.

CENTRO DE AMISTAD, INC.

Centro de Amistad, Inc. began in 1977 as a CETA funded project of the newly incorporated Town of Guadalupe to address the serious alcohol abuse problem in Guadalupe, Arizona. Today Centro has three general areas of programs and services: outpatient psychotherapy, prevention/early intervention, and health education and empowerment. Centro helps adults with mental health problems (including domestic violence), substance abuse problems, and serious mental illness. Centro also provides programs for children (including

children with behavioral problems and children who are victims of a crime such as physical, emotional or sexual abuse).

CHICANOS POR LA CAUSA

Chicanos Por La Causa (CPLC) is a non-profit community-based organization established in 1969 to address the social and economic needs of Hispanics and the economically disadvantaged. As a statewide Community Development Corporation, CPLC's services and programs are designed to have a measurable impact on the causes of poverty and dependency within Arizona in order to promote self-sufficiency.

In February of 1986, CPLC added to its continuum of care, domestic violence shelter and transitional services for women and their children through De Colores. It is the largest shelter for victims of domestic violence in Maricopa County with a static capacity of twenty-four crisis and sixteen transitional beds. The staff is completely bilingual and bicultural, and is thus uniquely equipped to shelter and advocate for the monolingual Spanish speaking victims of domestic violence.

COLORADO DOMESTIC VIOLENCE COALITION

The Colorado Domestic Violence Coalition is a statewide, grassroots, non-profit, membership organization which has been coordinating services for battered women and their families since 1981. The Coalition is dedicated to the elimination of domestic violence. Through regular meetings, technical assistance, community education, advocacy and action, the Coalition provides a comprehensive approach to funding and service provision across the state. The membership of the Colorado Domestic Violence Coalition is currently comprised of forty-three rural and urban programs for battered women and their families.

D.C. COALITION AGAINST DOMESTIC VIOLENCE

The D.C. Coalition Against Domestic Violence (DCCADV) is a coalition of groups which was formed

in 1986 and engages in activities to promote the elimination of domestic abuse in the District of Columbia and to advocate on behalf of battered women and their families. Its members include shelters for battered women, advocacy groups, legal organizations, and individuals.

DCCADV has a special interest in the issues presented in this case because the result will directly affect its members who live and work in the District of Columbia, and benefit from the parallel civil and criminal proceedings available under the Intrafamily Offenses Act.

FAMILY VIOLENCE PREVENTION FUND

The Family Violence Prevention Fund is a national public policy and educational institute working towards improving society's response to domestic violence. The Fund, which is located in San Francisco, has developed and implemented model policies and training protocols on a local, state, and national level for law enforcement, prosecutors, judges, probation officers, health care professionals, and legal advocates. In addition, the Fund provides services to victims of domestic violence seeking the protection of the justice system, and has conducted extensive public education campaigns on domestic violence.

FRIENDLY HOUSE INC.

Friendly House Inc. is a nonprofit, community-based organization in Phoenix, Arizona founded in 1920 to assist people in need, primarily Hispanic immigrant families. Friendly House Inc. provides legal services for immigration matters; adult education classes including English as a Second Language, citizenship, literacy, and high school equivalency; youth services including tutoring, recreation, and cultural activities; and family social services including individual and family counseling, parent skills training and emergency assistance. Friendly House Inc. is a well-established advocate for immigration matters, improved education for Hispanics, substance abuse and gang prevention, and behavioral health services for the improved functioning of the family.

Numerous women in the parent training classes and/or who are involved in counseling at Friendly House Inc. are battered women. A number of cases of battered women are also identified through the immigation services at Friendly House. Friendly House Inc. offers their support for whatever recourse there may be for protecting these women and offering them a better life of safety and hope.

GEORGE WASHINGTON UNIVERSITY NATIONAL LAW CENTER'S COMMUNITY LEGAL CLINICS

The Community Legal Clinics (CLC), operated by George Washington University National Law Center, provides a variety of legal services to indigent people, including representation in family law litigation. Through its Civil and Family Litigation Clinic, the CLC trains students, consults with pro bono attorneys, and represents numerous clients in domestic violence proceedings in the D.C. Superior Court and also advocates for battered women on policy matters that arise locally and nationally. The decision under review, if affirmed, could be devastating for the CLC's clients, by severely restricting their ability to enforce their civil protection orders.

GEORGETOWN UNIVERSITY LAW CENTER SEX DISCRIMINATION CLINIC

The Georgetown University Law Center Sex Discrimination Clinic is a clinical program in which law students represent domestic violence victims suing under the Intrafamily Offenses Act in D.C. Superior Court. Each year, the Clinic provides legal representation to approximately thirty to fifty clients, and gives legal counselling to another 100 victims of domestic violence.

The Clinic also administers the Emergency Domestic Relations Project (EDRP), which is co-sponsored by the D.C. Coalition Against Domestic Violence. EDRP provides free counseling and negotiation services for victims

of domestic violence in the District of Columbia. It also refers callers to community resources and secures representation for victims from volunteer attorneys who have been trained through EDRP. EDRP provides information about the court process and negotiates consent orders for nearly 2,000 victims each year at the D.C. Superior Court. It has worked with more than 20,000 victims over the past fourteen years.

HARVARD LAW SCHOOL BATTERED WOMEN'S ADVOCACY PROJECT

The Harvard Law School Battered Women's Advocacy Project (BWAP) has provided Boston-area women with courtroom advocacy, a hotline, and referral services since its inception in 1988. BWAP also has a legislative task force working to strengthen the institutional protection offered to victims of domestic violence.

The fact that a woman has pursued a contempt motion against her batterer for a violation of her temporary restraining order should not preclude a prosecutor from prosecuting the underlying crime. It is especially in the instance of a TRO violation that a prosecutor should take notice of the case and pursue criminal charges if warranted.

ILLINOIS COALITION AGAINST DOMESTIC VIOLENCE

The Illinois Coalition Against Domestic Violence was instrumental in developing the Illinois Domestic Violence Act of 1986 specifically to protect victims of domestic violence. Illinois law allows for both civil and criminal remedies and relief for victims.

To uphold the decision that bars prosecution of criminal acts by virtue of a finding of guilty in a civil matter is to fly in the face of the intent of lawmakers who understand the need to protect these victims from the very real escalating dangers they face.

MY SISTER'S PLACE

My Sister's Place is a not-for-profit shelter for battered women and their children in Washington, D.C. My Sister's Place is in a confidential location for the protection of the women who temporarily live there after escaping abusive partners. For many women, the shelter provides the first safe space that they have had in years. These women also rely on legal remedies, including civil protection orders, for their personal safety.

NATIONAL BATTERED WOMEN'S LAW PROJECT OF THE NATIONAL CENTER ON WOMEN AND FAMILY LAW

The National Battered Women's Law Project, a program of the National Center on Women and Family Law, acts as a legal backup to legal services programs, battered women's programs and *pro bono* attorneys in all fifty states. It serves as an information clearinghouse for advocates, attorneys and policymakers on legal issues facing battered women; produces manuals, handbooks, public education materials and resources packets on these legal issues; analyzes federal and state legislative and administrative developments and other legal issues which affect battered women; assists advocates, policymakers and attorneys on issues faced by battered women; and reports on legal and legislative developments with respect to battered women's issues in *The Women's Advocate*, the bi-monthly newsletter of the National Center on Women and Family Law.

The National Center on Women and Family Law was established thirteen years ago as the family law backup center for all legal services programs funded by the Legal Services Corporation and for *pro bono* attorneys. Since its inception it has primarily focused on domestic violence, custody and mediation and produced numerous manuals and information packets for attorneys. The Center has filed many amicus briefs in the U.S. Supreme

Court and state supreme courts throughout the United States in cases raising issues of importance to poor women.

The Project has been particularly concerned with protecting battered women, including through the civil and criminal enforcement remedies. This country, which has come a long way in the last twenty years in recognizing domestic violence and acting to protect its victims, must not be denied the means to effectively deal with this most serious problem.

NATIONAL COALITION AGAINST DOMESTIC VIOLENCE

The National Coalition Against Domestic Violence, a private, non-profit organization founded in 1978, is a Coalition of service providers, state domestic violence coalitions, and concerned individuals dedicated to the empowerment of battered women and their children, and committed to working toward societal changes necessary to eliminate both personal and societal violence against all women and children.

NEW JERSEY COALITION FOR BATTERED WOMEN

The New Jersey Coalition for Battered Women is a statewide coalition of domestic violence service programs and concerned individuals whose purpose and mission is to end violence in the lives of women. Incorporated in 1979, the Coalition is a private non-profit corporation whose members include all non-governmental domestic violence programs in New Jersey. The Coalition advocates for battered women with state level governmental organizations, private organizations, the state legislature, and the governor to support legislation and policies that will benefit victims of domestic violence.

NEW YORK CITY COALITION OF BATTERED WOMEN'S ADVOCATES

The New York City Coalition of Battered Women's Advocates is a non-profit organization dedicated to ending violence and abuse in the lives of women and children. As a grassroots organization of programs and individuals, we work to increase the public visibility of violence in intimate relations through education, advocacy and action. The Coalition holds the police, legal system, housing and public benefits agencies, media and other institutions accountable to the needs of battered women.

The Coalition has twenty members, including community-based battered women's programs, shelters, lawyers who represent battered women and other advocates in the City of New York. The Coalition as a whole works to educate the legal system as to the needs of battered women and to advocate for changes in policies and procedures.

The enforcement of orders of protection and the ability of the State to prosecute batterers are issues of vital importance to all Coalition members and to the thousands of battered women with whom they work. Battered women must be able to obtain proper protection from the courts without prejudicing possible actions to be taken by the State.

NOW LEGAL DEFENSE AND EDUCATION FUND

The NOW Legal Defense and Education Fund (NOW LDEF) is a national public service organization dedicated to eliminating sex discrimination and achieving equality for women through legal and education programs. NOW LDEF was founded as an independent non-profit corporation in 1970 by the leaders of the National Organization for Women, a membership organization of approximately 250,000 women and men in over

800 chapters nationwide. Violence against women is a major focus of NOW LDEF's work. NOW LDEF has participated as counsel and as amicus curiae in domestic violence litigation and has worked extensively on legislation to expand the legal rights of battered women.

OREGON COALITION AGAINST DOMESTIC & SEXUAL VIOLENCE

The Oregon Coalition Against Domestic & Sexual Violence (OCADSV) is a non-profit corporation, incorporated under the laws of the State of Oregon since 1978. The OCADSV has thirty-one member programs that provide direct services to victims of domestic and sexual violence throughout Oregon. The purposes of the OCADSV include, but are not limited to the following: providing assistance to victims of domestic and sexual violence; providing training assistance to staff of organizations engaged in crisis intervention or education in domestic and sexual violence; encouraging increased awareness and understanding of domestic and sexual violence, through public education; exploring and supporting innovative approaches to prevention of and responses to domestic and sexual violence.

Oregon was the first state to pass a comprehensive Family Abuse Prevention Act, and Oregon's scheme for responding to domestic violence relies on both civil and criminal remedies. Punishment for violation of a restraining order is punishment for contempt of the civil court's order. Punishment for assault is punishment for violation of the criminal law. Both are necessary to protect victims of domestic violence and exact compliance with the law. The Family Abuse Prevention Act's remedies work to insure the integrity of the judicial process as well as to provide relief to individual victims and protection to the general citizenry.

PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE

The Pennsylvania Coalition Against Domestic Violence, a non-profit, tax exempt organization founded in 1976, is a state-wide coalition committed to the elimination of domestic abuse of women and their children in Pennsylvania, and to the provision of comprehensive local services for victims.

Annually assisting over 77,000 victims of domestic violence, PCADV's fifty-eight member programs provide 24-hour Hotlines, emergency shelter, counseling, advocacy, court accompaniment, transitional housing, and community education. Representatives of PCADV regularly provide consultation, training, and technical assistance to members of the Pennsylvania Legislature, the Judiciary, the Bar, Law Enforcement Agencies and Domestic Violence Programs.

WOMEN'S LEGAL DEFENSE FUND

The Women's Legal Defense Fund (WLDF) is a non-profit, tax-exempt organization founded in 1971 to assist women in their efforts to achieve equality under law. WLDF is a national advocacy group which represents women before public agencies and courts. For many years, WLDF also provided legal counseling and referrals to victims of domestic abuse, including assistance in seeking and enforcing civil protection orders. In addition, WLDF started and operated a battered women's shelter in the District of Columbia and was instrumental in coalition efforts that resulted in the 1982 amendments expanding the protections provided by the D.C. Intra-family Offenses Act.

APPENDIX B

SUPERIOR COURT OF D.C.— INTRAFAMILY RULES

TABLE OF CONTENTS

RULE NO.

RULE NO.

RULES OF THE FAMILY DIVISION

for the

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

PART FIVE *
INTRAFAMILY PROCEEDINGS

RULE 1

SCOPE AND PURPOSE

These rules govern the procedure in all proceedings regarding intrafamily offenses as defined in Title 16, Section 1001 et seq. of the D.C. Code. The purpose of these rules is to provide for the just determination of every such proceeding in as fair, speedy and inexpensive a manner as possible within the principles of law and equity and to effectuate the statutory intent of eliminating intrafamily violence.

Except where inconsistent with these intrafamily rules or with the expeditious nature of intrafamily proceedings, the following Superior Court Rules of Civil Procedure are deemed applicable to intrafamily proceedings: 2, 5, 5-I, 6, 9, 11, 43 (as modified by SCR Dom. Rel. 43(a)), 43-I, 44, 44-I, 44.1, 46, 60, 61, 63, 63-I, 77, 77-I, 79, 79-I, 80, 82, 84, 86-I, and 101.

The institution of a criminal charge by the United States Attorney shall not preclude the issuance of a Temporary Protection Order or Civil Protection Order based on the same conduct of the respondent as alleged in the criminal proceeding.

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* All new rules. Previous text not shown.

RULE 2

COMMENCEMENT OF ACTION

(a) PETITION. An intrafamily proceeding shall be commenced by filing a petition pursuant to D.C. Code § 16-1003(a). The petition shall be signed under oath and supported by affidavit, reciting the facts and circumstances upon which the complainant believes that an intrafamily offense is threatened or has been committed.

(b) AMENDMENT. The petition may be amended at any time prior to the conclusion of the hearing on the merits. Such amendments shall be under oath. Oral motions to amend the petition made during the hearing shall be granted in the absence of a showing of prejudice to the respondent.

(C) CONSOLIDATION WITH OTHER MATTERS. When a petition is filed the clerk shall note in the file the existence of any other causes before the Family Division involving the same parties. If deemed appropriate, the Court may consolidate the action with the other causes, provided that said consolidation shall not delay any hearing on the petition for a Civil Protection Order. Copies of the order of consolidation shall be filed in each case consolidated, and all further proceedings shall be conducted in one action designated in the order of consolidation, with all subsequent pleadings and orders filed in each case consolidated.

RULE 3

SERVICE OF PROCESS

(a) ISSUANCE. Upon the filing of the petition, the intrafamily clerk shall issue a notice of hearing and order directing appearance, which shall bear the name and seal of the Court and the Family Division and the title of the action. It shall direct the respondent, petitioner and, if appropriate, the family member(s) endangered

(or if a child, the person then having physical custody of the child) to appear in court on a date and at a time certain for hearing, which shall be scheduled by the clerk for the earliest return date possible. An original of the petition and copy for each person named in the petition or other individual whose presence is required, shall be presented to the intrafamily clerk for issuance. The intrafamily clerk shall send a notice of the hearing to the Director of Social Services.

(b) PERSONAL SERVICE.

(1) PERSONS AUTHORIZED TO SERVE PROCESS. The intrafamily clerk shall deliver the notice of hearing and order directing appearance to the petitioner for service by the U.S. Marshal, his/her deputy or any competent person over the age of eighteen (18) years who is not a party to and is not otherwise interested in the action and who is a bonafide resident of, or has a regular place of business in the District of Columbia. The service to be made upon the respondent or other person(s) named shall be personal service.

(2) MANNER OF SERVICE. The petition, notice of hearing and order directing appearance shall be served together. The petitioner shall furnish the person making service with necessary copies of the petition, notice of hearing and order directing appearance. Service shall be made upon an individual, other than an infant or an incompetent person, by delivering a copy of the petition, personally, or by leaving copies thereof at his or her dwelling house or usual place of abode with a person of suitable age and discretion then residing therein who is not a party. Service upon an infant or incompetent person shall be made by serving the petition and notice of hearing and order directing appearance in the manner prescribed by the law of the District of Columbia or the law of the state in which service is made.

(c) RETURN OF SERVICE. The person serving the process shall make proof of service to the Division

promptly and in any event by the date the person served must appear in Court. If service is made by a person other than a U.S. Marshal or his/her deputy, the person making service shall submit an affidavit stating the date, place and manner of service, including the name of the person served and specific facts from which the Court can determine that the person meets the qualifications for receipt of process, on the form provided by the intrafamily clerk. Failure to make proof of service does not affect the validity of the service.

(d) AMENDMENT OF RETURN OF SERVICE. At any time in its discretion and upon such terms as it deems just, the Division may allow any proof of service of process to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

RULE 4

CONTINUANCE

(a) THE "TWO DAY" RULE. Except in extraordinary and unforeseen circumstances, no continuance may be granted in any case unless requested at least two (2) days prior to the date set for hearing.

(b) DETERMINATION BY ASSIGNMENT COMMISSIONER. The Assignment Commissioner shall grant or deny consent continuances under Family Division Guidelines only where the petitioner is represented by counsel, and counsel certifies that he or she has consulted with, and obtained the approval of, his or her client for the continuance.

(c) DETERMINATION BY THE COURT. Where the continuance request is ex parte or opposed, or where the petitioner is appearing pro se, the judge assigned to hear intrafamily matters shall grant or deny the request.

(d) DAY OF HEARING CONTINUANCE. If the Court grants a continuance on the day of the hearing it

may condition that continuance on the granting of a Temporary Protection Order for fourteen (14) days. If the continuance is at the request of the respondent and a Temporary Protection Order has previously been entered, the Court may condition the continuance on an extension of the Order as circumstances may necessitate.

RULE 5

FAILURE TO APPEAR

(a) BENCH WARRANTS. If any party fails to appear in accordance with a notice of hearing and order directing appearance which has been served on that party in accordance with Rule 3, the Court may issue a bench warrant.

(b) EXECUTION OF BENCH WARRANTS. Upon execution of a bench warrant issued pursuant to paragraph (a) of this rule, the Court shall hold a hearing no later than the next available Court day. If a Temporary Protection Order or Civil Protection Order has previously been issued by the Court but not served upon the party, the party shall be served with a copy of the Order in Court. The Court shall release the party after notifying him or her, in writing, of a subsequent hearing date and after setting any conditions of release deemed necessary to protect the safety of the petitioner and the petitioner's family. Unless it appears that such an order is unwarranted, the Court shall include a condition requiring the respondent to avoid any contact with the petitioner or the petitioner's family.

(c) FAILURE OF RESPONDENT TO APPEAR AT HEARING ON PETITION FOR CIVIL PROTECTION ORDER. Where the respondent fails to appear at a hearing on a petition for a Civil Protection Order, after being served pursuant to Rule 3 with a notice of hearing and order directing appearance, the Court shall enter the respondent's default and set the matter down for proof

of the allegations of the petition. The Court shall send notice of this hearing to the respondent. The Court may also issue a Temporary Protection Order pursuant to Rule *7(a), in which case the date set for hearing shall be prior to expiration of the Temporary Protection Order.

(d) FAILURE OF RESPONDENT TO APPEAR AFTER A DEFAULT HAS BEEN ENTERED. If, after a default has been entered pursuant to paragraph (c) of this rule, the respondent fails to appear on the return date specified in the order of appearance, and the Court determines that there is good cause to believe the allegations in the petition, the Court shall enter a Civil Protection Order as a final Order by default. The default Order shall not be set aside unless, no later than ten (10) days after service of the Civil Protection Order, the respondent files and serves a motion to vacate the default, supported by affidavit showing both good cause for the failure to appear and grounds which, if proved, would be sufficient to prevent the issuance of the Civil Protection Order in whole or in part. A hearing may be held on the motion to vacate.

(e) PERSONAL SERVICE REQUIRED FOR TEMPORARY PROTECTION OR CIVIL PROTECTION ORDER. A Temporary Protection Order or Civil Protection Order issued in the absence of the respondent shall be valid but not enforceable against the respondent until the Order has been served personally on the respondent.

(f) PROCEDURE UPON FAILURE OF THE PETITIONER TO APPEAR. Where the petitioner fails to appear in accordance with a notice of hearing, the Court may dismiss the petition, may continue the case for further hearing if the allegations so warrant, or may return the case to files.

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* Correction

RULE 6

PLEADINGS ALLOWED: FORM

(a) PLEADINGS. There shall be a petition and an answer. No other pleading shall be allowed unless authorized by the Court.

(b) CAPTION; NAMES OF PARTIES. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the names of the parties, the file number and the type of pleading.

(c) STATIONERY AND LOCATIONAL INFORMATION. All papers for which forms are not provided shall be on plain white paper, approximately [13]* *11* inches long and 8½ inches wide, and stating under the caption the nature of the pleading and the relief, if any, requested. All pleadings and other papers shall set forth in the caption the name and full residence address of the parties, if known. Petitioners shall not be required to state their residence addresses provided that they substitute the name and address of their attorney or a third person willing to accept mailings for them and in care of whom such mailings may be sent. A paper which has a substituted address shall be clearly marked to indicate that such a substitution has been made.

(d) NONCONFORMANCE WITH ABOVE. A pleading or other paper not meeting the requirements of this rule shall not be accepted for filing. (Added 1/5/87)

RULE 7

MOTIONS

(a) MOTION FOR TEMPORARY PROTECTION ORDER.

(1) HEARING. On filing a petition, a petitioner may, by motion, request a Temporary Protection Order.

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* Bracketed material struck through on original.

The clerk shall schedule a hearing on the motion in Judge-in-Chambers for the same day. (Added 1/5/87)

(2) SCOPE OF ORDER. If the Court determines from testimony, or from the petition and affidavit, that the safety or welfare of a family member is immediately endangered, a Temporary Protection Order may be issued ex parte. A Temporary Protection Order shall, by its terms, be of no longer than fourteen (14) days duration from the date it is issued. The Temporary Protection Order may include any of the remedies authorized with issuance of a Civil Protection Order. The Temporary Protection Order shall be served on the respondent, together with the petition and the notice required by SCR Intrafamily 3. (Added 1/5/87)

(3) HEARING ON MOTION. In cases where a Temporary Protection Order is issued, the hearing on the motion shall be scheduled for a date prior to the expiration of the Temporary Protection Order. (Added 1/5/87)

(b) MOTION TO DISMISS. Upon motion by any party, or on its own initiative, the Court may dismiss the petition at any time prior to the entry of a protection order. Such motion shall be in writing and supported by affidavit if made prior to the hearing date and shall be heard on the date set for hearing on the petition prior to taking testimony. Oppositions, if any, shall be filed not later than one (1) day before the hearing and shall be supported by affidavit. Motions to dismiss during the hearing on the petition may be made orally. Upon dismissal of a petition all temporary protection orders based thereon shall be revoked. (Added 1/5/87)

(c) MOTION FOR CONTEMPT FOR VIOLATION OF PROTECTION ORDER. When a motion for contempt is filed alleging violation of a Civil Protection Order or Temporary Protection Order, the intrafamily clerk shall issue a notice of hearing and order directing appearance. The motion shall be in writing and shall be

supported by affidavit. A statement of points and authorities shall not be required for a motion for contempt. The notice of hearing and order directing appearance shall be served in the same manner set forth in SCR Intrafamily 3. Punishment upon a finding of contempt shall be limited as provided in SCR Intrafamily 12(e).

(d) SERVICE UPON ADVERSE PARTY. A copy of any motion filed and any response to such motion shall be served upon the adverse party (or that party's attorney, if he or she is represented by counsel). However, service of a motion for a Temporary Protection Order need not be made if it clearly appears from the motion or the petition for a Civil Protection Order that the safety or welfare of a family member is immediately endangered.

RULE 8

GENERAL PROVISIONS REGARDING DISCOVERY

(a) DISCOVERY METHODS. For good cause shown and with due regard for the summary nature of the proceedings, the Court may authorize a party to proceed with discovery from the other party by requests for written interrogatories or production of documents. Other Superior Court Civil Rules of discovery available against non-parties may be utilized if approved by the Court. Requests for reports filed with the Metropolitan Police Department may be made directly to the Department. The frequency and use of these methods is limited pursuant to subparagraphs (b), (c), (d) and (e) herein. Every application for discovery must state whether there is a criminal proceeding pending involving the facts alleged in the petition.

(b) SCOPE OF DISCOVERY. Unless otherwise directed by the Court, the scope of discovery is limited to matters directly relating to the incident or incidents of abuse alleged in the petition or answer, and to medical treatment obtained as a result of those incidents.

(c) SEQUENCE AND TIMING OF DISCOVERY. Discovery may be initiated in any sequence provided that any discovery methods used shall be initiated within five (5) calendar days of service of the petition on the respondent. Time for discovery shall not be enlarged if it would delay the scheduled hearing on the petition provided that the respondent has been served with the discovery request at least seven (7) days prior to the hearing.

(d) PROTECTIVE ORDER. No methods of discovery shall be used or enforced which would require direct contact between the parties if either party objects. Upon motion by a party, the Court may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that discovery be denied; (2) that discovery be granted only on specified terms and conditions; (3) that certain matters not be inquired into or that the scope of discovery be limited to certain matters.

(e) RESPONSES TO DISCOVERY. Responses to requests for discovery shall be served on the other party and filed with the clerk's office not later than the close of business of the second day prior to the hearing.

(f) ALTERNATIVE DISCOVERY METHODS. Requests for discovery by methods other than written interrogatories or requests for production of documents shall be made by written motion with notice that objections must be filed, in writing, no later than three (3) days after service of the motion. The motion may be decided by the Motions Judge without hearing.

RULE 9

CONDUCT OF HEARINGS

(a) REPRESENTATION BY COUNSEL.

(1) BY PRIVATE COUNSEL. Whenever a petition for a Civil Protection Order or a motion pursuant to these rules is filed by a petitioner, at his or her initiative, the petitioner and the respondent may be represented by private counsel.

(2) REPRESENTATION BY THE CORPORATION COUNSEL. Whenever a petition for a Civil Protection Order or a motion pursuant to these rules is filed by the Corporation Counsel, the Corporation Counsel shall represent the petitioner unless private counsel enters an appearance in the case or the Court permits the Corporation Counsel to withdraw.

(b) EVIDENCE.

(1) UNDER OATH. In all fact-finding hearings the testimony of witnesses shall be taken under oath or affirmation.

(2) NON-JURY HEARING. The Court shall, without a jury, hear and adjudicate petitions for Civil Protection Orders and all motions made pursuant to these rules.

(3) WHO MAY PRESENT EVIDENCE.

(A) Whenever a petition for a Civil Protection Order or a motion pursuant to these rules is filed, both the petitioner and the respondent may present evidence, including testimony of themselves and other witnesses as well as physical evidence.

(B) In cases where a petition for a Civil Protection Order or a motion made pursuant

to these rules is filed by the Corporation Counsel, the Corporation Counsel may present evidence.

(4) ADMISSIBLE EVIDENCE.

(A) Evidence which is competent, material and relevant shall be admissible at fact-finding hearings.

(B) Notwithstanding D.C. Code § 14-306, one spouse shall be a competent and compellable witness against the other and may testify as to confidential communications, but such testimony compelled over a claim of privilege conferred by D.C. Code § 14-306 shall be inadmissible as evidence in a criminal trial over the objection of a spouse entitled to claim that privilege.

(5) PROHIBITION AGAINST USE OF TESTIMONY AGAINST RESPONDENT IN A CRIMINAL ACTION. Pursuant to D.C. Code § 16-1002(c), testimony of the respondent in a proceeding for a Civil Protection Order or Temporary Protection Order shall be inadmissible as evidence in a criminal trial except in a prosecution for perjury or false statement.

(6) LEVEL OF PROOF REQUIRED FOR CIVIL PROTECTION ORDER. If the Court finds in a fact-finding hearing that there is good cause to believe the allegations in the petition, the Court may issue the Civil Protection Order.

(c) FINDINGS. At the conclusion of a contested hearing, the Court shall make those findings of fact essential to the ultimate conclusion of law.

RULE 10

DISMISSAL OF ACTION

(a) VOLUNTARY DISMISSAL. An action may be dismissed by the petitioner, without court order, at any time before filing of an answer or counterclaim by the respondent or before entry of a Civil Protection Order by filing a notice of dismissal. Unless otherwise stated, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication on the merits when filed by a petitioner who has once dismissed in any court of the United States or of any state an action based on or including the same claim. If a counterclaim has been pleaded by a respondent prior to the petitioner's dismissal, the action shall not be dismissed over the respondent's objection unless the counterclaim can remain pending for independent adjudication by the Court. If a Civil Protection Order has been entered the action shall not be dismissed over the respondent's objection if the dismissal would seriously prejudice substantial rights of the respondent granted by the order.

(b) FAILURE TO PROSECUTE. If a party fails for six (6) months from the time action may be taken to comply with any law, rule, or order requisite to the prosecution of the claim, or to take any other action to prosecute the claim, and the party has received a warning as provided below, the claim shall be dismissed with prejudice by the clerk. One (1) month before termination of the six (6) month period the clerk shall warn the dilatory party by mail that the claim will be dismissed if the party fails to take any action to prosecute the claim, making a note in the docket of the mailing. The failure to warn the party shall not affect the running of the six (6) month period but the case shall not be dismissed until thirty (30) days after notice is sent by the clerk. The six (6) month period shall be tolled for any period during which there was a bench warrant outstand-

ing against the respondent. The time in which the delinquent party may take appropriate action to reinstate under SCR Civ 60(b) shall commence from the entry of dismissal by the clerk.

(c) MOTION TO REINSTATE. Any motion to reinstate a case dismissed under paragraph (b) of this rule shall be filed in writing, accompanied by an affidavit of the attorney or party pro se, giving a good cause for failure of the case to be at issue not later than six (6) months after the filing date. If a motion to reinstate is not filed within twenty (20) days after the order of dismissal, the action shall not be reinstated.

RULE 11

ISSUANCE OR ORDERS

(a) ORDER ISSUED WHEN BOTH PARTIES ARE PRESENT. All protection orders entered by the Division shall be in writing, a copy of which shall be hand delivered to each party to the proceedings. The Court shall explain the meaning of the order to the parties and shall advise the parties that violation of the order may result in a fine or penalty of not more than $300.00 or imprisonment for not more than six (6) months, or both.

(b) CONSENT ORDER. When the respondent has consented to having a Civil Protection Order issued, the Court shall make sufficient inquiry to be assured that:

(1) the respondent voluntarily consented to the issuance of the Civil Protection Order; and

(2) the parties understand the contents of the Order.

(c) ORDER ISSUED IN THE ABSENCE OF RESPONDENT. When a Civil Protection Order or Temporary Protection Order is issued without the respondent's presence, the Court shall deliver an additional copy of the Order to the petitioner for service upon the respond-

ent. The Court shall inform the petitioner that the Order is valid and effective, but that the respondent cannot be held in contempt of Court for violation of the Order unless the violation is committed after the respondent is legally served with a copy of it pursuant to Rule 3. The Court may for good cause order that a member of the Metropolitan Police Department accompany an individual designated to serve the Order by the petitioner.

(d) ISSUANCE OF ORDER AGAINST BOTH PARTIES. No Civil Protection Order may be issued unless a Petition and Affidavit have been filed and served upon the individual who is the subject of the Order pursuant to Rules 2 and 3 of these Rules, unless the individual, after having been apprised by the Court of his or her rights with respect to the filing of a Petition and Affidavit and to a hearing on such Petition, understandingly consents to the issuance of an Order binding him or her, provided, however, that the Court may, as a condition of the issuance of a Civil Protection Order in favor of any party, require that party to abide by such fair and reasonable conditions as may be necessary and appropriate to ensure fairness and facilitate compliance with the Civil Protection Order.

(e) AVAILABLE REMEDIES. If, after hearing, the Court finds that there is good cause to believe the respondent has committed or is threatening an intrafamily offense, it may issue a protection order:

(1) directing the respondent to refrain from the conduct committed or threatened and to keep the peace toward the family member,

(2) requiring the respondent, alone or in conjunction with any other member of the family before the Court, to participate in psychiatric or medical treatment or appropriate counseling programs,

(3) directing, where appropriate, that the respondent avoid the presence of the family member endangered,

(4) directing the respondent to refrain from entering, or to vacate, the dwelling unit of the complainant when the dwelling is:

(A) marital property of the parties, or

(B) jointly owned, or

(C) owned, leased or rented by the complainant individually, or

(D) jointly owned, leased or rented by the complainant and a person other than the respondent,

(5) directing the respondent to relinquish the use of certain personal property owned jointly by the parties or by the complainant individually,

(6) awarding temporary custody of a minor child of the parties,

(7) determining visitation rights with appropriate restrictions to protect the safety of the complainant and the minor children,

(8) awarding litigation costs and attorney fees,

(9) ordering the Metropolitan Police Department to take such action as the Family Division deems necessary to enforce its orders,

(10) directing the respondent to perform or refrain from other actions as may be appropriate to the effective resolution of the matter, or

(11) combining two or more of the directions or requirements prescribed by the preceding paragraphs.

(f) DURATION AND EXTENSION. A Civil Protection Order shall be in effect for one (1) year unless

the Court has provided for a lesser period of time. Upon written motion of any party to the original proceeding, the Court may extend, rescind or modify an order for good cause shown.

RULE 12

CONTEMPT

(a) IN THE PRESENCE OF JUDGE. A criminal contempt may be punished summarily if the judge certifies that he or she saw or heard the conduct constituting the contempt and that it was commited in the actual presence of the Court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) VIOLATION OF PROTECTION ORDER. A motion alleging one or more violations of a Temporary Protection Order or Civil Protection Order shall be filed and served pursuant to Rule 7(c).

(c) CONTEMPT HEARING PROCEDURES.

(1) The respondent has the right to counsel and shall be so advised.

(2) Anytime the judge contemplates imposing a sentence of imprisonment if the contempt is proven beyond a reasonable doubt, the judge may appoint counsel for the respondent. The Court may also request that the Corporation Counsel represent the petitioner.

(3) If the respondent requests a continuance the judge may grant the continuance on any one or all of the following conditions:

(A) that any existing Temporary Protection Order or Civil Protection Order be extended,

(B) that additional conditions to ensure the safety of the moving party be imposed

(e.g., vacation of the premises pending the continuance; a temporary total ban on visitation; awarding temporary custody of a minor child of the parties),

(C) that the respondent receive no further continuances.

(4) Both parties have the right to present sworn testimony of witnesses and other evidence in support of or in opposition to the motion. The respondent may not be compelled to testify or give evidence.

(d) APPLICATION OF THE SPOUSAL PRIVILEGE. One spouse is a competent and compellable witness against the other and may testify as to confidential communications, but testimony compelled over a claim of privilege shall be inadmissible as evidence in a criminal trial over the objection of a spouse entitled to claim that privilege.

(e) PUNISHMENT UPON FINDING OF CONTEMPT BY THE DIVISION. Contempt may be punished by a fine or penalty of not more than $300.00 or by imprisonment for not more than six (6) months, or both.

RULE 13

APPEAL

(a) APPEALABLE ORDER. Any final order issued pursuant to D.C. Code § 16-1005, any order granting or denying extension, modification, or *rescission of such order, or any adjudication of contempt shall be appealable to the District of Columbia Court of Appeals and shall be governed by the rules of that court.

(1) A notice of appeal shall be filed within thirty (30) days after entry of any final order

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* Correction

(e.g. a Civil Protection Order, an order granting or denying modification or *rescission, an adjudication of contempt).

(2) Upon a showing of excusable neglect, the Superior Court may extend the time for filing the notice of appeal by any party for a period not to exceed thirty (30) days from the expiration of the time prescribed in subparagraph (a) (1) of this rule. However, if such a request is made after the initial thirty (30) day period has expired, the request shall be made by motion, with notice to the other parties.

(b) STAY OF ORDER APPEALED FROM. The Division may stay its order pending appeal upon such terms and conditions as the Division deems proper only on written motion of the appellant, with notice to the appellee.