No. 08-6261

IN THE

Supreme Court of the United States

JOHN ROBERTSON,
Petitioner,

v.

WYKENNA WATSON,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF FOR WYKENNA WATSON IN OPPOSITION

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QUESTION PRESENTED

Whether a plea agreement in which an Assistant United States Attorney agrees on behalf of his office not to bring charges concerning particular acts that both constituted crimes and violated a civil protection order prohibits the beneficiary of that order from invoking her independent right under a local statute to seek criminal contempt convictions.

LIST OF PARTIES

In the view of respondent and the court below, the parties to this case are John Robertson and Wykenna Watson. This case should be captioned accordingly. As explained in this brief and the decision below, petitioner errs in arguing that the United States rather than Ms. Watson is the true party-in-interest. The United States has not participated as a party and does not consider itself a party.

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STATEMENT

In March 1999, respondent Wykenna Watson filed a petition for a civil protection order (CPO) in the Superior Court of the District of Columbia. Pet. App. A, at iii; *see* D.C. Code § 16-1003(a). She alleged that on March 27 she had been assaulted by her former boyfriend, petitioner John Robertson, who threatened to kill her. Pet. App. A, at iii. The Superior Court issued a CPO prohibiting him from, *inter alia*, assaulting, threatening, harassing, abusing, or contacting her. *Id.* at iii–iv. The United States Attorney's Office separately charged him with various crimes in connection with the events of March 27. *Id.* at iv.

Mr. Robertson proceeded to violate the CPO. On June 26, he demanded that Ms. Watson "drop" the pending criminal charges, pushed her into a wall, and called her derogatory names. *Id.* at iv–v. On June 27, he threw drain cleaner on her, causing lye burns that required her hospitalization. *Id.* at v–vi.

In July 1999, he and an Assistant United States Attorney entered a plea agreement to resolve the pending criminal charges relating to the March 27 incident. *Id.* at iv. It was handwritten on a standard form that both his office and the Office of the Attorney General for the District of Columbia (then known as the Office of the Corporation Counsel) used in the Superior Court. C.A. App. 65. Because the Assistant United States Attorney was acting only on behalf of his own office, the signatories struck the words "District of Columbia" in the caption on the pre-printed form (leaving the caption as "United States vs. John Robertson") and the words "Assistant Corporation Counsel" below the signature

line (leaving the words "Assistant U.S. Attorney"). *Id.* Mr. Robertson agreed to plead guilty to attempted aggravated assault. *Id.* The "gov't" agreed to dismiss other charges and "not pursue any charges concerning an incident on 6-26-99." *Id.*

As D.C. Code §§ 16-1002(c) and 16-1005(f) permit, Ms. Watson separately filed her own motion to adjudicate criminal contempt in January 2000. Pet. App. A, at iv. The motion was based on Mr. Robertson's actions on both June 26 and June 27, 1999. *Id.*[1]

After trial in May 2000, the Superior Court found Mr. Robertson guilty on three counts of criminal contempt. *Id.* at v–vi. He was sentenced to 180 days in jail on each count, with execution on one count suspended, and five years of probation. *Id.* at vi. He was also ordered to pay restitution for Ms. Watson's medical bills. *Id.* He appealed. *Id.*

More than three years later, in November 2003, Mr. Robertson moved the Superior Court under D.C. Code § 23-110 to vacate his criminal contempt convictions. Pet. App. A, at vi. He argued that the convictions violated his plea agreement with the United States Attorney's Office and that his trial counsel had been ineffective in not arguing as much. *Id.*

The Superior Court denied the motion. *Id.* at vi–vii. It held "that the plea agreement . . . is binding only on the government and not on any party seek-

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[1] By this point, the Office of the Attorney General had begun representing Ms. Watson. Pet. App. A, at iii. It continues to do so now, as authorized under the Superior Court's local rules. Super. Ct. Domestic Violence Unit R. 9(a)(2).

ing to vindicate a right against [Mr. Robertson] arising from the events of June 26, 1999." *Id.* at vii; C.A. App. 49. He appealed from that order, and the appeal was consolidated with the pending direct appeal from his criminal conviction. Pet. App. A, at ii.

The District of Columbia Court of Appeals affirmed. Based on its precedent and the language and purposes of D.C. Code § 16-1005(f), the court read this local law to confer "a private right of action to enforce the CPO through an intrafamily contempt proceeding." Pet. App. A, at xii–xiii. It rejected Mr. Robertson's argument "that such an action could only be brought 'in the name of the relevant sovereign, . . . the United States," rather than "in the name and interest of [Ms.] Watson." *Id.* at xiv. Noting that Mr. Robertson's argument "loses sight of the special nature of criminal contempt," the court found that this "unique statute . . . does not contravene the general principle that criminal prosecutions are prosecuted in the name of the sovereign" and was consistent with relevant precedent in this Court. *Id.* at xiv–xviii. Because the United States was not a party to the contempt proceeding, the court held that the United States Attorney's Office's plea agreement did not affect the validity of the contempt convictions. *Id.* at xvii–xix.

ARGUMENT

Petitioner agrees that private parties may serve as prosecutors in criminal contempt proceedings, and he explicitly waives the argument that these private prosecutors must be disinterested. Hence, he does not dispute that Ms. Watson could prosecute him for violating the civil protection order that protected her from his assaults. He instead asks this

Court to rule on the abstract issue of whether such a private, interested prosecutor must be taken to represent the sovereign or, as the court below ruled, she could represent herself as authorized by local law.

The petition should be denied for any of three independent reasons. First, petitioner's sole argument why review is warranted is that the decision below is contrary to this Court's case law, but the decision is in fact consistent with this Court's case law. Second, the issue he identifies is not sufficiently important to warrant review. Third, this case is a poor vehicle for considering petitioner's issue.

1. The decision of the court of appeals is consistent with this Court's case law. Thus, petitioner's sole assertion why review is warranted under Supreme Court Rule 10 (Pet. 7–8) is unsupported.

a. Petitioner's primary argument is that this Court has held that a private party may not prosecute criminal contempt in her own name and interest, at least in a "congressionally created court." Pet. i, 17–21. That is incorrect.

On many past occasions, this Court has extended various procedural protections to those charged with criminal contempt, as a consequence either of federal constitutional law or the Court's exercise of supervisory power over the federal courts. *E.g.*, *United States v. Dixon*, 509 U.S. 688, 696 (1993) (protection of Double Jeopardy Clause); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 809 (1987) (protection against prosecution by interested party); *Bloom v. Illinois*, 391 U.S. 194, 201–02 (1968) (right to jury trial); *Offutt v. United States*, 348 U.S. 11, 13–18 (1954) (right to trial before unbiased judge); *Cooke v. United States*, 267 U.S. 517, 536–37 (1925)

(right to counsel, to call witnesses, to be advised of charges, and to respond); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911) (presumption of innocence, proof beyond reasonable doubt, right not to testify). In doing so, the Court has at times stated that criminal contempt is "a crime in the ordinary sense." *E.g.*, *Dixon*, 509 U.S. at 696; *Bloom*, 391 U.S. at 201. Seizing on such language, petitioner argues that the Court has held that any prosecutor in a criminal contempt action necessarily represents the sovereign — in this case, the United States. Pet. 16.

That attempt to read isolated language out of context is misguided. The Court was considering the particular questions raised in the cases before it; criminal contempt was "ordinary" in the particular senses relevant in those cases. As it has explained, it did not hold that criminal contempt must be treated as an "ordinary" crime in every sense:

> The fact that we have come to regard criminal contempt as "a crime in the ordinary sense" does not mean that any prosecution of contempt must now be considered an execution of the criminal law in which only the Executive Branch may engage. Our insistence on the criminal character of contempt prosecutions has been intended to rebut earlier characterizations of such actions as undeserving of the protections normally provided in criminal proceedings.

Young, 481 U.S. at 799–800 (citation omitted).

In addition to relying on language misleadingly taken out of context, petitioner argues that the Court actually held in various cases — most notably *Dixon*, *Young*, and *Gompers* — that anyone prosecut-

ing criminal contempt necessarily does so in the sovereign's name and interest, not her own. Pet. 17–26. Again, that is incorrect.

Dixon involved double jeopardy concerns that are not at issue here. The case involved the United States's prosecution of Michael Foster for criminal offenses that had previously been the subject of criminal contempt proceedings prosecuted by attorneys representing his wife, Ana Foster, who held a CPO against him. 509 U.S. at 692–93. As petitioner conceded in the court below, "the *Dixon* plurality did not explicitly discuss whose interests Mrs. Foster's lawyers represented in this criminal contempt proceeding." C.A. Reply Br. 5. Nor was there any implicit holding on who the parties-in-interest are in criminal contempt proceedings, as that issue was not briefed or presented for resolution. *See Webster v. Fall*, 266 U.S. 507, 511 (1925).[2]

Petitioner nonetheless argues that the Court should be taken to have ruled on whether the private attorneys actually represented Mrs. Foster or the United States. His argument has two parts. First, he notes that the Court held that one count in the second prosecution was precluded by the Double

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[2] The United States as petitioner in *Dixon* did not challenge the reasoning of the court below that the "the identity of the prosecutor" was not relevant to the double jeopardy analysis. *United States v. Dixon*, 598 A.2d 724, 732 (D.C. 1991). Instead, as this Court recounted, "the Government presented the sole question '[w]hether the Double Jeopardy Clause bars prosecution of a defendant on substantive criminal charges based upon the same conduct for which he previously has been held in criminal contempt of court.'" *Dixon*, 509 U.S. at 694.

Jeopardy Clause. Pet. 20; *see* 509 U.S. at 712. Second, he contends that the Court would have found no jeopardy bar "unless the antecedent prosecution was brought in the name of the 'same sovereign' as was the subsequent one." Pet. 20.

Whatever the Court may have thought about whom Mrs. Foster's attorneys actually represented, there was no holding on that point. If anything, the Court's statement in describing the proceedings below that "the United States was not represented at trial," 509 U.S. at 691, suggests that it understood Mrs. Foster's attorneys to represent Mrs. Foster.

Moreover, the Court's double jeopardy holding was entirely consistent with that understanding. The Double Jeopardy Clause is not offended by successive prosecutions by different sovereigns. *Heath v. Alabama*, 474 U.S. 82, 88 (1985). "The 'dual sovereignty' concept does not apply, however, in every instance where successive cases are brought by nominally different prosecuting entities." *United States v. Wheeler*, 435 U.S. 313, 318 (1978). The key point for analysis is "not the extent of control exercised by one prosecuting authority over the other but rather the ultimate source of the power under which the respective prosecutions were undertaken." *Id.* at 320; *see Heath*, 474 U.S. at 88–89.

Even though Mrs. Foster's attorneys did not *represent* the United States, their *authority* to prosecute in the District's judiciary came from the District's legislature, and both bodies ultimately draw their authority from the United States. U.S. Const. art. I, § 8, cl.17; D.C. Code § 1-201.01 *et seq.* (Home Rule Act). The *Dixon* Court's holding thus makes perfect sense. The District's legislature could not circum-

vent the Double Jeopardy Clause merely by allowing private parties to represent themselves in seeking criminal contempt. The Court's holding says nothing, however, about whether the District could allow holders of CPOs to represent themselves in criminal contempt proceedings.

Petitioner attempts to blur this distinction by repeatedly referring to a supposed holding by the court below that the criminal contempt prosecution here was taken pursuant to Ms. Watson's "power." *E.g.*, Pet. i, 2, 20. That word appears nowhere in the decision below. The court instead held that this criminal contempt prosecution proceeded in the "name" and "interest" of Ms. Watson rather than those of the United States. Pet. App. A, at xiv. That holding is consistent with *Dixon*.

The decision below is also consistent with *Young*. In that case, the Court made clear that the federal courts may appoint private counsel to prosecute criminal contempt. 481 U.S. at 793–801; *see supra* page 5. In so ruling, the Court noted that "[p]rivate attorneys appointed to prosecute a criminal contempt action represent the United States, not the party that is the beneficiary of the court order allegedly violated." *Id.* at 804. Petitioner asserts that Ms. Watson accordingly must be taken to have represented the United States. Pet. 18.

Petitioner's reliance on that sentence in *Young* is misplaced. He quotes from the decision but omits the word "appointed." Pet. 18. That word was essential; *Young* involved the appointment of private attorneys pursuant to the federal courts' "inherent authority" to pursue contempt. 481 U.S. at 793–801; *see United States v. Providence Journal Co.*, 485 U.S.

693, 700 (1988) (similar). This case, by contrast, does not involve appointed counsel but instead prosecution pursuant to a statute giving the holder of a CPO a private right to pursue criminal contempt. Pet. App. A, at xii. *Young* thus does not speak to this case.

That *Young* is not on point is made all the more clear by the fact that the Court based its decision on its supervisory power over the federal courts, not the Constitution. 481 U.S. at 790, 809 n.21. Because this Court cannot exercise that power in a manner that contravenes statutory provisions, the statute would prevail if it were in conflict with the holding in *Young*. *Thomas v. Arn*, 474 U.S. 140, 148 (1985).

Finally, *Gompers* is also unhelpful to petitioner. In that decision, the Court discussed how to distinguish civil and criminal contempt and recognized that those charged with the latter receive protections such as the presumption of innocence. 221 U.S. at 441–44. Unlike petitioner here, the defendants in *Gompers* had not received such protections, and hence punishment for criminal contempt was improper. *Id.* at 423–24, 444.

In a separate discussion, the Court considered whether the parties had proceeded with the actual understanding that criminal rather than civil contempt was at issue. *Id.* at 444–52. That discussion was relevant for two main reasons. First, the Court recognized that it would be inappropriate to grant criminal relief in a case where such relief had not even been requested. *Id.* at 446, 448–50. Second, the underlying case had settled, such that the Court thought any criminal component could survive only if, as the court below thought, it was a "separate ac-

tion" rather than part of the original case. *Id.* at 445, 451–52.

In considering whether the parties had proceeded with the understanding that criminal charges were at issue, the Court stated that "proceedings at law for criminal contempt are between the public and the defendant," whereas this case had proceeded like a case in equity between private parties. *Id.* at 445. Far from petitioner's characterization (Pet. 25–26), however, this was no holding that any criminal contempt proceeding necessarily must proceed in the sovereign's name and interest. Rather, the Court's observation that criminal contempt proceedings generally proceed in that fashion was just support for its eventual conclusion that "both parties treated this as a proceeding which was a part of the original equity cause." 221 U.S. at 448. By contrast, petitioner knew from the outset that Ms. Watson had explicitly moved for criminal contempt. Pet. App. A, at iv.

Moreover, like *Young*, *Gompers* did not arise in the context of a statute like that at issue, nor did it suggest that any such statute would be unconstitutional. Further, this portion of *Gompers*, like the decision in *Young*, appears to rest on the Supreme Court's supervisory power rather than on any constitutional provisions, and thus its applicability here is suspect. *See supra* page 9. *Gompers*, like the other cases on which petitioner relies, is consistent with the decision below.

b. Petitioner's secondary argument is that this Court has already interpreted the statute in question in a manner inconsistent with how the court below interpreted it. Again, that is incorrect.

Dixon involved the same statutory scheme as that at issue here. Petitioner contends that the Court issued an "authoritative interpretation" that any prosecution authorized by D.C. Code § 16-1005(f) is "brought in the name and power of the United States." Pet. 22. There is no such interpretation of the statute in the *Dixon* decision, nor was any issue of statutory interpretation raised in the briefs or the decision of the court below.[3] Petitioner's argument apparently is based upon the same faulty logic under the Double Jeopardy Clause discussed above. *See supra* pages 7–8.

c. In passing, petitioner also asserts that "private individuals cannot, consistent with due process, bring criminal actions in their own name." Pet. 22. The case he cites simply does not support that proposition. The question before the Court was whether a citizen had Article III standing to challenge an interpretation of state criminal law that made parents of legitimate children subject to prosecution for certain failures, but not those of illegitimate children. *Linda R.S. v. Richard D.*, 410 U.S. 614, 614–16 (1973). In that context, the Court stated: "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the

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[3] After *Dixon*, the court below issued *Green v. Green*, 642 A.2d 1275 (D.C. 1994), which first interpreted the statute at issue to confer a private right to seek criminal contempt. *Id.* at 1278–80 & n.7 (distinguishing *Young*). As the *Dixon* plurality recognized, this Court ordinarily accepts "the construction of a District of Columbia law adopted by the District of Columbia Court of Appeals." 509 U.S. at 701 n.6 (op. of Scalia, J.) (citing *Pernell v. Southall Realty*, 416 U.S. 363, 368–69 (1974)).

prosecution or nonprosecution of another." *Id.* at 619. There was nothing close to a holding that the Due Process Clause forbids legislatures from giving private citizens authority to pursue criminal contempt in their own name and interest.

2. Furthermore, the issue that petitioner seeks to present is of limited importance. Because that issue's importance does not go "beyond the academic or the episodic," review is unwarranted. *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955).

Resolution of this case is unlikely to affect the legal interests of people other than the parties themselves. The essential facts underlying the petition are unusual. The decision below concerns the prosecution of criminal contempt, not of crimes generally. Pet. App. A, at xiv. Criminal contempt proceedings may occur with some frequency, but far rarer are (a) criminal contempt proceedings (b) in Article I or Article III courts, where (c) the prosecutor is someone other than the United States (d) with statutory authority to prosecute in his or her own interest, but (e) the prosecution purportedly violates a plea bargain with the United States. Petitioner tellingly does not assert that the decision below conflicts with that of any federal court of appeals or state court of last resort, or even cite any decision with similar facts. *Cf.* Supreme Court R. 10.

Petitioner nonetheless argues that the decision will have "important ramifications" because those who are subject to criminal contempt proceedings will be unfairly treated if the decision is left standing. Pet. 28–32. This Court has recognized in the context of contempt proceedings, however, that

"criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings." *Hicks v. Feiock*, 485 U.S. 624, 632 (1988). Indeed, in a series of decisions this Court has already ensured that criminal contempt defendants receive protections like those that other criminal defendants receive. *See supra* pages 4–5. And, of course, whoever the prosecutor may be, no punishment can be ordered except by a court exercising sovereign authority and ensuring these protections are provided.

Petitioner does not dispute that he was afforded such protections in this case except to assert that he was denied an essential right because he was prosecuted by a private party acting in her own name and interest. Pet. 29. He has not, however, shown the existence of any right against such a prosecution. Of course, if the court below or another court deprives a criminal defendant of the benefit of actually recognized rights in the future, this Court can exercise review then.[4]

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[4] Petitioner hypothesizes (Pet. 31) that under the reasoning of the court below he might have been denied his rights under *Brady v. Maryland*, 373 U.S. 83 (1963), but he recognized below that the trial court "required [Ms. Watson's counsel] to comply with the strictures of *Brady*." C.A. Br. 19. Citing *Ex parte Grossman*, 267 U.S. 87 (1925), he also questions (Pet. 32) whether he could petition the President to use his "Power to grant . . . Pardons for Offenses against the United States." U.S. Const. art. II, § 2, cl.1. That decision indicates, however, that "the pardon of the President was to operate upon offenses against the United States as distinguished from offenses against the states." 261 U.S. at 113. His criminal contempt

The separate concern that private prosecutors may not administer justice as fairly as public prosecutors (Pet. 29–30) is misplaced. Again, this Court has already approved federal courts' practice of appointing private prosecutors in contempt actions. *Young*, 481 U.S. at 793–801. Although private attorneys appointed in such cases "represent the United States," *id.* at 804, that does not suggest that the United States retains any active role in deciding how — or whether — the prosecution should proceed.[5] To the contrary, the Court suggested that federal courts should turn to private prosecutors only after public prosecutors declined to participate. *Id.* at 801–02. In the absence of any constitutional restraint — and petitioner has shown none — the

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conviction would thus apparently be eligible for pardon, though he does not assert that he has even requested one.

[5] Petitioner contends that the Executive Branch of the United States historically has had authority to dismiss criminal contempt prosecutions in the federal courts even over the objections of private prosecutors. Pet. 29–30 & n.15. That assertion is both unhelpful, as the United States has never objected to this prosecution, and unsupported, as the decision of this Court he cites involved the application of a statute not at issue here. *Providence Journal Co.*, 485 U.S. at 698–708. The view that the "United States' lawyers" should "retain[] ultimate control" over all criminal litigation in Article I courts (Pet. 30) is also inconsistent with the fact that the District of Columbia government, through the Office of the Attorney General, has separate prosecutorial authority in the District's courts. D.C. Code § 23-101. There is no good reason why an Assistant United States Attorney should be able to bargain away the prosecutorial discretion of the District's Attorney General, or conversely why an Assistant Attorney General should be able to bargain away that of the United States Attorney.

District's legislature has authority to decide whether having private prosecutors acting in their own names and interests is good policy.

To the extent the issue of whether private prosecutors can represent themselves or instead must represent the sovereign is important, that importance depends on a related issue that petitioner explicitly waives. This Court held in *Young* "that counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order." 481 U.S. at 809. Petitioner, however, disclaims review based on the notion that Ms. Watson's status as an "interested" party prevented her from prosecuting this matter. Pet. 18 n.12. He also forsook that issue in the court below (C.A. Reply Br. 4 n.3), which thus did not address the issue.

What is left is the far more abstract question of who a criminal contempt prosecutor must be thought to represent. Even if "intellectually interesting," the academic issue is unworthy of review: "this Court does not sit to satisfy a scholarly interest in such issues." *Rice*, 349 U.S. at 74. "[T]he administration of criminal law in matters not affected by Constitutional limitations or a general federal law is a matter peculiarly of local concern. . . . Matters relating to law enforcement in the District are entrusted to the courts of the District." *Fisher v. United States*, 328 U.S. 463, 476 (1946).

3. In any event, for multiple reasons, this case is not a good vehicle for consideration of the issue petitioner seeks to present.

a. First, his argument depends on an unreasonable interpretation of the plea agreement at issue.

He asserts that it purported to bind everyone with authority to prosecute in the name and the interest of the United States, including in his view Ms. Watson. The face of the agreement indicates otherwise.

The plea agreement referred to the "gov't." C.A. App. 65. As the court below properly recognized, "Ms. Watson's name appeared nowhere on the form." Pet. App. A, at xviii. "[N]o objectively reasonable person could understand that Mr. Robertson's plea agreement bound Ms. Watson and precluded her contempt proceeding against Mr. Robertson . . . ." *Id.* at xix.

Even assuming the word "gov't" might be read to mean everyone with prosecutorial authority ultimately deriving from the United States, other portions of the plea agreement make that interpretation impossible. By crossing out the words "District of Columbia" and "Assistant Corporation Counsel" to leave "United States" and "Assistant U.S. Attorney," the signatories made plain that the plea agreement did not bind the District of Columbia. C.A. App. 65; Pet. App. A, at xviii–xix. Although the United States and the District of Columbia are distinct legal entities with separate prosecutorial authority, D.C. Code § 23-101, the government of the District ultimately derives its authority from the United States. U.S. Const. art. I, § 8, cl.17; D.C. Code § 1-201.01 *et seq.* The plea agreement is thus naturally read to include a promise on behalf of federal prosecutors, not everyone with prosecutorial authority ultimately deriving from the United States.

b. Second, the plea agreement was not raised during petitioner's criminal contempt trial, only in a later motion to vacate the convictions. Pet. App. A,

at vi. Given this waiver, petitioner would not merit any relief from this Court merely on a showing that the prosecution violated the plea agreement. In his direct appeal from his criminal convictions, he should be required to show that the failure to dismiss the prosecution based upon the plea agreement was plain error. *See In re Sealed Case*, 356 F.3d 313, 316–17 (D.C. Cir. 2004) (citing cases); *United States v. Olano*, 507 U.S. 725, 732 (1993).[6] Alternatively, in his consolidated appeal from the denial of his collateral attack on his convictions under D.C. Code § 23-110, he is required to show "cause" for his failure to raise the asserted error earlier and prejudice from that error. *Head v. United States*, 489 A.2d 450, 451 (D.C. 1985). Such "cause" may include ineffective assistance of trial counsel. *McCrimmon v. United States*, 853 A.2d 154, 159 (D.C. 2004).

Petitioner cannot make either showing. For the reasons above, it was not error, let alone plain error, for the trial court not to dismiss the criminal contempt charges based on a plea agreement that was inapplicable and that petitioner failed even to mention. Nor has he shown any cause for that failure or any error by trial counsel "so serious that counsel was not functioning as the 'counsel' guaranteed the

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[6] The Court has heard oral argument in *Puckett v. United States*, No. 07-9712, on the question "[w]hether a forfeited claim that the government breached a plea agreement is subject to the plain-error standard of Rule 52(b) of the Federal Rules of Criminal Procedure." The Court can readily conclude that this petition should be denied without waiting for *Puckett* to be decided.

defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

c. Third, on a related note, petitioner never sought relief in the case in which he entered the plea agreement — that relating to his aggravated assault on March 27, 1999 — as he should have done. When a defendant alleges that the government has breached a plea agreement, the sentencing court may consider whether there is a breach and what any remedy should be. *Santobello v. New York*, 404 U.S. 257, 262–63 (1971). Petitioner argued below that the proper remedy for a breach would be in the nature of specific performance — an order vacating convictions following a prosecution that, in his view, never should have begun (C.A. Br. 35–36) — but "*Santobello* expressly declined to hold that the Constitution compels specific performance of a broken prosecutorial promise as the remedy for such a plea." *Mabry v. Johnson*, 467 U.S. 504, 510 n.11 (1984). Here, relief in the nature he recommends would interfere with Ms. Watson's independent right under local law to pursue criminal contempt, and specific performance is disfavored when it would undermine third-party interests. Restatement (Second) of Contracts § 364 (1981).

Withdrawal of the guilty plea that followed the plea agreement would have been more appropriate relief. To the extent that relief would not aid him now because he has completed his sentence following that plea, he is to blame given that he waited more than three years after his criminal contempt convictions before even raising the possibility that they violated the plea agreement. Pet. App. A, at vi.

d. Fourth, because petitioner relied below on his mistaken argument that this Court's decisions required that his convictions be vacated, he did not discuss key issues in any meaningful depth. He did not discuss whether as a matter of statutory interpretation D.C. Code § 16-1005(f) should be read to authorize private parties to bring criminal contempt actions in their own names and interests. Nor did he discuss whether such a statute is inconsistent with the Due Process Clause. The court below thus did not address these issues, leaving this Court in a poor position to do so in the first instance. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168–69 (2004).

e. Fifth, petitioner was convicted on counts relating to incidents on both June 26 and June 27, 1999, but the plea agreement on its face covers only June 26. Pet. App. A, at iv–v. Before the court below, he nonetheless argued that the plea agreement justified reversal of all his criminal contempt convictions based on the parol evidence that an Assistant United States Attorney in discussing the agreement later referred to an "incident . . . approximately on June 26th." C.A. Br. 17–18 & n.25, 48. Whether or not he is correct on that point, the need to resolve it is another reason why this case is a poor vehicle for consideration of petitioner's issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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