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 Writ Of Certiorari To The District Of Columbia Court Of Appeals

SUPPLEMENTAL BRIEF FOR PETITIONER

JAMES W. KLEIN*
LEE R. GOEBES
JACLYN S. FRANKFURT

PUBLIC DEFENDER SERVICE
633 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 628-1200

Counsel for Petitioner

November 2009 **Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

ARGUMENT

Petitioner John Robertson sought this Court's review of the question whether, in a congressionally created court, an action for criminal contempt may be brought in the name and pursuant to the power of a private individual, as opposed to in the name and pursuant to the power of the United States. In Petitioner's view, "[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." Pet. 4. Both the Court of Appeals and this Court requested the views of the United States on this matter that so directly affects its sovereign power. In the course of two submissions to two courts, the position taken by the United States has shifted dramatically.

In its Court of Appeals brief, the United States contended that the proceeding here was a "private action for criminal contempt brought by [Wykenna] Watson in her own name and interest" (U.S. C.A. Br. 21), and that "criminal contempt prosecutions under D.C. Code § 16-1005(f) may *lawfully* be conducted as private actions." U.S. C.A. Br. 9; *see also id.* at 4 (contending it is "establishe[d] that such prosecutions are constitutional"). The United States secured a favorable ruling from the Court of Appeals as a result; the lower court explicitly relied on the position of the United States, quoting its brief (Pet. App. A10) and stating, "we agree with the United States . . . and

we hold that, under the intrafamily offense statute, a criminal contempt proceeding is properly brought in the name of a private person, here Watson, rather than in the name of the sovereign." Pet. App. A15. This holding was in no sense "artificial" or "abstract," as the United States now suggests. U.S. Br. 8. It enabled the court to deny Mr. Robertson's due process claim that the United States as sovereign had prosecuted the criminal contempt, and that the United States had breached the plea agreement by so doing.

In this Court the United States refrains from asserting that a private criminal right of action in a congressionally created court is lawful, proper, or consistent with the Constitution. No longer is the United States asserting that a criminal contempt prosecution can be "lawfully conducted as a private action in the name and interest of" a private person. U.S. C.A. Br. 23.[1] And failing to acknowledge that it previously took such a position, it never explains why it changed course. This Court should afford great

[1] The Solicitor General also makes no effort to defend the reasoning of the court below. In his petitions for rehearing and for certiorari, Mr. Robertson sought review because the court's holding rested on the repudiated notion 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.' " Pet. App. A14 (citation omitted). Below, the United States responded: "The unanimous decision of the Court is correct and does not warrant further review." U.S. Reh. Opp. 1. Notably absent from the United States' brief to this Court is any suggestion that the lower court's ruling is *correct*.

weight to the decision of the United States to abandon the affirmative position it took in the lower court.[2] The United States has conceded that this case presents "complex issues that might warrant this Court's attention" and is wrong in its assertions that the issues are not properly framed and that the case is an imperfect vehicle. U.S. Br. 5. The petition for certiorari should be granted.

A. The Issues in this Case Are Properly Framed.

Rather than offering this Court its views on whether the federal, sovereign power to prosecute crime can be lodged in a private individual to prosecute in her own name and pursuant to her own power, the United States faults Petitioner for not raising issues different than the question presented and contends that the precedent Petitioner cites is inapposite. It comes to the latter conclusion only by the most crabbed – or inaccurate – reading of this Court's precedent. The United States contends that Petitioner is wrong to rely on *Bloom v. Illinois*, 391 U.S. 194 (1968), for the proposition that "[c]riminal contempt

[2] Because the court below expressly relied on a position set forth by the United States that the United States is no longer willing to assert or defend, this Court could grant the petition for certiorari, vacate the judgment below, and remand to the Court of Appeals for consideration in light of the United States' change in position. *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

is a crime in the ordinary sense," suggesting that "what the Court has meant by that statement is that the adjudication of criminal contempt must be attended by many of the same procedural protections for defendants that attend the adjudication of other crimes." U.S. Br. 9. Such a limited interpretation cannot be squared with the language from *Bloom*, which continues beyond the portion that the United States quotes in its brief:

> Criminal contempt is a crime in the ordinary sense; it is a violation of the law, *a public wrong* which is punishable by fine or imprisonment or both. In the words of Mr. Justice Holmes: "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech."

391 U.S. at 201 (emphasis added, citation omitted). The United States offers this Court no support for the notion that the power to prosecute such "public wrongs" can be lawfully and constitutionally lodged in a private party, who pursues the case not in the name of the sovereign, but pursuant to her own name and power.

The United States faults Petitioner for improperly developing the issue presented, suggesting his argument would have been better supported by citations to civil cases that address the question of what constitutes state action. U.S. Br. 14. But Petitioner

relies on the more fundamental notion of what is a "crime" in our legal system, a concept of significant historical pedigree. In 1892, this Court stated:

> Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state. . . . The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual, according to the familiar classification of Blackstone: "Wrongs are divisible into two sorts or species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed 'civil injuries;' the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community, and are distinguished by the harsher appellation of 'crimes and misdemeanors.'"

Huntington v. Attrill, 146 U.S. 657, 667-69 (1892) (quoting William Blackstone, 3 Commentaries *2). And as far back as *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this Court has made clear that the power to punish violators of the criminal law in this country is a *sovereign* power:

> The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised, without hesitation, whenever the

> sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers. . . . It is a right incidental to the power, and conducive to its beneficial exercise.

Id. at 418; *see also Heath v. Alabama*, 474 U.S. 82, 93 (1985) ("Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code."); *United States v. Wheeler*, 435 U.S. 313, 320 (1978) ("[I]nherent in any sovereign . . . [is the power] to determine what shall be an offense against its authority and to punish such offenses."). This Court relied on precisely these principles in *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), when interpreting a Colorado statutory scheme governing the issuance of civil protection orders and the initiation of contempt proceedings. 545 U.S. at 765 ("The serving of public rather than private ends is the normal course of the criminal law because criminal acts, 'besides the injury [they do] to individuals, . . . strike at the very being of society.'") (citations omitted).[3] Nowhere in its brief is the United States able to explain how the quintessentially sovereign power to prosecute crime can properly be transformed,

---

[3] The *Castle Rock* Court also relied on the language from *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), that, "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another," which Petitioner cited to this Court and the United States suggests is inapposite. U.S. Br. 13.

whether by statute or by judicial order, into an individual power to prosecute a private wrong as a crime.

Instead of offering its views on the question presented, the United States focuses on Petitioner's purported "litigation strategy" – identifying issues it claims Petitioner has conceded and others it believes Petitioner should have raised. U.S. Br. 5. These arguments rest in large part on an imprecise presentation of Petitioner's view of *Green v. Green*, 642 A.2d 1275 (D.C. 1994), a case relied upon by the court below. Larry Green appealed his conviction for criminal contempt pursuant to D.C. Code § 16-1005(f), contending that the private prosecution of the criminal contempt by an interested party violated this Court's holding in *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987), or, in the alternative, the Due Process Clause. The District of Columbia Court of Appeals rejected Green's claims, noting that the "case does not present the potential for discovery abuses and financial conflicts of interest the *Young* Court addressed." 642 A.2d at 1279-80. The very fact that the *Green* court spoke of "conflicts of interest" reflected its awareness that the private prosecutor in that case was *representing the sovereign*, as there would be no potential for a conflict of interest if she were bringing the criminal action "in her own name and interest." Thus, although in a footnote the *Green* court stated that it was "satisfied that the 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," *id.* at 1279 n.7, the court's words could not be read, consistent with the rest of the opinion, as holding that § 16-1005(f) permits a private party to bring a criminal case in her own name and interest. The issue was not presented and such a conclusion would have been inconsistent with the holding of the case.[4]

The United States urged the *Robertson* court to read the footnote in *Green* as a holding, and the *Robertson* court followed suit. U.S. C.A. Br. 12 n.6; Pet. App. A12, A15. But when the United States asserts in this litigation that, "Petitioner does not contest *Green*" (U.S. Br. 6), it is correct only to the extent that Petitioner did not challenge the holding in *Green* that, in an intrafamily contempt proceeding under § 16-1005(f), a private, interested party can serve as a private prosecutor as that term was understood by this Court in *Young*. The United States is entirely *incorrect* in its suggestion that Petitioner "recognizes" or believes that the Court of Appeals in *Green* "construed District of Columbia law to confer a private right of action for criminal contempt on the holder of a CPO," and that he strategically declined to challenge such a holding. U.S. Br. 6. It was the

[4] Indeed, in its brief before this Court, unlike in its brief below, the United States refers to the relevant language in *Green* as an "observation" or a "conclusion," but not a "holding." U.S. Br. 6. It is only when discussing the decision in *Robertson* that the Solicitor General states that the court "held" that the respondent has a private right of action to enforce her CPO through a criminal contempt proceeding. *Id.*

Robertson court that first held that § 16-1005(f) confers a private criminal right of action on the holder of a CPO. And Petitioner most certainly *does* "ask this Court, as the ultimate arbiter of District of Columbia law, to review that statutory holding." Pet. 22 (citing *Whalen v. United States*, 445 U.S. 684, 687 (1980)).

Petitioner explicitly contended in his petition that this Court should overturn the statutory holding as inconsistent with *United States v. Dixon*, 509 U.S. 688 (1993), which held that § 16-1005(f) punishes a "crime in the ordinary sense," and that such prosecutions are public cases brought in the name and power of the United States. Pet. 3. The United States fails in its attempt to harmonize the decision below with this Court's holding in *Dixon*. At root, the court below held that the criminal contempt action prosecuted pursuant to § 16-1005(f) was an action between private parties, brought by Ms. Watson in her own name and interest against Petitioner. Yet the Double Jeopardy Clause does not apply to actions between private parties. *United States v. Halper*, 490 U.S. 435, 451 (1989) ("The protections of the Double Jeopardy Clause are not triggered by litigation between private parties."), *abrogated on other grounds by Hudson v. United States*, 522 U.S. 93 (1997). Given this most fundamental constitutional fact, the judgment below cannot be harmonized with *Dixon*. For this reason alone, this Court should grant review and reverse. Pet. 4.

The only issue Petitioner declined to raise in this case was the question this Court did not reach in *Young*: whether the Due Process Clause prohibits a private, interested party from prosecuting a criminal contempt action on behalf of the sovereign. Petitioner raised the more fundamental claim that a criminal action in a congressionally created court cannot, consistent with the Constitution, be brought in the name and pursuant to the power of a private individual. The United States devotes significant energy to its attempt to convince this Court that Petitioner's claim is somehow weakened by his decision not to raise the due process claim reserved in *Young*. It does little to explain, however, why the fact that the *Young* issue is not presented makes the claim Petitioner *does* present any less worthy of this Court's review. U.S. Br. 8, 15. The United States' attack on Petitioner's litigation strategy is unconvincing; having declined to defend the judgment below, the United States offers this Court little to support its suggestion that the petition be denied.

B. There Is No Merit to the United States' Claim that this Case Is an Unsuitable Vehicle for this Court's Review.

The United States suggests that this case is an unsuitable vehicle for review, citing procedural bar

arguments that are plainly inapplicable.[5] These arguments are mere diversions, as the court below resolved this case solely on the merits. The United States also suggests that review should not be granted because "it is not clear" that petitioner seeks an appropriate remedy for the breach. U.S. Br. 19.[6] But because the remedy question was never addressed below, it is not, as the United States characterizes it, a "predicate" (*id.*) to relief from this Court. *See Corley v. United States*, ___ U.S. ___, 129 S. Ct. 1558 (2009) (vacating and remanding for consideration by court of appeals of issues not previously addressed). Finally, the United States contends that review should be denied because "no logic justifies construing the agreement to cover a private prosecutor who, at the time of the agreement, was understood by local law to pursue such claims in her own right." U.S. Br. 17.[7] But it was not until

---

[5] Plain error does not apply because the plea breach claim was raised on appeal from a collateral attack. *United States v. Frady*, 456 U.S. 152, 164 (1982). "Cause and prejudice" does not apply because Petitioner's collateral attack alleged ineffective assistance of counsel and was filed during the pendency of the direct appeal. *Shepard v. United States*, 533 A.2d 1278 (D.C. 1987).

[6] Petitioner sought specific performance. *See Roye v. United States*, 772 A.2d 837, 840 (D.C. 2001) ("When specific performance can be accomplished, it is preferred to other remedies for breach of the plea agreement.").

[7] The United States now asserts that even if the respondent were representing the United States, she would not be bound by the plea agreement. U.S. Br. 15. Below, the United States viewed the question differently. U.S. C.A. Br. 31 ("[W]e tend to

(Continued on following page)

Robertson was decided that anyone would have understood the local law in the District of Columbia to permit a private party to pursue a criminal contempt action in her own name and interest. *Green* did not so hold. If the criminal contempt proceeding here were properly construed as an action between Petitioner and the United States, then the prosecution of Petitioner by the United States for the events at issue would have been a clear violation of the plea agreement. The Due Process Clause entitles Petitioner to a remedy for that breach.

think that the plea agreement in this case could reasonably be interpreted as a promise that no such prosecution [of a privately prosecuted contempt brought in the name and interest of the United States] would occur."). The District of Columbia Court of Appeals has held, in a contempt case not involving the intra-family statutory scheme, that a plea agreement signed by a private prosecutor binds the United States. *In re Peak*, 759 A.2d 612 (D.C. 2000).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JAMES W. KLEIN
LEE R. GOEBES
JACLYN S. FRANKFURT

PUBLIC DEFENDER SERVICE
633 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 628-1200

Counsel for Petitioner
John Robertson