No. 08-6261

IN THE

Supreme Court of the United States

JOHN ROBERTSON,

Petitioner,

v.

UNITED STATES *EX REL.* WYKENNA WATSON,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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November 2008

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QUESTION PRESENTED

Whether, consistent with this Court's cases and the Due Process Clause of the Fifth Amendment to the United States Constitution, an action for criminal contempt in a congressionally created court may be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States.

LIST OF PARTIES

Petitioner John Robertson was the defendant and the appellant below. In Petitioner's view, the criminal contempt action for violation of a civil protection order that is at issue in this case was prosecuted in the name and on the behalf of the United States as the real party-in-interest. In Petitioner's view, Wykenna Watson, although the beneficiary of the underlying civil protection order, was not the real party-in-interest to the criminal contempt prosecution here at issue. Hence, in Petitioner's view, this case should be captioned John Robertson v. United States *ex rel.* Wykenna Watson.

The District of Columbia Court of Appeals, however, ultimately held that Wykenna Watson, rather than the United States, was the real party-in-interest to the criminal contempt prosecution, and that the criminal prosecution thus had been maintained in Wykenna Watson's name and power. The District of Columbia Court of Appeals captioned the case *In re* John Robertson.

The District of Columbia, through the Attorney General for the District of Columbia, maintained that it represented Wykenna Watson in her individual capacity as a private criminal contempt prosecutor. It filed appellate briefs and trial submissions in this putative representational capacity in the proceedings below.

The United States Attorney for the District of Columbia filed an appellate brief at the request of the District of Columbia Court of Appeals.

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The January 24, 2008, opinion of the District of Columbia Court of Appeals in the consolidated case of *In re John Robertson*, Nos. 00-FM-925, 04-FM-1269, appears at Appendix A to this petition and is reported at *In re Robertson*, 940 A.2d 1050 (D.C. 2008). The June 13, 2008, order of the District of Columbia Court of Appeals denying en banc rehearing appears at Appendix B.

STATEMENT OF JURISDICTION

Petitioner seeks review of the January 24, 2008, decision of the District of Columbia Court of Appeals in *In re Robertson*, 940 A.2d 1050 (D.C. 2008). The Court of Appeals denied en banc review on June 13, 2008. Petitioner filed a petition for a writ of certiorari in this Court, along with a motion to proceed *in forma pauperis* on September 10, 2008. On November 10, 2008, this Court denied the *in forma pauperis* motion, and allowed Petitioner until December 1, 2008, to submit a petition in compliance with Sup. Ct. R. 33.1. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1257(a) & (b).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The at-issue constitutional provision states: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The at-issue statutory provision states: "Violation of any temporary or final order issued under [the Intrafamily Offenses Act] . . . shall be punishable as contempt." D.C. Code § 16-1005(f).

STATEMENT OF THE CASE

I. INTRODUCTION

This case is about whether, under this Court's decisional law and the Due Process Clause of the Fifth Amendment to the United States Constitution, a prosecution for criminal contempt in a congressionally created court must be a public action that is brought in the name and pursuant to the power of the United States, or whether such a criminal prosecution properly may be brought in the name and pursuant to the "power" of a private individual.

In exchange for his entering of a guilty plea to a felony charge for an assault that occurred on March 27, 1999, the United States promised never to prosecute Petitioner John Robertson for his alleged actions of June 26, 1999. Notwithstanding the United States' bargained-for agreement not to prosecute him for his alleged actions of June 26, 1999, Mr. Robertson subsequently was prosecuted under D.C. Code § 16-1005(f), convicted of three counts of criminal contempt, sentenced to three 180-day jail sentences and a five-year term of probation, and ordered to remit fines and restitution to public funds for his alleged behavior of that date.

The District of Columbia Court of Appeals held that Mr. Robertson's criminal contempt prosecution under D.C. Code § 16-1005(f) did not violate the United States' promise never to prosecute him for the events of June 26, 1999. Instead, it held that the criminal prosecution was not brought in the name, interest, and power of the United States, but rather was brought in the name, interest, and power of Wykenna Watson—Mr. Robertson's estranged

girlfriend and the holder of a civil protection order ("CPO") against him. Stated otherwise, the court held that Mr. Robertson's prosecution was a wholly *private*, yet also a wholly *criminal*, cause of action—a cause of action that allowed Ms. Watson to prosecute a "private criminal action" in her own "name and interest." *In re Robertson*, 940 A.2d 1050, 1057-58 (D.C. 2008).

In *United States v. Dixon*, 509 U.S. 688 (1993), however, this Court authoritatively interpreted D.C. Code § 16-1005(f), the very contempt statute at issue in Mr. Robertson's case, and held that it punishes "'a crime in the ordinary sense.'" 509 U.S. at 696 (quoting *Bloom v. Illinois*, 391 U.S. 194, 201 (1968)). And, because the statute punishes "a crime in the ordinary sense," this Court in *Dixon* held that, even though private attorneys had served as prosecutors in that case, the criminal contempt prosecution had been an exercise of the United States' sovereign power that had resulted in a jeopardy bar to the Office of the United States Attorney's subsequent attempt to bring an assault charge stemming from the same event. 509 U.S. at 712.

This Court is the ultimate arbiter of the meaning of a D.C. Code provision. *See Whalen v. United States*, 445 U.S. 684, 687 (1980). The Court of Appeals, therefore, was bound by this Court's holding in *Dixon* that § 16-1005(f) prosecutions are public cases brought in the name and power of the United States. The court simply was not free to interpret the statute as denoting a "private criminal action" that permitted Ms. Watson to bring a prosecution in her own "name and interest." Rather, it was bound to follow *Dixon* and to hold that, because the contempt action had been brought in the

United States' name, the action had violated Mr. Robertson's due process right to receive the benefit of the United States' bargained-for promise never to prosecute him for the events of June 26, 1999. *See Santobello v. New York*, 404 U.S. 257 (1971). For that reason alone, this Court should grant review and reverse.

Moreover, and even if this Court had not already definitively interpreted § 16-1005(f), the lower court could not, consistent with the Due Process Clause, construe the statute as allowing for a prosecution brought in the name and power of a private person. Rather, it is axiomatic that criminal contempt actions are "between the public and the defendant," and are brought in the name and power of the government. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 445 (1911). A criminal prosecution is an exercise of sovereign power; a private person has no more power to prosecute a criminal action in her own name and power than she would have to enter into treaties with foreign nations or to mint a currency. But, under the lower court's decision, Ms. Watson had the power to deprive Mr. Robertson of his liberty and to force him to pay fines payable to the public fisc in a "private criminal action" that she maintained in "her own name"—a "private criminal action" over which the United States not only had no control or authority, but that could proceed in the face of its explicit promise not to prosecute.

The Court of Appeals grounded this remarkable interpretation of criminal contempt actions in the repudiated notion, voiced in a *dissenting* opinion in *Dixon*, as well as discredited dictum from *In re Debs*, 158 U.S. 564 (1895), that criminal contempt prosecutions are not brought in the name of the

government in order to vindicate the public's interest in enforcement of the criminal law, but rather are private causes of action brought in the names of individual litigants to "'secur[e] to suitors the rights [to] which [a court] has adjudged them entitled.'" 940 A.2d at 1057 (quoting *Dixon*, 509 U.S. at 742 (Blackmun, J., dissenting and concurring in part) (quoting *In re Debs*, 158 U.S. at 596)). But, as this Court long ago recognized, "[c]riminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong." *Bloom*, 391 U.S. at 201 (overruling *In re Debs*). Thus, although a criminal contempt action may arise out of a judicial order entered in a civil action, a criminal contempt action is a separate action "between the public and the defendant." *Gompers*, 221 U.S. at 445. Indeed, in *Gompers* this Court held that criminal contempt actions in congressionally created courts, as opposed to civil contempt actions in such courts, may only be maintained in the United States' name. *Id.*

To be sure, there is a well-established tradition of private attorneys serving as prosecutors to criminal contempt actions. This Court's decisional law is clear, however, that when a private lawyer prosecutes a criminal contempt action in a congressionally created court, such lawyer "represent[s] the United States, not the party that is the beneficiary of the court order allegedly violated." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987). This Court thus has held repeatedly, *see infra* n.11, that criminal contempt prosecutions in such courts, regardless of whether they are litigated by public or private lawyers, are exercises of the United States' sovereign power. For this reason too, the lower court was bound to hold that the D.C. Code § 16-1005(f) prosecution had been

brought in the United States' name and power and, therefore, that the prosecution violated the United States' promise never to prosecute Mr. Robertson for the June 26, 1999, events.

In addition to defeating Mr. Robertson's due process right to enforcement of the plea agreement and defying this Court's precedents, the lower court's invention of a private criminal contempt action has grave consequences for the prosecution of criminal contempts. By insisting that criminal contempt prosecutions seek to punish crime in the ordinary sense, this Court has sought to guarantee that alleged contemnors receive the full panoply of constitutional protections afforded to all criminal defendants.[1] And, as this Court recognized in *Gompers*, courts and creative litigants may not evade or trammel these protections by nominally recasting what in reality are public criminal contempt actions as private civil ones. 221 U.S. at 445-48.

Yet, by ignoring the time-honored meanings of "crime" and "criminal action" and allowing for a private cause of criminal contempt, the Court of Appeals has done just that. Because criminal contempt prosecutions are fundamentally public actions, the public prosecutor always has retained the power to make the discretionary decisions that are vital to the fair and uniform enforcement of the criminal law, even when private lawyers are

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[1] *See, e.g.*, *Dixon*, 509 U.S. at 696 (double jeopardy); *Bloom*, 391 U.S. at 208 (jury trial); *Ex parte Grossman*, 267 U.S. 87, 122 (1925) (presidential pardon); *Cooke v. United States*, 267 U.S. 517, 537 (1925) (right to counsel); *Gompers*, 221 U.S. at 444 (presumption of innocence, proof beyond reasonable doubt, and guarantee against self-incrimination).

prosecuting the case.[2] Under the Court of Appeals' decision, however, the United States has no power to dismiss or in any manner control the private criminal cause of action, no matter how vindictive or overzealous such prosecution might be.

Furthermore, because criminal contempt prosecutions in congressionally created courts fundamentally are public actions maintained in the United States' name, alleged contemnors also are ensured that their basic constitutional rights as criminal defendants will be respected. But, when a private individual brings the criminal contempt prosecution in her own name and power, there is no guarantee that alleged contemnors will receive the safeguards, such as the protection against double jeopardy, the right to the disclosure of exculpatory evidence, or the ability to ask the President for a commutation or pardon, that are guaranteed in criminal contempt actions maintained in the United States' name.

The court's decision constitutes a radical departure from this Court's repeated insistence that criminal contempt actions are public actions brought in the government's name. Because the decision "decide[s] an important federal question in a way

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[2] *See, e.g., United States v. Providence Journal Co.*, 485 U.S. 693 (1988) (holding that private contempt prosecutor in federal court may not petition for writ of certiorari unless United States Solicitor General seeks certiorari review); *Cronan ex rel. State v. Cronan*, 774 A.2d 866, 875 (R.I. 2001) ("[T]he Attorney General may file a *nolle prosequi* and thereby cause a criminal case, including one initiated via a private complaint, to be dismissed at any time.").

that conflicts with relevant decisions of this Court," this Court should grant review. Sup. Ct. R. 10(c).[3]

II. FACTUAL BACKGROUND AND THE PROCEEDINGS BELOW

On March 27, 1999, Petitioner John Robertson allegedly struck his then-girlfriend, Wykenna Watson (App. at 121).[4] Thereafter, the Office of the United States Attorney for the District of Columbia charged Mr. Robertson in the Superior Court of the District of Columbia, Criminal Division, with three counts of felony assault (App. at 56).

Meanwhile, on April 26, 1999, Ms. Watson, pursuant to the District of Columbia Intrafamily Offenses Act, D.C. Code §§ 16-1001 *et seq.*, obtained a civil protection order on the basis of Mr. Robertson's assault of March 27, 1999 (R.20; App. at 6). This CPO, which was issued by a judge sitting in the Superior Court, Family Division, ordered Mr. Robertson to stay away from Ms. Watson and not to assault her (R.20; App. at 6).

At some point in June 1999, the Assistant United States Attorney ("AUSA") prosecuting the felony assault charges extended Mr. Robertson a plea offer

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[3] Petitioner respectfully contends that the lower court's decision is so fundamentally violative of *Dixon* and this Court's other case law that summary reversal is warranted. *See* Sup. Ct. R. 16(1).

[4] Citations to "(App. at *)" refer to a page from Petitioner's appendix in the Court of Appeals. Citations to "(**/**/** Tr. at *)" refer to a date and page from the trial transcripts. Citations to "(R.*)" refer to a page in the record on appeal in Appeal No. 00-FM-925. Citations to "(CR.*)" refer to a page in the record on appeal in Appeal No. 04-FM-1269.

(App. at 61). Shortly thereafter, however, the AUSA informed Mr. Robertson's counsel that he was withdrawing the plea offer due to another incident that had occurred on June 26, 1999, an incident which apparently had involved Mr. Robertson again attacking Ms. Watson. The AUSA further told Mr. Robertson's counsel that he likely would seek an additional indictment relating to the June 26, 1999, incident (App. at 61).

After, however, he investigated the incident, the AUSA decided that the United States might not pursue additional charges with respect to the June event (5/10/00 Tr. at 88; 5/2/00 Tr. at 5; App. at 131). Rather, the AUSA offered Mr. Robertson that if he pled guilty to one count of felony assault with respect to the March 27, 1999, event, the United States would dismiss the remaining two charges and would *promise never to pursue any criminal charges with respect to the events of June 26, 1999* (7/28/00 Tr. at 3-4; App. at 61, 100).

Mr. Robertson accepted this offer and entered a guilty plea (7/28/00 Tr. at 16; App. at 65, 103). The Superior Court judge that presided over the felony case sentenced him to one to three years in prison.

Notwithstanding the promise that Mr. Robertson would not suffer criminal prosecution for the alleged events of June 26, 1999, Ms. Watson, aided by the Attorney General for the District of Columbia,[5] filed a motion under D.C. Code § 16-1005(f) to show cause why Mr. Robertson should not be held in criminal contempt of the CPO entered on April 26, 1999, for

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[5] At all times relevant to the trial court proceedings in this case, the Attorney General was known as the Corporation Counsel for the District of Columbia.

the alleged events of June 26, 1999 (App. at 10). Ms. Watson also filed a civil motion to modify the CPO on the basis of the events of June 26, 1999 (R.30).

Following a consolidated bench trial where an Assistant Attorney General served both as the plaintiff's lawyer and the prosecuting attorney, the Family Court judge adjudicated Mr. Robertson guilty of three counts of criminal contempt for his behavior of June 26, 1999 (5/11/00 Tr. at 33; App. at 190). The judge thereafter entered a Criminal Judgment and Conviction Order that sentenced him to three consecutive 180-day jail terms (execution of one count suspended), imposed a five-year period of probation, ordered him to pay the court costs imposed on all persons convicted of crimes in the Superior Court, and required him to pay fines and criminal restitution to public funds (6/14/00 Tr. at 21; R.144; App. at 23, 208).

With respect to the civil allegations, the Family Court judge found "good cause" to modify and extend the April 26, 1999, CPO on the basis of Mr. Robertson's behavior of June 26, 1999 (App. at 215). Due to this civil finding, the judge extended the CPO and ordered Mr. Robertson to pay civil restitution to Ms. Watson (6/14/00 Tr. at 22-28; R.100; App. at 17, 214).

Mr. Robertson appealed from the Family Court judge's finding of criminal contempt (R.145; App. at 24). In addition, Mr. Robertson filed a collateral motion in the Family Court to vacate his criminal contempt convictions (CR.40; App. at 26).[6] In this

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[6] Mr. Robertson did not appeal or collaterally challenge the trial court's finding of good cause to modify and extend the CPO or the remedial civil relief that the court imposed.

collateral challenge, Mr. Robertson relied, inter alia, on *Dixon* and *Santobello*, and argued that the § 16-1005(f) prosecution had been maintained in the name of the United States and, therefore, that the prosecution had violated the United States' bargained-for promise not to prosecute him for the events of June 26, 1999 (CR.41; CR.40; App. at 37).

In response, the Attorney General argued that the contempt prosecution, although a criminal case, had not been a public prosecution, but rather had been a private cause—maintained in the name and power of Ms. Watson in her "private capacity" (CR.42; App. at 42). The Attorney General thus argued that, although it had resulted in Mr. Robertson suffering criminal punishment for his behavior of June 26, 1999, the prosecution had not violated the United States' plea agreement because the action had been a private one (App. at 42-46).

On August 27, 2004, the Family Court ruled that Mr. Robertson's criminal contempt prosecution had been a "private action" and that Ms. Watson, as a "private petitioner," was "not bound by a plea agreement entered into by government prosecutors" (App. at 50). Mr. Robertson appealed this decision, and the District of Columbia Court of Appeals consolidated this appeal with Mr. Robertson's extant direct appeal (App. at 54).

On appeal, Mr. Robertson again argued that, under the Due Process Clause and this Court's precedents, all criminal contempt prosecutions are maintained pursuant to the power of the government. For its part, the Attorney General again argued that the criminal contempt prosecution

had been brought in the name and interest of Ms. Watson.[7]

At the Court of Appeals' request, the United States Attorney also filed a brief. The United States argued that CPO holders have the right under § 16-1005(f) to pursue criminal actions in "their own names," and that Mr. Robertson's prosecution "was conducted as a private action brought in the name and interest of Watson, not as a public action brought in the name and interest of the United States" (United States Br. 6). The United States thus maintained that the prosecution had not violated its plea agreement.

III. THE DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

In an opinion issued on January 24, 2008, a three-judge panel of the Court of Appeals affirmed Mr. Robertson's convictions. The court recounted that Mr. Robertson's position was that criminal contempt actions may "only be brought 'in the name of the relevant sovereign,'" in this case "'the United States.'" *In re Robertson*, 940 A.2d at 1057 (quoting

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[7] In the Family Court, the Attorney General acknowledged that, under D.C. Code § 23-101—the statute that governs prosecutions in the District—it could not maintain a criminal contempt action under § 16-1005(f) in the District's name (CR.42; App. at 43). But, the Attorney General argued on appeal that, if the court found that the criminal contempt prosecution had not been brought in Ms. Watson's name, it should find that the action had been maintained in the name of the District. In the appellate brief that it filed, the United States recognized that D.C. Code § 23-101 precludes the Attorney General from bringing a § 16-1005(f) action in the name of the District (United States Br. 20). *See also Goode v. Markley*, 603 F.2d 973, 976 (D.C. Cir. 1979).

Appellant Supp'l Br. 11). The court, however, found that Mr. Robertson's "characterization of the proceeding against him lo[st] sight of the special nature of criminal contempt." *Id.*

Quoting from Justice Blackmun's *dissenting opinion* in *Dixon*, the court stated that "criminal contempt is 'a special situation.'" 940 A.2d at 1057 (quoting *Dixon*, 509 U.S. at 742 (Blackmun, J., dissenting and concurring in part)). And, again quoting Justice Blackmun's dissenting *Dixon* opinion, which in turn had quoted this Court's dictum in *In re Debs*, *supra*, the court stated that a "'court [ ] enforcing obedience to its orders by proceedings for contempt [ ] is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to.'" 940 A.2d at 1057 (quoting 509 U.S. at 742 (Blackmun, J., dissenting and concurring in part) (quoting *In re Debs*, 158 U.S. at 596)). The court held that, under D.C. Code § 16-1005(f), "a criminal contempt proceeding is properly brought in the name of a private person [such as Ms. Watson] . . . rather than in the name of the government," and thus found that Mr. Robertson's criminal contempt prosecution had not violated his plea agreement with the United States. 940 A.2d at 1058.

Mr. Robertson filed a timely rehearing petition with the full Court of Appeals. In an order issued on June 13, 2008, the court denied en banc review.

REASONS FOR GRANTING THE WRIT

I. SUMMARY

Criminal prosecutions are public actions. This Court has held time-and-again that a criminal contempt prosecution is no different. Criminal

contempt is a crime in the ordinary sense and a criminal contempt action in a congressionally created court is like any other criminal action: it is between the United States and the accused. In *Dixon*, this Court interpreted D.C. Code § 16-1005(f), the very statute at issue in this case, as being no different.

The Court of Appeals, however, ignored this Court's authoritative interpretation of § 16-1005(f) and held instead that the statute denotes a "private criminal action" that a private litigant may bring in "her own name and interests." 940 A.2d at 1057-58. As a result of this interpretation, the court found that Mr. Robertson's criminal contempt prosecution had not violated the United States' bargained-for promise never to prosecute him for the events of June 26, 1999. This decision, which the lower court grounded in a *dissent*, as well as on repudiated dictum from *In re Debs*, not only flies in the face of this Court's controlling interpretation of § 16-1005(f), but also of this Court's repeated holdings that criminal contempt prosecutions in congressionally created courts are public actions brought in the name and pursuant to the power of the United States.

In addition, the lower court's creation of a private cause of criminal contempt—a cause of action over which the United States has no control or power—has grave implications for the prosecution of criminal contempt. This Court should grant review to address this important question of federal law and to correct a lower court opinion that simply cannot be reconciled with the relevant decisions of this Court.

II. ARGUMENT

No principle is more basic to our tradition of criminal proceedings or more enduring in its consistency than the definition of crime itself. A "crime," in Blackstone's words, is a "public wrong," "a breach and violation of the public rights and duties, due to the whole community, considered as a community, in it's [sic] social aggregate capacity." William Blackstone, 4 *Commentaries* *5. And, due to the public nature of the harm that it causes, a crime is "punishable by a proceeding brought in the name of the government whose law has been violated." 1 Ronald A. Anderson, *Wharton's Criminal Law & Procedure* § 10 (1957).

By every definition, a "crime" is a "public" wrong; thus, under every conception, a "criminal prosecution" is brought in the government's name, pursuant to the government's power, and on the government's behalf.[8] "[I]n American jurisprudence

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[8] *See, e.g.*, 1 Joel P. Bishop, *Commentaries on the Criminal Law* § 43 (2d ed. 1858) ("Criminal law treats of those wrongs which the government . . . punishes . . . in its own name."); 1 William L. Burdick, *The Law of Crime* § 2 (1946) ("A crime is a public wrong."); William L. Clark & William L. Marshall, *A Treatise on the Law of Crimes* § 1 (3d ed. 1927) ("A crime is any act or omission prohibited by public law . . . and made punishable by the state in a judicial proceeding in its own name."); James E. Grigsby, *The Criminal Law* § 1 (1922) ("Crim[es]. . . are punished by the state in its own name."); 1 Emlin McClain, *A Treatise on the Criminal Law* § 4 (1897) ("A crime is an act or omission punishable as an offense against the state. . . . [I]n case of a crime, the state is deemed the injured party and punishes the wrong-doer . . . in its own name, while in the case of a civil injury, although the state furnishes means for redress, the proceeding is directly in the name . . . of the party injured.").

at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another," *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), and criminal prosecutions are exercises of governmental, rather than private, power. *See Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 449 (1911) ("The result was as fundamentally erroneous as if in an action of 'A vs. B, for assault and battery,' the judgment entered had been that the defendant be confined in prison for twelve months.").

This Court has held repeatedly that "[c]riminal contempt is a crime in the ordinary sense." *Bloom v. Illinois*, 391 U.S. 194, 201 (1968); *accord Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 826 (1994); *Michaelson v. United States ex rel. Chi., St. Paul, Minneapolis & Omaha Ry. Co.*, 266 U.S. 42, 64 (1924); *Gompers v. United States*, 233 U.S. 604, 610 (1914). Because criminal contempt "is a crime in the ordinary sense," criminal contempt prosecutions likewise are prosecutions in the ordinary sense: such causes of action, although they may arise out of the violation of an order entered in a civil case, "are between the public and the defendant." *Gompers*, 221 U.S. at 445; *see also* 17 Am. Jur. 2d *Contempt* § 145 (2008) ("A criminal contempt proceeding is like any other criminal proceeding, with the public on one side and the alleged contemnor on the other.").

To the extent that any confusion may exist about the public character of criminal contempt actions, such uncertainty likely is the result of the fact that criminal contempt actions sometimes are "prosecuted privately." This Court has held that the federal courts possess the inherent power to hold persons in criminal contempt. *See Young v. United States ex*

rel. Vuitton et Fils S.A., 481 U.S. 787, 796 (1987).[9] As a corollary, this Court has held that the federal courts have the inherent power to appoint private attorneys to prosecute criminal contempt actions. *See id.*

In addition, both the federal court system and the District's local court system have codified the power of private lawyers to prosecute certain criminal contempt actions.[10] For these reasons, there is a well-established tradition in these courts of private attorneys serving as prosecutors in criminal contempt cases. *See, e.g., United States ex rel. Brown v. Lederer*, 140 F.2d 136, 138 (7th Cir. 1944); *In re Jones*, 898 A.2d 916 (D.C. 2006).

Nonetheless, this Court has been unwavering in holding that even when a private lawyer actually

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[9] The Superior Court of the District of Columbia and the District of Columbia Court of Appeals are congressionally created courts, albeit established pursuant to Congress' Article I, rather than its Article III, power. *See* D.C. Code § 11-101(2).

[10] In federal court, the district court must request that the United States Attorney prosecute a contempt action; if the public prosecutor is unable or unwilling, the court then can "appoint another attorney to prosecute." Fed. R. Crim. P. 42(a)(2). The Superior Court Rules Governing Proceedings in the Domestic Violence Unit state that a criminal contempt prosecution under § 16-1005(f) may be prosecuted by the Attorney General, the United States Attorney, an individual CPO holder, or by "an attorney appointed by the Court." Super. Ct. Dom. Viol. R. 12(d). As recounted above, while an Assistant Attorney General served as the prosecutor to Mr. Robertson's contempt action, the Court of Appeals found that the Attorney General had represented Ms. Watson in her private capacity, rather than the United States or, for that matter, the District. 940 A.2d at 1058.

stands in the courtroom well and litigates the case, a criminal contempt action in a congressionally created court is maintained pursuant to the power of the United States.[11] Again, proceedings "for criminal contempt are between the public and the defendant." *Gompers*, 221 U.S. at 445; *see also Michaelson*, 266 U.S. at 64 ("[A] proceeding for criminal contempt, unlike that for civil contempt, is between the public and the defendant."). For this reason, although private lawyers may prosecute certain criminal contempt actions in the congressionally created courts, this Court squarely has held that such attorneys "represent the United States, not the party that is the beneficiary of the court order allegedly violated." *Young*, 481 U.S. at 804.[12] At bottom, this

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[11] *See, e.g.*, *United States v. Providence Journal Co.*, 485 U.S. 693, 700 (1988) ("'Private attorneys appointed to prosecute a criminal contempt action *represent the United States.*'") (citation omitted); *Young*, 481 U.S. at 804 ("Private 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.").

[12] In *Young*, this Court found that "[a] private attorney appointed to prosecute a criminal contempt . . . should be as disinterested as a public prosecutor who undertakes such a prosecution." 481 U.S. at 804. It therefore held, pursuant to its supervisory power, 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." *Id.* at 809. In *Green v. United States*, 642 A.2d 1275 (D.C. 1994), the District of Columbia Court of Appeals declined to apply the *Young* requirement of disinterested prosecutors in the context of the Intrafamily Offenses Act. Rather, it held that an interested person can serve as the prosecutor to a D.C. Code § 16-1005(f) action. Petitioner never has challenged the *Green* court's holding that interested attorneys can stand in the courtroom well and

Court's cases are clear in holding that all criminal contempt prosecutions in the congressionally created courts are brought in the name of the United States pursuant to its sovereign power to prosecute crimes.

In *United States v. Dixon*, 509 U.S. 688 (1993), this Court held that criminal contempt actions prosecuted under D.C. Code § 16-1005(f)—the very criminal contempt statute at issue in Mr. Robertson's case—are no different. *Dixon* involved two cases that were consolidated for appeal, *United States v. Dixon* and *United States v. Foster*, both of which were litigated in the District of Columbia's local courts. In *Foster*, Ana Foster—pursuant to the District of Columbia Intrafamily Offenses Act, D.C. Code §§ 16-1001 *et seq.*, the statutory scheme at issue in Mr. Robertson's case—obtained a CPO against her estranged husband, Michael Foster. And, when Foster violated this CPO, Ms. Foster's retained attorneys successfully prosecuted a § 16-1005(f) criminal contempt action against him.

The United States Attorney was not itself involved in the criminal contempt prosecution. 509 U.S. at 692. The United States Attorney, however, later brought charges against Foster for, among other things, an assault arising from the same incident that had supported the criminal contempt prosecution. Although Foster argued that the § 16-1005(f) prosecution had raised a jeopardy bar that precluded the United States Attorney's subsequent

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physically prosecute § 16-1005(f) actions (Appellant Supp'l Br. 3 n.3; Appellant Reply Br. 4 n.3). Rather, he challenges the court's holding in this case that, irrespective of whether a public or private lawyer actually litigates such action, a contempt action under § 16-1005(f) can be brought in the name and interest of a private person.

assault prosecution, the trial court rejected this claim. 509 U.S. at 692-93.

On certiorari review, this Court was presented with the question of whether the Double Jeopardy Clause applies to criminal contempts. In answering that question in the affirmative, this Court squarely held that a criminal contempt in violation of D.C. Code § 16-1005(f) "'is a crime in the ordinary sense.'" 509 U.S. at 696 (quoting *Bloom*, 391 U.S. at 201). And, because the statute denotes a crime in the ordinary sense, the United States was the true party-in-interest to the D.C. Code § 16-1005(f) action, even though "[c]ounsel for Ana Foster . . . prosecuted [it]." 509 U.S. at 692. This Court therefore held it "obvious" that the criminal contempt action had resulted in a jeopardy bar to the assault prosecution. *Id.* at 696.

Of course, there can be no jeopardy bar to a subsequent prosecution unless the antecedent prosecution was brought in the name of the "same sovereign" as was the subsequent one. *See Heath v. Alabama*, 474 U.S. 82, 88 (1985). That is, "the ultimate source of the power under which the respective prosecutions were undertaken" must be the same in both cases. *United States v. Wheeler*, 435 U.S. 313, 320 (1978). The *Foster* case would have come out quite differently if the antecedent contempt prosecution had been maintained in the name and power of Ana Foster. An action maintained pursuant to the "power" of Ms. Foster simply could not have raised a bar to a prosecution maintained pursuant to the power of the United States. *See Wheeler*, 435 U.S. at 318-19.

But, the notion that a criminal action could have been maintained pursuant to Ms. Foster's "power"

simply is nonsensical. Ms. Foster is not a sovereign entity and she was not "the ultimate source of the power under which the [contempt prosecution] w[as] undertaken." *Wheeler*, 435 U.S. at 320. Instead, Foster's criminal contempt prosecution, although prosecuted by his wife's retained attorneys, was maintained pursuant to the United States' power. *See Dixon*, 509 U.S. at 696. It is for this reason that this Court held that the § 16-1005(f) action, although prosecuted by private attorneys, had raised a bar to the United States Attorney's subsequent assault prosecution.[13] *Cf. Gompers*, 221 U.S. at 451 ("If this had been a separate and independent proceeding at law for criminal contempt . . . with the public on one side and the defendants on the other, it could not . . . have been affected by any settlement which the parties to the equity cause made in their private litigation.")

Provisions of the D.C. Code are a species of federal law. *See Whalen v. United States*, 445 U.S. 684, 687 (1980); *see also District of Columbia v. Heller*, 554 U.S. __, 128 S. Ct. 2783, 2853 (2008) (Breyer, J., dissenting) ("This Court has final

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[13] As Justice White stated in concurring with this Court's holding in this respect:

> That the contempt proceeding was brought and prosecuted by a private party in *Foster* is immaterial. For private 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. As we said in *Gompers*, "criminal contempt proceedings arising out of civil litigation are between the public and the defendant."

Dixon, 509 U.S. at 727 n.3 (White, J., concurring and dissenting in part) (citations omitted).

authority (albeit not often used) to definitively interpret District law, which is, after all, simply a species of federal law."). As a result, this Court, rather than the District of Columbia Court of Appeals, is the ultimate arbiter of the meaning of a D.C. Code provision. *See* 445 U.S. at 687-88.

Under this Court's authoritative interpretation of the statute in *Dixon*, Mr. Robertson's D.C. Code § 16-1005(f) prosecution was brought in the name and power of the United States. The criminal contempt prosecution, therefore, violated Mr. Robertson's due process rights because it occurred in derogation of the United States' bargained-for promise that it would not prosecute him for the events of June 26, 1999. *See Santobello*, 404 U.S. at 262.

The Court of Appeals was bound by this Court's interpretation of § 16-1005(f); it was not free to interpret the statute as setting forth a "private criminal action" brought in the "name and interest" of a private person. The fact that the court's interpretation of § 16-1005(f) is flatly counter to this Court's authoritative interpretation of the statute in *Dixon* is reason enough for this Court to grant review and reverse.

Furthermore, and even apart from this Court's authoritative construction, the Court of Appeals' interpretation of § 16-1005(f) as allowing private individuals to bring criminal contempt actions in their own names and interests is unconstitutional. Criminal actions are exercises of sovereign power; as a result, private individuals cannot, consistent with due process, bring criminal actions in their own name. *See Linda R.S.*, 410 U.S. at 619. In recognition of the public nature of all criminal prosecutions in our system of law, this Court has

held repeatedly that criminal contempt actions in the congressionally created courts likewise are not private actions, but rather are exercises of the United States' power. *See, e.g.*, *Michaelson*, 266 U.S. at 67; *Ex parte Grossman*, 267 U.S. 87, 122 (1925).

The fundamental proposition that criminal contempt actions in a congressionally created court may only be brought in the name of the United States dates back at least as far as this Court's 1911 decision in *Gompers v. Buck's Stove & Range Co.*, *supra*. A District of Columbia trial judge had issued an injunction enjoining three union officials, including Samuel Gompers, from disseminating certain statements about the Buck's Stove & Range Company. 221 U.S. at 435-36. When Gompers and the two other union officials violated this injunction, the Buck's Stove & Range Company moved the judge to hold them in contempt. The judge found the officials in contempt of court and sentenced them to sentences of twelve, nine, and six months in jail, respectively. *Id.* at 424.

On certiorari review, this Court was presented with the question of whether the contempt action had been "a case at law for criminal contempt" or "a case in equity for civil contempt." 221 U.S. at 441. This Court began by noting that, in the case of civil contempt actions, the punishment imposed is purely remedial in nature. Remedial relief, which is imposed "for the benefit of the complainant," *id.*, may consist of a monetary payment to the aggrieved judicial order holder, or it may consist of coercive incarceration—that is, that "the defendant stand committed unless and until he performs the affirmative act required by the court's order." *Id.* at 442. Although the defendant in a civil contempt

action thus may suffer imprisonment, "'he carries the keys of his prison in his own pocket.' He can end the sentence and discharge himself at any moment by doing what he had previously refused to do." *Id.* (citation omitted).

In contrast, the remedies available upon a finding of criminal contempt are fines and a term of imprisonment "for a definite period." 221 U.S. at 442. Such punishment "is solely punitive." *Id.* at 443. Once a defendant is sentenced to a term of imprisonment for a finding of criminal contempt he, like any other person convicted of a crime, "is furnished no key, and [ ] cannot shorten the term by promising not to repeat the offense." *Id.* at 442. And, rather than serving the remedial goals underlying civil remedies, such punitive fines and incarcerations serve the same interests undergirding the whole of our criminal law: incapacitation, retribution, deterrence, and the vindication of the public's interest in having its laws enforced. *Id.*

This Court stated that this difference in remedies and punishments was crucial in determining whether a contempt action was civil or criminal, because, under our system of law, only the government itself can impose criminal punishment. 221 U.S. at 451. Because civil sanctions are remedial measures imposed for the benefit of the holder of the allegedly violated court order, "[p]roceedings for civil contempt" arising out of the alleged violation of a judicial order entered in a civil case "are between the original parties." *Id.* at 444-45. In contrast, because criminal contempt actions seek punitive sanctions, proceedings for criminal contempt are separate from any civil case and are "between the public and the defendant." *Id.* at 445.

This Court thus held that criminal contempt actions are public actions, "with . . . the government[ ] on one side and the defendant[ ] on the other." *Id.*[14]

With respect to the case before it, however, this Court found that the Buck's Stove & Range Company had acted "not only [as] the nominal, but [as] the actual, party on the one side, with the defendants on the other." 221 U.S. at 445. In other words, the plaintiff, as well as the lower courts, had acted throughout the litigation in such a manner that showed that they "regarded [the case] as a civil proceeding." *Id.* at 447. The punishment imposed, however, which consisted of definite jail terms, was undoubtedly punitive. *Id.* at 449.

This Court held that, because criminal punishments had been imposed in what, in reality, had been a private cause of action, the sentences simply were invalid. 221 U.S. at 449. For this reason, it held that "[t]he criminal sentences imposed in the civil case [ ] should be set aside." *Id.* at 452.

This Court in *Gompers* thus established that

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[14] This Court recognized that in the case of both civil and criminal contempt actions imprisonment may also have an "incidental effect." 221 U.S. at 443. If the case is civil and the punishment is purely remedial, imprisonment nonetheless will have the ancillary effect of vindicating the government's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive—imposed to vindicate the authority of the government—the holder of the court order "may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience." *Id.* This Court was clear, however, that "such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or *vice versa*." *Id.*

there simply is no such thing as a criminal contempt prosecution maintained in the name of a private person (or company). And, in the almost one century since its *Gompers* decision, this Court has been unwavering in holding that, regardless of whether such actions arise out of the alleged violation of a judicial order entered in a civil case, and no matter whether a public or a private lawyer prosecutes them, criminal contempt prosecutions are public actions. The Court of Appeals' holding that "the criminal contempt prosecution in this case was conducted as a private action brought in the name and interest of Ms. Watson, not as a public action brought in the name and interest of the United States," 940 A.2d at 1057-58, is absolutely contrary to the manner in which this Court has interpreted contempt actions for the last one-hundred years.

Tellingly, rather than abiding by *Gompers* and the unbroken line of its progeny, the support on which the lower court relied for its interpretation of D.C. Code § 16-1005(f) actions was Justice Blackmun's dissenting opinion in *Dixon* and dictum from the thoroughly repudiated case of *In re Debs*. The court stated: "'[A] court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but [is] only securing to suitors the rights [to] which it has adjudged them entitled.'" 940 A.2d at 1057 (quoting *Dixon*, 509 U.S. at 742 (Blackmun, J., concurring and dissenting in part) (quoting *In re Debs*, 158 U.S. at 596)). The court's reliance on these authorities and the principle espoused therein illustrates the abject incorrectness of its decision.

First, and at the risk of stating the obvious, Justice Blackmun's opinion in *Dixon* was a *dissent*.

Writing in *Dixon*, Justice Blackmun disagreed with the majority's holding that, because criminal contempt is a crime in an ordinary sense, the privately prosecuted D.C. Code § 16-1005(f) action implicated the Double Jeopardy Clause. Rather, he wrote that, in his view, criminal contempt actions were a "special situation," brought not to enforce the public's interest in the enforcement of the criminal laws, but rather to secure "'to suitors the rights [a court] has adjudged them entitled to.'" 509 U.S. at 742 (Blackmun, J., concurring and dissenting in part) (quoting *In re Debs*, 158 U.S. at 596).

Justice Blackmun's characterization of criminal contempt, of course, was contrary to the "opinion of the Court," *Dixon*, 509 U.S. at 691, which held that D.C. Code § 16-1005(f) punishes "a crime in the ordinary sense." *Id.* at 696. Considering that Justice Blackmun's dissent is contrary to the controlling "opinion of the Court," it is rather astounding that the Court of Appeals relied on his minority opinion to support its anomalous characterization of this criminal contempt action as a private affair.

Second, in the years since *Gompers* this Court has repudiated the case of *In re Debs*, right down to the very language the lower court quoted and on which Justice Blackmun relied in his *Dixon* opinion. In the 1895 case of *In re Debs*, this Court held that there was no right to a jury trial in a criminal contempt action. The *In re Debs* Court further opined in dictum that a court that seeks to vindicate a court order through "proceedings for [criminal] contempt, is not executing the criminal laws of the land, but [is] only securing to suitors the rights which it has adjudged them entitled to." 158 U.S. at 596.

But, in *Bloom* this Court expressly overruled *In*

re Debs and held that, because criminal contempt is "a crime in the ordinary sense," the jury trial right does in fact attach to serious criminal contempt actions. 391 U.S. at 208. Furthermore, in *Young* this Court renounced the very dictum from *In re Debs* on which the court here relied. This Court in *Young* recognized that one could interpret some of the language from its pre-*Gompers* cases as suggesting that criminal contempt actions are private affairs. 481 U.S. at 800. In rejecting these pre-*Gompers* intimations, this Court, using *In re Debs* as a counterpoint, said:

> 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. *See, e.g., In re Debs* . . . (no jury trial in criminal contempt action because a court in such a case is "*only securing to suitors the rights which it has adjudged them entitled to*").

Young, 481 U.S. at 800 (emphasis added). In sum, from *Gompers* to *Dixon*, as well as in a myriad of opinions in between, this Court flatly has rejected the notion that criminal contempt actions are private affairs.

Finally, in addition to being contrary to controlling law, the Court of Appeals' decision has grave implications for the conduct of criminal contempt prosecutions. The fact that a criminal contempt action—regardless of whether it arises from a judicial order entered in a civil case, and irrespective of whether it is prosecuted by a public or

a private lawyer—remains, at bottom, the United States' case has important ramifications.

In this case, the Office of the United States Attorney "wield[ed the United States'] formidable criminal enforcement powers," *Young*, 481 U.S. at 810 (plurality opinion), exercised its prosecutorial discretion, and determined that Mr. Robertson, in exchange for a guilty plea with respect to the March 27, 1999, event, should not suffer criminal prosecution for the June 26, 1999, event. Under this Court's controlling interpretations of § 16-1005(f) and criminal contempt generally, Mr. Robertson's subsequent contempt prosecution under § 16-1005(f) undoubtedly violated his due process right to enjoy the benefit of the United States' promise not to prosecute him in any manner for the events of June 26, 1999.

Under the lower court's erroneous interpretation of criminal contempt prosecutions, however, the D.C. Code § 16-1005(f) action did not violate the plea bargain because the prosecution was a private affair. Rather, pursuant to the court's wholly contrarian view of criminal contempt actions, Ms. Watson had the power to override the decision of the United States Attorney and to bring a criminal prosecution in her own name and power—a prosecution which resulted in Mr. Robertson being sentenced to three 180-day jail terms and a five-year term of probation. Bluntly put, the court's interpretation of criminal contempt actions resulted in Mr. Robertson suffering criminal sanctions for the June 26, 1999, event in the face of a bargained-for governmental promise that he would not.

Relatedly, because criminal contempt prosecutions in the congressionally created courts

always have been public cases, the United States' lawyers always have retained the ultimate control over such actions regardless of whether or not a public prosecutor is litigating the case. This control has allowed the public prosecutor to ensure consistent application of the criminal law; furthermore, it has allowed the public prosecutor—who does not labor under the personal grievances that may animate privately brought prosecutions—to preempt, preclude, or mitigate overreaching privately prosecuted criminal cases.[15]

But, under the lower court's construction of criminal contempt actions, the United States Attorney no longer has such control over § 16-1005(f) prosecutions. Rather, because, according to the court, such cases are brought in the name and power of private CPO holders, the United States' lawyers have no ability to step in and preempt or preclude them. As a result, the United States Attorney, who of course is charged with the mandate not just to "win a case," but to ensure "that justice shall be done," *Berger v. United States*, 295 U.S. 78, 88 (1935), has no ability under the court's decision here to vindicate the public's interest, protect the rights of

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[15] *See, e.g., Providence Journal Co.*, 485 U.S. at 701 (holding that private contempt prosecutor in federal court may not petition for writ of certiorari unless Solicitor General seeks certiorari review); *accord State ex rel. Borkowsky v. Rudman*, 274 A.2d 785, 786 (N.H. 1971) (holding that public prosecutor has power to dismiss criminal cases and that this "authority is not limited to prosecutions initiated by public officials[,] but extends also to those originated by a private person"); *Cronan ex rel. State v. Cronan*, 774 A.2d 866, 875 (R.I. 2001) ("[T]he Attorney General may file a *nolle prosequi* and thereby cause a criminal case, including one initiated via a private complaint, to be dismissed.").

the accused, or to have any control over a case that seeks to impose decidedly criminal sanctions, no matter how vindictive or overzealous the private § 16-1005(f) prosecutor may be.

Moreover, the fact that—prior to the decision here—criminal contempt actions in the congressionally created courts have always been brought in the name and power of the United States has meant that an alleged contemnor is entitled to the protection of the constitutional rights that attach in any other criminal case brought in the name of the government. *See supra* n.1; *see generally Mooney v. Holohan*, 294 U.S. 103, 112-13 (1935) (prosecuting attorney is officer of state and hence constrained by Due Process Clause). For example, in an action maintained in the name of the United States, an alleged contemnor is entitled to the production of exculpatory material under *Brady v. Maryland*, 373 U.S. 83 (1963). The *Brady* rule, however, which is grounded in due process and the concept of state action, perforce has no application in private cases. Similarly, an alleged contemnor to an action brought in the name of the United States is protected from successive punishments under the Double Jeopardy Clause. *See Dixon*, 509 U.S. at 712. Although the lower court stated that its opinion was not "inconsistent with *Dixon*," 940 A.2d at 1058, it is impossible to see how this can be true and why, since the criminal contempt action, under the lower court's view, is brought pursuant to the "power" of an individual, an alleged contemnor could not be prosecuted multiple times for the same offense—either by successive private and public prosecutions, or by successive *private* prosecutions brought by different individual beneficiaries of a CPO.

As a final example, because a criminal contempt prosecution in a congressionally created court is brought in the name and power of the United States, a convicted contemnor is entitled to petition the President for a pardon or commutation. *See Ex parte Grossman*, 267 U.S. at 121. Because, however, the lower court now has held that a criminal contempt prosecution under § 16-1005(f) may be brought in the name and power of a private person, a contemnor convicted in such a private action is unable to petition the executive for clemency from the undoubtedly criminal sanctions imposed against him. *See* 267 U.S. at 121 (holding that President's pardon power extends to criminal (but not civil) contempt convictions imposed in federal courts).

In a criminal contempt action maintained in the United States' name and power, an alleged contemnor is entitled to the benefit of bargained-for promises made by government lawyers, is protected from vindictive prosecution, and is ensured that his constitutional rights will be protected. Under the lower court's holding that § 16-1005(f) denotes a private criminal cause of action, however, Mr. Robertson's rights under his plea agreement were completely sidestepped. And, if allowed to stand, the decision will continue to work an end run around this Court's directive that "[p]rosecution [for criminal contempt] must be in conformity with the practice in criminal cases." *Michaelson*, 266 U.S. at 65.

CONCLUSION

Petitioner respectfully requests that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

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(Appendix A)
Reported at *In re Robertson*, 940 A.2d 1050 (D.C. 2008).

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 00-FM-925, 04-FM-1269.

IN RE JOHN ROBERTSON, APPELLANT.

Appeal from the Superior Court of the District of Columbia
(VSP-785-99)

(Hon. Linda Kay Davis, Trial Judge)

(Argued Jan. 9, 2007 Decided Jan. 24, 2008)

Lee Richard Goebes, Public Defender Service, with whom *James Klein*, Public Defender Service, and *Jaclyn S. Frankfurt*, Public Defender Service, were on the brief, for appellant.

Janice Y. Sheppard, Assistant Attorney General, District of Columba, with whom *Robert J. Spagnoletti*, Attorney General at the time, *Linda Singer*, Acting Attorney General at the time, and *Todd S. Kim*, Solicitor General, and *Rosalyn Calbert Groce*, Deputy Solicitor General, were on the brief, for appellee.

Jeffrey A. Taylor, United States Attorney, and *Roy W. McLeese III*, Assistant United States Attorney, filed a brief at the request of the court.

Joan S. Meier filed a brief for *Amici Curiae* Domestic Violence Legal Empowerment and Appeals Project

(DV LEAP), AYUDA, Break the Cycle, D.C. Coalition Against Domestic Violence, and Women Empowered Against Violence (WEAVE), in support of appellee.

Before FARRELL and REID, *Associate Judges*, and KERN, *Senior Judge*.

REID, *Associate Judge*:

Appellant, John Robertson, appeals from the trial court's denial of his motion to vacate his criminal contempt convictions (Appeal No. 04-FM-1269). He essentially contends that (1) the trial court violated his due process rights by failing to vacate his contempt conviction in light of his plea agreement with the United States Attorney's Office for the District of Columbia ("United States Attorney's Office"); and (2) the trial court erred by failing to find that his trial counsel rendered ineffective assistance of counsel when he did not move to dismiss the criminal contempt proceeding on the basis of the plea agreement.

Mr. Robertson also lodged an earlier appeal challenging his criminal contempt convictions in the trial court (Appeal No. 00-FM-925). After a bench trial, the court had found him guilty of three counts of violating a civil protection order ("CPO") obtained by Ms. Watson. He claims that the trial court erred by (1) misapplying the law of self-defense with respect to one count of his criminal contempt convictions; and (2) rejecting his demand for a jury trial.

Following oral argument relating to these consolidated appeals, we invited the United States Attorney to file a brief pertaining to the appeal concerning the alleged violation of Mr. Robertson's plea agreement, and we requested responses to the

government's brief from Mr. Robertson and Ms. Watson. In addition, we granted the request of several public interest groups to file an amicus brief in support of Ms. Watson.

We hold that the trial court (1) did not violate Mr. Robertson's plea agreement with the United States' Attorney's office by permitting Ms. Watson to enforce her CPO against him, and (2) for that reason, correctly ruled that Mr. Robertson's right to the effective assistance of counsel had not been violated (Appeal No. 04-FM-1269). In addition, we conclude that the trial court correctly rejected Mr. Robertson's claim of self-defense and his demand for a jury trial.

FACTUAL SUMMARY

The record shows that on March 29, 1999, Ms. Watson filed a "Petition and Affidavit For Civil Protection Order" in the Family Division, Domestic Relations Branch, of the Superior Court. She alleged that on March 27, 1999, Mr. Robertson repeatedly pursued and hit her on various parts of her body, including her head and face, with his closed fist; kicked her several times in the head with his heavy work shoes; and threatened to kill her while holding a pocket knife. She suffered a black eye and head injuries. At Ms. Watson's request, the Family Division issued a temporary protection order on March 29, 1999. On April 26, 1999, the Office of Corporation Counsel (now the Office of the Attorney General for the District of Columbia ("OAG")) entered its appearance on behalf of Ms. Watson in the Family Court, and after a hearing that same day, the Domestic Violence Unit of the Superior Court issued a CPO, effective for twelve months, ordering that Mr. Robertson not assault, threaten, harass, or physically abuse Ms. Watson in any manner; stay

away from Ms. Watson's person, home, and workplace; and avoid contacting Ms. Watson in any manner.

On March 29, 1999, Mr. Robertson was charged by complaint in the Superior Court, Criminal Division, with one count of aggravated assault based on the March 27, 1999, incident. On July 8, 1999, a grand jury indicted Mr. Robertson on one count of aggravated assault and two counts of assault with a dangerous weapon. On July 20, 1999, Mr. Robertson entered into a plea agreement with the United States Attorney's Office in which he agreed to plead guilty to one count of felony attempted-aggravated assault related to the March 27, 1999 incident, and in return the United States agreed that it would "not pursue any charges concerning an incident on June 26, [19]99."

On January 28, 2000, Ms. Watson, represented by Corporation Counsel, filed a motion to adjudicate Mr. Robertson in criminal contempt for violations of the CPO, based on incidents between Mr. Robertson and Ms. Watson on June 26 and 27, 1999. She also made a motion to modify and extend the CPO. To support her motion to adjudicate contempt, Ms. Watson submitted an affidavit stating, in part, that (1) on June 26, Mr. Robertson "harassed [her] by repeatedly demanding that [she] drop the criminal charges that were pending against him," and he called her names (Count 1); (2) on June 26, Mr. Robertson "pushed [her] and knocked [her] into a wall" and called her names (Count 2); (3) on June 26/27, around midnight, Mr. Robertson harassed her by repeatedly cursing her (Count 3); (4) on June 26/27, after midnight, Mr. Robertson "physically attacked [her] in the living room," and followed her into the bathroom

where he "repeatedly punched [her] in the head and face" (Count 4); (5) and on June 27, a short time after the living room and bathroom incident, Mr. Robertson "threw drain cleaner at [her]" and caused "lye burns" resulting in her hospitalization in an intensive care unit (Count 5). During a status hearing on April 4, 2000, the parties agreed to extend the CPO, which had been modified by consent on January 31, 2000, until May 30, 2000.

Mr. Robertson filed a demand for a jury trial on April 3, 2000, which Ms. Watson opposed. On May 9, 2000, the Family Court entered an order rejecting Mr. Robertson's jury trial demand and proceeded on May 10 and 11, 2000, with a bench trial to resolve the motion to adjudicate criminal contempt and the motion to modify and extend the CPO. After hearing testimony from Ms. Watson and her mother, Jacqueline Watson, and from defense witness, Vallace Player, and crediting that of Ms. Watson with respect to the first and second counts, the trial judge found beyond a reasonable doubt that Mr. Robertson "harassed Ms. Watson [on June 26, 1999] by making his request that she drop criminal charges and calling her names and . . . by pushing her into a wall [Counts 1 and 2]." The court determined that "[i]n doing those acts he violated willfully the [CPO]." With respect to Counts 3 and 4, the trial court credited the testimony of Ms. Player that all three persons in the house that night "were cursing and behaving in . . . an abominable fashion," and that Ms. Watson was the instigator of the fight because she taunted Mr. Robertson, opened a can of draino over which Mr. Robertson and Ms. Watson fought and bit each other. The court found Mr. Robertson not guilty of Counts 3 and 4. As for the final count, Count 5, "the throwing of the lye," the trial court credited Ms.

Player's testimony. After it was clear that Mr. Robertson "had won the fight convincingly," and "Ms. Watson was down on the ground bleeding badly," Ms. Player asked Mr. Robertson to leave. The trial court found that Mr. Robertson "had ten seconds to get away," but "[i]nstead [Mr. Robertson] stayed there, [ ] had the lye in [his] hand and . . . threw it on [Ms. Watson]." The court determined that Mr. Robertson's assault in throwing the lye at that point was not "any kind of self-defense." Consequently the court adjudged him guilty of Count 5.

Following the trial court's finding on May 11, 2000, that Mr. Robertson was guilty of three counts, the trial judge sentenced him to three consecutive 180-day jail terms, with execution of one of those sentences suspended in favor of five years of probation. The court also ordered Mr. Robertson to pay $10,009.23 in restitution pertaining to medical expenses incurred by Ms. Watson which were paid from the Victims of Crime Compensation Fund. Mr. Robertson filed a timely appeal.

Years later, on November 13, 2003, Mr. Robertson filed a motion, pursuant to D.C. Code § 23-110, to vacate his contempt convictions on the grounds that the contempt proceeding violated his July 28, 2000 plea agreement with the United States.[1] He further argued that his convictions should be vacated because "his trial counsel was ineffective in failing to . . . move to dismiss the [contempt charges], when the government was pursuing criminal charges in violation of a binding plea agreement." Ms. Watson

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[1] Along with the motion to vacate Mr. Robertson filed a request with the Court of Appeals to stay the briefing schedule in the appellate case, pending resolution of the November 13, 2003 motion by the trial court.

filed an opposition to the motion on January 23, 2004. In an order signed on August 27, 2004, the trial court denied Mr. Robertson's motion to vacate the convictions, (1) "find[ing] that the plea agreement . . . is binding only on the government and not on any party seeking to vindicate a right against the respondent arising from the events of June 26, 1999"; and (2) "conclud[ing] that the Office of Corporation Counsel is not acting as a prosecutor but more as an 'aid' to the petitioner," and that "the private practitioner is therefore not bound by a plea agreement entered into by government prosecutors in another case." Mr. Robertson filed a timely appeal.

ANALYSIS

Pertinent Statutory Background: Intrafamily Offenses

In 1982, the Council of the District of Columbia, the District's legislature, determined that it was essential to strengthen the law regarding intrafamily offenses because "[e]xisting remedies have been shown to be inadequate in aiding victims in preventing further abuse." COUNCIL OF THE DISTRICT OF COLUMBIA, COMMITTEE ON THE JUDICIARY, REPORT ON BILL 4-195, THE PROCEEDINGS REGARDING INTRAFAMILY OFFENSES AMENDMENT ACT OF 1982, May 12, 1982, at 2. Consequently, the Council decided "to fill in . . . areas of need in the current District law." *Id.* Measures taken to fill in these areas of need included: (1) "authorizing private rights of action whereby victims of intrafamily offenses may seek protective orders without necessarily going through the Office of the

Corporation Counsel";[2] (2) "expanding coverage of the current law . . ."; and (3) "authorizing civil protection cases to coexist legally along side criminal prosecutions against the same person by providing certain due process protections to the respondent." *Id.* at 2, 3.[3] Thus, the Council enhanced a distinct

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[2] The 1982 amendment added language to D.C. Code § 16-1003(a) specifying that "In the alternative to referral to the Corporation Counsel, a complainant on his or her own initiative may file a petition for civil protection in the Family Division."

[3] One of the provisions added was D.C. Code § 16-1002(c). D.C. Code § 16-1002 provides:

> (a) If, upon the complaint of any person of criminal conduct by another or the arrest of a person charged with criminal conduct, it appears to the United States Attorney for the District of Columbia (hereafter in this subchapter referred to as the "United States attorney") that the conduct involves an intrafamily offense, he shall notify the Director of Social Services. The Director of Social Services may investigate the matter and make such recommendations to the United States attorney as the Director deems appropriate.
>
> (b) The United States attorney may also (1) file a criminal charge based upon the conduct and may consult with the Director of Social Services concerning appropriate recommendations for conditions of release taking into account the intrafamily nature of the offense; or (2) refer the matter to the Attorney General for the filing of a petition for civil protection in the Family Division. Prior to any such referral, the United States attorney shall consult with the Director of Social Services concerning the appropriateness of the referral.

statutory scheme for handling intrafamily offenses and protecting victims against further abuse. The Council created a system under which enforcement of the statutory objectives could be accomplished not only through criminal charges brought by the United States Attorney's Office, but also through the right of a victim or complainant to seek a protective order and, concomitantly, to file a motion for contempt pursuant to D.C. Code § 16-1005 to enforce the CPO. *See Green v. Green*, 642 A.2d 1275, 1279 (D.C. 1994); *In re Peak*, 759 A.2d 612, 620 n.16 (D.C. 2000) ("*Green* arose in the special context of 'an intrafamily proceeding, conducted pursuant to local statutes and rules designed by the Council of the District of Columbia . . . to expedite the application and, if necessary, the enforcement of [Civil Protection Orders] in cases involving domestic violence.' *Green*, [ ] 642 A.2d at 1279"). Our analysis of Mr. Robertson's arguments, as well as those of the United States and the District, proceeds in light of this pertinent statutory background.

Arguments of the Parties and Standard of Review

Mr. Robertson argues that the United States, not Ms. Watson, was "the true party-in-interest to the contempt proceeding"; that under D.C. Code § 16-1005(f), the action against him "was maintained 'in

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> (c) 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 subchapter. Testimony of the respondent in any civil proceedings under this subchapter and the fruits of that testimony shall be inadmissible as evidence in a criminal trial except in a prosecution for perjury or false statement.

the name of' the relevant sovereign, . . . the United States"; and that "there is no such thing in our legal system as a criminal action maintained 'in the name of' a private person." He asserts that in "prosecuting [him] for criminal contempt for his alleged behavior on June 26, 1999, the United States breached the plea agreement it entered on July 28, 1999." Further, Mr. Robertson contends that "[his] trial counsel rendered ineffective assistance of counsel by failing to move to dismiss the criminal contempt prosecution as violation of the plea agreement executed on July 28, 1999." Alternatively, Mr. Robertson asserts that his conviction for throwing the lye on Ms. Watson should be vacated because (1) the trial court's denial of his self-defense claim was based on an erroneous application of this jurisdiction's self-defense laws; and (2) the trial court erred in rejecting his demand for a jury trial on the ground that his contempt prosecution constituted a "petty offense."

The United States maintains that "The criminal contempt prosecution in the present case was conducted as a private action brought in the name and interest of [Ms.] Watson, not as a public action brought in the name and interest of the United States or any other governmental entity." And the action was styled and prosecuted as one between Ms. Watson and Mr. Robertson, with the Corporation Counsel's office "acting in a representative capacity on [Ms.] Watson's behalf, not on behalf of the United States government, the District of Columbia government, or any other governmental entity." Furthermore, the government contends that Mr. Robertson's plea agreement with the United States Attorney's Office "could not reasonably be read as a promise that [Ms.] Watson would not bring a private action in her own name and interest seeking an

adjudication of criminal contempt"; nor could it "properly be interpreted as a promise that [Mr.] Robertson would not be subject to prosecution for criminal contempt in the name of the District of Columbia."

The District focuses, in part, on D.C. Code § 16-1002(c) in arguing that "in addition to criminal charges filed by the United States Attorney, Ms. Watson had a right to enforce the CPO through a criminal contempt proceeding and the United States Attorney's Office had no authority to bargain away this right." In addition, the District asserts that "the United States alone agreed not to pursue any charges against Mr. Robertson," and since "[t]he United States and the District of Columbia are separate entities with distinct legal existence [ ]," "the actions of one cannot bind the other."[4]

The question as to whether the terms of the plea agreement between Mr. Robertson and the United States Attorney's Office bind Ms. Watson is a legal issue which we review *de novo*. *Louis v. United States*, 862 A.2d 925, 928 (D.C. 2004) (the court "interprets the terms of the plea agreement *de novo* and . . . reviews the [trial court's] factual findings

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[4] The various *amici curiae* generally stress the importance of private enforcement of the intrafamily offense statute, asserting in part that "it is unlikely that criminal prosecutions can be expected to fill the need for enforcement of all CPOs, given the enormous pressure on the resources of the [United States Attorney's Office] and the high volume of minor CPO violations." *Amici* rely on *Green*, *supra*, indicating that: "The *Green* [c]ourt correctly stated that the Intrafamily Offenses Act 'reflect[s] a determination by the Council that the beneficiary of a CPO should be permitted to enforce that order through an intrafamily proceeding.' 642 A.2d at 1279 and n.7. . . ."

regarding alleged breaches of the plea agreement for clear error.") (quoting *United States v. Gary*, 351 U.S. App. D.C. 380, 383, 291 F.3d 30, 33 (2002) (internal quotation marks omitted)).

Discussion

In our view, the arguments of the United States and the District are more persuasive and more closely reflect the 1982 legislative purpose in granting to victims of intrafamily offenses a central role in the enforcement of the intrafamily offenses statute. As we noted in *Green*, *supra*,

> [T]he Council intended that considerations supporting a private right of action to seek a CPO apply equally to a private right of action to enforce the CPO through an intrafamily contempt proceeding. *See* D.C. Code § 16-1005(f) ("Violation of any temporary or permanent order issued under this chapter and failure to appear as provided in subsection (a) shall be punishable as contempt.").

642 A.2d at 1279-80 n.7. As the District's legislature acknowledged in 1982, the Office of the Corporation Counsel (now the OAG) lacked the resources to meet the increasing demands for protection under the intrafamily offenses statute. *Id.* Indeed, following oral argument in *Green*, the District filed a motion to supplement the record, which we granted. The supplement revealed that "'Corporation Counsel prosecutes less than 10 percent of the criminal contempt motions brought for violations of civil protection orders, and has only one counsel available for that duty.'" *Id.* Consequently, "to expedite the application and, if necessary, the enforcement of

CPOs in cases involving domestic violence, . . . the Council [determined] that the beneficiary of a CPO should be permitted to enforce that order through an intrafamily contempt proceeding." *Id.* at 1279-80 (footnote omitted). And, D.C. Code § 16-1005(f) and Super. Ct. Dom. V.R. 12(d) authorize an individual to file a motion to adjudicate criminal contempt.[5]

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[5] D.C. Code §§ 16-1005(f) and (g) currently provide:

> (f) Violation of any temporary or final order issued under this subchapter, or violation in the District of Columbia of any valid foreign protection order, as that term is defined in subchapter IV of this chapter, and respondent's failure to appear as required by § 16-1004(b), shall be punishable as contempt. Upon conviction, criminal contempt shall be punished by a fine not exceeding $1,000 or imprisonment for not more than 180 days, or both.
>
> (g) Any person who violates any protection order issued under this subchapter, or any person who violates in the District of Columbia any valid foreign protection order, as that term is defined in subchapter IV of this chapter, shall be chargeable with a misdemeanor and upon conviction shall be punished by a fine not exceeding $1,000 or by imprisonment for not more than 180 days, or both.

Super. Ct. Dom. V.R. 12(d) specifies, in pertinent part:

> (d) Motion to adjudicate criminal contempt. A motion requesting that the court order a person to show cause why she/he should not be held in criminal contempt for violation of a temporary protection order or civil protection order may be filed by an individual, Corporation Counsel or an attorney appointed by the Court for that purpose. . . .

Mr. Robertson describes the contempt proceeding brought against him by Ms. Watson as a "criminal action," and asserts that such an action could only be brought "in the name of the relevant sovereign, . . . the United States." Mr. Robertson's characterization of the proceeding against him loses sight of the special nature of criminal contempt. As Justice Blackmun said in *United States v. Dixon*, 509 U.S. 688 (1993), criminal contempt is "a special situation." *Id.* at 742 (Blackmun, J., concurring in part and dissenting in part). "'[Criminal contempt] proceedings are not intended to punish conduct proscribed as harmful by the general criminal laws.'" *Id.* at 742 (quoting *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 799-800 (1987)). That is, "[t]he purpose of contempt is not to punish an offense against the community at large but rather to punish the specific offense of disobeying a court order." *Id.* Furthermore, "'[a] court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to.'" *Id.* (quoting *In re Debs*, 158 U.S. 564, 596 (1895)). In short, as the United States maintains, "[t]he criminal contempt prosecution in [this] case was conducted as a private action brought in the name and interest of [Ms.] Watson, not as a public action brought in the name and interest of the United States or any other governmental entity." Thus, the unique statute governing intrafamily offenses, which authorizes an individual to file a motion to adjudicate criminal contempt against one who violates a CPO, does not contravene the general principle that criminal prosecutions are prosecuted in the name of the

sovereign, the United States, or where statutes specify, the District of Columbia.

Consequently, we agree with the United States and the District and we hold that, under the intrafamily offense statute, a criminal contempt proceeding is properly brought in the name of a private person, here Ms. Watson, rather than in the name of the sovereign. *See Green*, *supra*, 642 A.2d at 1279. This statutory scheme which permits a private person to file a motion to adjudicate criminal contempt does not stand alone in the District. A comparable statutory framework exists in the area of enforcement of child support orders. D.C. Code § 46-225.02(a) (2005) provides that "[t]he Mayor *or any party who has a legal claim to any child support may initiate a criminal contempt action for failure to pay the support* by filing a motion in the civil action in which the child support order was established" (emphasis added). *See In re Warner*, 905 A.2d 233 (D.C. 2006); *Rogers v. Johnson*, 862 A.2d 934 (D.C. 2004).

We cannot agree with Mr. Robertson's arguments that Supreme Court decisions in *Dixon* and *Young*, *supra*, and our decision in *Peak*, *supra*, undermine the criminal contempt provision in the District's intrafamily offense statute, which allows a private person to enforce a CPO order. Mr. Robertson contends that *Dixon* "leaves no doubt that D.C. Code § 16-1005(f) actions are maintained 'in the name of' the United States." He also asserts that "as . . . *Dixon* [ ] established, a private contempt prosecutor can foreclose the public prosecutor's ability itself to prosecute a criminal case by herself first litigating a private contempt action that raises a jeopardy bar." That *Dixon* was a complicated case is clear from the extensive, multiple opinions written by Justices

Scalia (announcing the judgment of the court), Rehnquist (concurring in part and dissenting in part with two other justices), White (concurring in the judgment in part and dissenting in part with two other justices), Blackmun (concurring in the judgment in part and dissenting in part), and Souter (concurring in the judgment in part and dissenting in part with one other justice). Significantly, as the United States correctly points out, however, "the Court's holding in *Dixon* did not turn on the premise that the prior contempt prosecution was conducted in the name and interest of the United States—rather, it turned on the premise that the identity of the prosecutor in the earlier proceeding was simply irrelevant for Double Jeopardy Clause purposes."[6] In that regard, *Green* is not inconsistent with *Dixon*. In addition, what we said in *Green* is true with respect to Mr. Robertson's case—*Dixon* "simply does not apply to the circumstances presented by this appeal." *Green*, 642 A.2d at 1278 (footnote omitted).

Mr. Robertson's reliance on *Young* is also unavailing. Notably, plaintiff's counsel in *Young* conducted a "sting" operation relating to an investigation of the defendants' alleged violation of a federal court injunction prohibiting infringement of plaintiff's trademark, and plaintiff's counsel also prosecuted the defendants for contempt. *Young*, 481 U.S. at 791-92. The Supreme Court held "that

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[6] Of course, where the "dual sovereignty" principle governs, the identity of the prosecutor is relevant for double jeopardy purposes, *see, e.g., United States v. Wheeler*, 435 U.S. 313 (1978), but even that "concept does not apply . . . in every instance where successive cases are brought by nominally different prosecuting entities." *Id.* at 318. *Dixon* was an instance of the latter.

counsel for a party that is the beneficiary of a court order may not be appointed to undertake contempt prosecutions for alleged violations of that order." *Id.* at 790. Thus, as we declared in *Green*, "the *Young* Court was primarily concerned with the financial and tactical conflicts of interest presented by using plaintiff's counsel to prosecute the criminal contempt charges." *Id.* at 1279 (citing *Young*, *supra*, 481 U.S. at 805-06). "In contrast, the instant criminal contempt arose out of an intrafamily proceeding, conducted pursuant to local statutes and rules designed by the Council of the District of Columbia [ ] to expedite the application and, if necessary, the enforcement of CPOs in cases involving domestic violence." *Id.* (citations omitted).

Peak also is inapplicable to Mr. Robertson's case. There, we distinguished the situation in *Peak* from that in *Green* "which arose in the special context of 'an intrafamily proceeding . . . '"; and we further declared that the *Peak* decision "casts no doubt on the propriety of the contempt procedures authorized in that context by the Superior Court's Intra-Family rules." 759 A.2d at 620 n.16 (citation omitted). In short, the decisions in *Dixon*, *Young*, and *Peak* do not alter our conclusion that the criminal contempt proceeding against Mr. Robertson under the District's intrafamily offense statute was prosecuted in the name of Ms. Watson, not in the name of the United States or the District of Columbia.

Mr. Robertson's Plea Agreement With the United States Attorney's Office

Mr. Robertson essentially argues that Ms. Watson's contempt proceeding against him was barred by his plea agreement with the United States Attorney's Office. "[A] plea agreement is a contract."

United States v. Jones, 313 U.S. App. D.C. 128, 131, 58 F.3d 688, 691 (1995) (citation omitted). "As a consequence, courts will look to principles of contract law to determine whether the plea agreement has been breached." *Id.* (citations omitted); *see also United States v. Ahn*, 343 U.S. App. D.C. 392, 401, 231 F.3d 26, 35 (2000) (citation omitted). The District applies an objective law of contracts and looks to the written language of the parties to determine the reasonable interpretation of the agreement. *See Tillery v. District of Columbia Contract Appeals Bd.*, 912 A.2d 1169, 1176 (D.C. 2006) (citations omitted).

As we have shown, Mr. Robertson starts from the faulty assumption that the criminal contempt proceeding against him was brought in the name of the United States. To interpret Mr. Robertson's plea agreement, we apply contract principles, examining the language of the agreement to determine the intent of the parties. The plea agreement was entered on a form styled "United States vs. John Robertson." The District of Columbia, whose name appeared under that of the United States, was crossed out. Mr. Robertson, his attorney, and an Assistant United States Attorney signed the form. The words "Assistant Corporation Counsel," which appeared under the words "Assistant U.S. Attorney," were crossed out. Ms. Watson's name appeared nowhere on the form. In addition, the pertinent handwritten narrative stated: "In exchange for Mr. Robert[son's] plea of guilty to Attem[pted] Aggravated Assault, the gov't agrees . . . not [to] pursue any charges concerning an incident on 6-26-99." The abbreviated word "gov't" clearly referred to the United States, not Ms. Watson, and certainly not the District of Columbia since that name was deleted. Moreover, only a representative of the

United States and Mr. Robertson and his counsel signed the plea agreement. Under these circumstances, we are satisfied that no objectively reasonable person could understand that Mr. Robertson's plea agreement bound Ms. Watson and precluded her contempt proceeding against Mr. Robertson,[7] or that the agreement bound the District, a distinct, separate governmental entity[8] (whose Corporation Counsel's Office represented Ms. Watson during her prosecution of her motion to adjudicate contempt). *See United States v. Garcia*, 954 F.2d 12, 17 (1st Cir. 1992) ("a defendant's subjective expectations as to how a plea agreement will redound to his benefit are enforceable, if at all, only to the extent that they are objectively reasonable") (citations omitted).

Mr. Robertson's Other Arguments

We dispose of Mr. Robertson's other arguments summarily. In light of our conclusions pertaining to Mr. Robertson's plea agreement, we reject his contention that his trial counsel "rendered [constitutionally] ineffective assistance of counsel by failing to move to dismiss the criminal contempt prosecution as violative of the plea agreement

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[7] That is especially so given § 16-1002(c), which states that "[t]he institution of criminal charges by the United States Attorney shall . . . not affect the rights of the [CPO] complainant to seek any other relief under this subchapter," including—implicitly—a contempt adjudication under § 16-1005(f).

[8] *See Johnson v. District of Columbia*, 853 A.2d 207, 210 n.6 (D.C. 2004) (citing *Randolph v. District of Columbia*, 156 A.2d 686, 688 (D.C. 1959); *District of Columbia v. Ray*, 305 A.2d 531, 534 (D.C. 1973)).

executed on July 28, 1999." Under *Strickland v. Washington*, 466 U.S. 668 (1984), Mr. Robertson's counsel's conduct was reasonable under prevailing professional norms. *See Stewart v. United States*, 881 A.2d 1100, 1113 (D.C. 2005).

Mr. Robertson argues that the "Family Court committed error in denying [his] demand for a jury trial," because, "although D.C. Code § 16-1005(f) sets forth a maximum period of incarceration of 180 days, the $10,000 restitution penalty imposed on [him], viewed in tandem with this maximum period of incarceration and the five-year maximum period of probation, undoubtedly served to remove this case from the category of 'petty' offense." The record shows that in filing her motion to modify and extend civil protection order, apparently simultaneously with her motion to adjudicate contempt, Ms. Watson demanded payment for her medical bills (around $10,000) resulting from the burns caused by Mr. Robertson when he threw lye at her. Because of this demand, which Mr. Robertson interpreted, in part, as an effort to obtain personal injury damages, he argued that he was entitled to a jury trial under both the Sixth and Seventh Amendments to the Constitution. The trial court denied his jury demand.[9]

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[9] There is some confusion in the record as to whether the $10,000 restitution requirement for medical bills (payable to the Victims of Crime Compensation Fund) was imposed as part of Mr. Robertson's sentence, or as part of the modification of the CPO. At the June 14, 2000 hearing where the trial court imposed sentence and extended and modified the CPO, the trial court stated that it was suspending execution of the incarceration penalty "and putting [Mr. Robertson] on a five year period of probation with the condition that you pay $10,000 in restitution." A few minutes

In *Olafisoye v. United States*, 857 A.2d 1078 (D.C. 2004), we reiterated the principle that "while federal and state courts must provide jury trials for all 'serious crimes,' trials for offenses that are regarded as 'petty' do not require the same treatment." *Id.* at 1083 (citing *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968)). Moreover, "[t]he factor that distinguishes a serious offense from a petty offense is the 'maximum authorized period of incarceration.'" *Id.* (citing *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541-42 (1989)). "*Blanton* established a presumption that crimes punishable by incarceration of six months or less were not deemed serious for jury trial purposes." *Id.* (citing *Blanton*, *supra*, at 542-43; *Day v. United States*, 682 A.2d 1125, 1128 (D.C. 1996)). On this record, where the maximum statutory penalty is a fine not exceeding $1,000, or a period of incarceration up to 180 days; and where the $10,000 payment was earmarked as restitution or reimbursement for Ms. Watson's medical expenses paid by the Victims of Crime Compensation Fund, we conclude that Mr. Robertson was not constitutionally entitled to a jury trial; under *Olafisoye* and *Blanton*, *supra*, his offense is classified as "petty" rather than "serious." *Cf. Nebraska v. Clapper*, 732 N.W.2d 657,

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later the trial court "move[d] on to the [CPO]" and there also was a reference to restitution and the $10,000 payment. Before the trial court imposed sentence, counsel for Ms. Watson stated that they had "formally asked for the restitution in the modified and extended [CPO]," but that "whether it be done through the contempt proceeding or through the modification of the [CPO], we do think that a restitution is appropriate [and] that total came to just over $10,000. . . ." Mr. Robertson does not press his Seventh Amendment contention in this court.

662-63 (Neb. 2007) (no violation of Sixth Amendment where court ordered defendant to pay $18,862.72 in restitution to victim for medical expenses; "a judge's factfinding for restitution does not result in a sentence that exceeds a statutory maximum"); *United States v. Milkiewicz*, 470 F.3d 390, 403 n.24 (1st Cir. 2006) ("Although restitution is 'criminal' in many senses, . . . we note that some courts have concluded that restitution is not the sort of 'punishment' to which the Sixth Amendment apples") (citations omitted); *United States v. Leahy*, 438 F.3d 328, 337 (3d Cir. 2006) ("restitution order does not punish a defendant beyond the 'statutory maximum' as that term has evolved in the Supreme Court's Sixth Amendment jurisprudence") (citations omitted). *See also United States v. Nachtigal*, 507 U.S. 1, 5 (1993) (sentence which included five years of probation was not an infringement on liberty that required a jury trial under the Sixth Amendment).

Finally, Mr. Robertson asserts that the trial court "misapplied the law of self-defense." The trial court essentially found that after "Mr. Robertson had won the fight [with Ms. Watson] convincingly, Ms. Watson was down on the ground bleeding badly." At Ms. Player's request, Mr. Robertson left her house, but remained on the premises instead of walking away. The trial court credited Ms. Player's testimony and found that Mr. Robertson "had ten seconds to get away," but remained there with lye in his hands and "threw it on [Ms. Watson]." Case law in this jurisdiction holds that "[w]hen a defendant raises a claim of self-defense, the trial court must decide, as a matter of law, whether there is record evidence sufficient to support the claim." *Howard v. United States*, 656 A.2d 1106, 1111 (D.C. 1995). Moreover, the trial court here was the factfinder in adjudicating

Mr. Robertson's self-defense claim, and she applied correct legal standards in rejecting it. "[S]elf-defense may not be claimed by one who deliberately places himself . . . in a position where he . . . has reason to believe his . . . presence . . . would provoke trouble." *Id.* (citations and internal quotation marks omitted). What we said in *Gillis v. United States*, 400 A.2d 311 (D.C. 1979) supports the trial court's rejection of Mr. Robertson's self-defense claim with respect to Count 5 of the charges against him:

> [The] middle ground between the two extremes [of] the right to stand and kill, and the duty to retreat to the wall before killing[,] imposes no duty to retreat. . . . But this middle ground does permit [the fact finder] to consider whether a defendant, if he safely could have avoided further encounter by stepping back or walking away, was actually or apparently in imminent danger of bodily harm. In short, this rule permits the [fact finder] to determine if the defendant acted too hastily, was too quick to pull the trigger. A due regard for the value of human life calls for some degree of restraint before inflicting serious or mortal injury upon another.

Id. at 313. Given the trial court's credibility determination and its factual findings, we see no reason to disturb its rejection of Mr. Robertson's claim to self-defense.

Accordingly, for the foregoing reasons, we affirm the judgments of the trial court in Appeal No. 00-FM-925 and Appeal No. 04-FM-1269.

So ordered.

(Appendix B)

District of Columbia
Court of Appeals

Nos. 00-FM-925 and 04-FM-1269

IN RE: JOHN ROBERTSON,

Appellant.

VSP785-99

BEFORE: Washington, Chief Judge; *Farrell, Ruiz, *Reid, Glickman, Kramer, Fisher, Blackburne-Rigsby, and Thompson, Associate Judges; *Kern, Senior Judge.

ORDER

On consideration of appellant's petition for rehearing or rehearing en banc, the oppositions of appellee and amicus curiae (United States) thereto, the motion of the National Association of Criminal Defense Lawyers, et al., for leave to file amici curiae submission in support of petition, and the motion of Domestic Violence Legal Empowerment and Appeals Project, et al., for leave to file brief as amici curiae in opposition to petition, it is

ORDERED that the motions are granted and the Clerk is directed to file the lodged brief of National Association of Criminal Defense Lawyers, et al., in support of petition and the lodged brief of Domestic Violence Legal Empowerment and Appeals Project, et al., in opposition to petition. It is

FURTHER ORDERED by the merits division* that the petition for rehearing is denied; and it appearing

that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

Filed: June 13, 2008

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