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*D.C. Superior Court*

**PROSECUTION OF CRIMINAL CONTEMPT ALLEGATIONS / VIOLATION OF CIVIL PROTECTION ORDERS AND TEMPORARY PROTECTION ORDERS**

**U.S. ATTORNEY'S OFFICE IS PROPER PROSECUTORIAL AUTHORITY / APPOINTMENT OF PRIVATE COUNSEL, IF DEEMED NECESSARY, IN THE ABSENCE OF DETERMINATION OF THAT OFFICE NOT TO PROSECUTE / GUIDELINES FOR SAME**

**Précis:** In light of a recent decision by the D.C. Court of Appeals in the case of *In re John Robertson* (2011), which held that the power to prosecute criminal contempt allegations for violations of Civil Protection Orders (CPOs) and Temporary Protective Orders (TPOs) issuing from the Domestic Violence Unit of the Superior Court rests with the Office of the United States Attorney, not with the office of the D.C. Attorney General, the Trial Court in this case set forth guidelines for the appointment of *pro bono* private counsel to prosecute such allegations in order to vindicate the integrity of the Court's orders, should the Office of the United States Attorney find it not in the public interest to do so. These include: **(1)** Consulting with the Office of the United States Attorney as to its view regarding whether prosecution of the contempt is in the public interest. **(2)** If that Office believes that a particular contempt prosecution does not qualify, it should be heard on that matter and the fact that it takes that position should be given some weight by the Court, although it is not dispositive. **(3)** Where that Office declines to prosecute, the Court retains its independent authority to appoint a private lawyer as a prosecutor to assess whether it is in the public interest to pursue criminal contempt charges in connection with alleged violations of a CPO. **(4)** Such appointees would represent the United States, not the party that is the beneficiary of the court order allegedly violated, because such prosecutions are in the public interest by vindicating the Court's authority, not simply the interests of the individuals involved. **(5)** Anyone appointed via this process must not have been involved in the case at issue and, beyond that, must not ever have had any prior connection to any interested party. **(6)** Because no funds currently available under the D.C. Criminal Justice Act (CJA) to compensate any attorney making himself or herself available for such appointments, their service will be on a *pro bono* basis.

**Abstract:** In a thoughtful opinion, a D.C. Superior Court Judge attempted to reconcile a recent holding by the Court of Appeals which distinguishes between the prosecutorial interests involved in contempt proceedings stemming from Civil Protection Orders (CPOs) and Temporary Protection Orders TPO's).

**Facts:** On April 28, 2011, the Petitioner filed a *pro se* petition for a Civil Protection Order (CPO). The same day the court issued a TPO requiring the Respondent to stay at least 100 feet away from her person, home, workplace, and vehicle, and not to contact her in any manner, either directly or indirectly. By its terms the TPO would remain effective until May 12, 2011, the date of the CPO hearing. Two days after the Respondent had been served, however, on May 3, 2011, the Petitioner filed a *pro se* motion for criminal contempt, alleging three prohibited telephone communications to her over the previous two days in violation of the TPO. At the scheduled CPO hearing before a Superior Court Judge, an Assistant D.C. Attorney General (AAG) made an appearance "on behalf of" the Petitioner, and private Counsel appeared on behalf of the Respondent. No one from the U.S. Attorney's Office participated in the hearing. Respondent was arraigned on the criminal contempt allegation and entered a plea of not guilty. A criminal contempt status hearing was set for June 2, 2011. At that hearing, the Respondent filed a motion to dismiss the allegation pursuant to the holding of the Court of Appeals in the *Robertson II* case (May 2011). The concern before the Trial Court was whether

an AAG could serve as both advocate for the Petitioner in the CPO and as Prosecutor of the criminal contempt, a dual role which presented potential conflict of interest issues under the *Robertson* ruling. Respondent contended that the contempt matter must proceed in the name of the Petitioner personally, inasmuch as it had been filed *pro se*. Even if there was a government role in the matter, he further argued, Robertson held that the proper governmental authority for a contempt prosecution was the sovereign, which in this case must be represented by the Office of the U.S. Attorney, not the Office of the D.C. Attorney General. The AAG in attendance denied any conflict of interest and argued that the position of her office was that its attorneys can simultaneously serve both as counsel for petitioners in such matters and as representative of the of the sovereign in connection with the prosecution of a criminal contempt of the jurisdiction's Trial Court. After

TABLE OF CASES	
<i>D.C. Superior Court</i>	
Porter v. Jones .....	1777
<b>Also in this issue</b>	
Classifieds.....	1782
Legal Notices.....	1782

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## Same *Continued from page 1777*

further briefing was ordered, the parties and respective counsel appeared on June 7, 2011, for both the criminal contempt status hearing and the CPO trial. The Court held the latter trial first, during which the AAG served as the Petitioner's Counsel. The Court found good cause for entry of a CPO and referred the still-pending criminal contempt motion to the Judge who ultimately issued this Memorandum Opinion. That Court heard oral argument on the *Robertson* issue on August 8, 2011, considering the Petitioner's opposition via the AAG to the Respondent's motion to dismiss and that Office's Memorandum of Law on its role in the pending contempt action, as well as the Respondent's written replies to both these submissions. **Rulings:** The Court ruled on the issues presented as follows: **(A) Mechanisms.** The Intrafamily Offense Act of 2008, provides a mechanism for victims of domestic violence to petition the Domestic Violence Unit (DVU) of the D.C. Superior Court for a CPO to protect them and associated individuals from further criminal acts by a victimizer. It also provides for the issuance of a TPO on an ex parte basis until such time as the respondent appears in court to contest the CPO. The Act is silent as to who may initiate a contempt action if an order is violated, but the Superior Court Rules governing proceedings in the DVU provide that contempt actions may be initiated either by an individual, the Office of the D.C. Attorney General (OAG), or a private attorney appointed by the Court; neither, however, makes any provision as to who may prosecute those charges. In the *Robertson* case, the Court of Appeals held that prosecution of criminal offenses, including criminal contempt for alleged violations of the orders of the DVU, must "be brought in the name and pursuant to the sovereign power of the United States." In the instance authorized by the statute, wherein an individual petitioner as filed a motion for criminal contempt, that person may be "assisted" by attorneys from the OAG "so long as the beneficiary's CPO enforcement action is brought in the name of the United States." This amalgam of private, governmental, and judicial interests, the Court found, "suggests a range of possible outcomes flowing from *Robertson*." This opinion is meant to sort them out and provide guidance for the respective roles in prosecuting such criminal contempt allegations. **(B) Competing Options.** Two antithetical options emerge from *Robertson*, the Court found. At one extreme is the Respondent's position that *Robertson* requires that

henceforth all criminal contempt prosecutions to enforce CPOs must be pursued by the Office of the United States Attorney, as the sole authorized representative of the sovereign. At the other extreme, the OAG argued that *Robertson* requires only an "essentially ministerial" approach, allowing that Office to prosecute contempt actions "in the name of the United States" as the "substituted ... name of the individual petitioner." **(C) The Mean.** The Court rejected both positions, finding it "impossible to believe" that the *Robertson* Court intended a wholesale repudiation of precedent in these matters, particularly inasmuch as one panel of the Court of Appeals may not overrule the decision of another panel, a prerogative reserved to the Court *en banc*. Moreover, it found that the "entire thrust" of *Robertson* was to allow "a contempt proceeding ... initiated by a private party ... with the involvement of and OAG attorney, but without the involvement of the [Office of the U.S. Attorney]." At the same time, however, the Court found it equally implausible that the *Robertson* requirement that a contempt action must proceed "in the name and pursuant to the sovereign power of the United States" could be ignored as being "entirely devoid of substantive meaning." It was obvious to the Court, however, that although a petitioner could initiate a contempt proceeding, s/he could not proceed *pro se* to prosecute it because such a party does not have the capacity to represent the public interest beyond his or her own. The Court therefore laid out a set of procedures that it deemed would reasonably preserve the interests of all entities concerned. **(D) As Applied.** The Court set forth the following prosecutorial pre-requisites: **(1)** To conform to the "in the name of the sovereign" requirement, the Office of the United States Attorney "must at least be consulted as to its view regarding whether prosecution of the contempt is in the public interest." **(2)** If that Office believes that a particular contempt prosecution does not qualify, it should be heard on that matter and the fact that it takes that position should be given some weight by the Court, although it is not dispositive. **(3)** Where that Office declines to prosecute, the Court retains its independent authority pursuant to DV Rule 12(d) & (e)(2), to vindicate its orders and "the settled public policy" is for it to appoint a private lawyer as a prosecutor "to assess whether it is in the public interest to pursue criminal contempt charges in connection with alleged violations of a CPO." **(4)** Such appointees would represent the United States, not the party that is the beneficiary of the court order allegedly violated, because such prosecutions are in the public interest by vindicating the

Court's authority, not simply the interests of the individuals involved. (5) Anyone appointed via this process must not have been involved in the case at issue and, beyond that, must not ever have had any prior connection to any interested party. (6) Because the Chief Judge of the Superior Court advises that there are no funds currently available under the D.C. Criminal Justice Act (CJA) to compensate any attorney making himself or herself available for such appointments, their service will be on a pro bono basis. (G) **Conclusion.** In this particular case, the Court scheduled a criminal contempt status hearing for August 24, 2011, at which the Office of the United States Attorney was directed to informant whether it will proceed with contempt charges herein, the Court reserving the authority to take the alternative steps set forth herein if deemed necessary.

### PORTER v. JONES

D.C. Super. Ct. No. 2011 CPO 001356. Decided Aug. 15, 2011. (Stuart G. Nash, J.). *Mark O'Brien*, Asst. U.S. Attny., Dep. Chief, Domestic Violence Office, U.S. Attny.'s Office and *Yvette Garcia Missri*, Asst. U.S. Attny. *Ebony Porter*, Petitioner. *Michael Okezie*, Esq., Counsel for Respondent. *Carey Jones*, Respondent.

### ORDER

Before the Court is Respondent's Motion to Dismiss the contempt charges pending against him in light of the Court of Appeals' recent decision in *In re Robertson* (Robertson II), 19 A.3d 751 (D.C. 2011). For the reasons set forth below, Respondent's Motion is denied.<sup>1</sup>

#### I. Factual and Procedural History

On April 28, 2011, Ms. Ebony Porter filed a *pro se* petition for a civil protection order ("CPO") against Mr. Carey Jones. The Honorable José M. Lopez granted Ms. Porter a temporary protection order ("TPO") the same day. The TPO required Mr. Jones not to harass, assault, threaten, stalk, or physically abuse Ms. Porter or her children. In addition, the order instructed Mr. Jones to stay at least 100 feet away from Ms. Porter's person, home, workplace, and vehicle, and not to contact Ms. Porter by telephone, in writing, or in any other manner, either directly or through a third party. By its terms, the TPO would become operative at the time it was served upon Mr. Jones, and would remain in effect until May 12, 2011, the date he was required to appear in court to respond to Ms. Porter's petition for a CPO.

A Prince George's County police officer served Mr. Jones with the TPO on May 1, 2011, at 9:55 a.m.<sup>2</sup> Two days later, on May 3, 2011, Ms. Porter filed a *pro se* motion for criminal contempt alleging three violations of the TPO. Ms. Porter claimed that Mr. Jones called Ms. Porter's phone and left a voicemail on May 1, at approximately 11:00 p.m., placed three additional calls to Ms. Porter's phone on May 2, beginning at approximately 9:30 p.m., and sent Ms. Porter a text message on May 3, at approximately

8:00 a.m. A criminal contempt arraignment was scheduled for May 12, 2011.

At the May 12 hearing, both Ms. Porter and Mr. Jones appeared before the Honorable Fern F. Saddler. Assistant Attorney General ("AAG") Yvette Garcia Missri of the Office of the Attorney General for the District of Columbia ("OAG") announced her presence "on behalf of Ms. Porter,"<sup>3</sup> and Justin Okezie appeared as Mr. Jones's counsel for the contempt matter only.<sup>4</sup> No one from the United States Attorney's Office for the District of Columbia ("USAO") made any representations on the record. Pursuant to Mr. Okezie's request, Judge Saddler arraigned Mr. Jones on the criminal contempt allegations. Mr. Jones pled not guilty, and a criminal contempt status hearing was set for June 2, 2011.

On June 2, 2011, the day of the hearing, Mr. Jones filed a motion to dismiss the contempt allegations premised on *Robertson II*. Mr. Jones contended that the criminal contempt matter was proceeding in the name and pursuant to the power of the petitioner rather than the United States, thereby violating *Robertson II* and requiring dismissal of the prosecution. During the hearing, Judge Saddler *sua sponte* questioned whether AAG Garcia Missri's service as both Ms. Porter's CPO advocate and as prosecutor of the criminal contempt allegations could result in a conflict of interest in contravention of *Robertson II*. AAG Garcia Missri disclaimed any conflict, and articulated the OAG's position that its attorneys can simultaneously serve both as petitioner's counsel and as representative of the sovereign in connection with the prosecution of a contempt. In light of these representations, Judge Saddler continued the matter to allow the OAG to file a written response to the defendant's motion.

On July 7, Ms. Porter, Mr. Jones, and their respective counsel appeared for both the criminal contempt status hearing and the CPO trial. Judge Saddler held the CPO trial first, during which AAG Garcia Missri served as Ms. Porter's counsel and Mr. Okezie represented Mr. Jones. The trial resulted in Judge Saddler finding good cause for the entry of a CPO. Judge Saddler then referred the still pending criminal contempt motion to the undersigned judge (who had, as of July 5, assumed responsibility for Judge Saddler's docket).

On August 8, 2011, the Court heard oral argument on the *Robertson II* issue. At the time of the hearing, the Court had two filings from the OAG. One was Ms. Porter's opposition to Mr. Jones's motion to dismiss, and the other was OAG's Memorandum of Law in Response to Court's Inquiry into OAG's Role in Pending Contempt Action. The Court was also in receipt of Mr. Jones's response to both of these pleadings.

#### II. The *Robertson II* Backdrop

The D.C. Code provides a mechanism for victims of domestic violence to petition the Domestic Violence Unit of the D.C. Superior Court for a CPO to protect the petitioner and associated individuals from further criminal acts by the respondent. See Intrafamily Offenses Act of 2008, D.C. Code §§ 16-1001-1006 (2010). Such relief may include, *inter alia*, an order directing the respondent to refrain from committing or threatening to commit criminal offenses against the petitioner and other protected persons; requiring the respondent to stay away from or have no contact with the petitioner and other protected persons; requiring the respondent to

participate in appropriate treatment or counseling programs; directing the respondent to vacate his or her dwelling or relinquish certain personal property; and allocating temporary custody of minor children of the parties. D.C. Code § 16-1005(c). The Code also provides for entry by the Court of a TPO, on an *ex parte* basis, to protect the petitioner until such time as the respondent can appear in court to contest, or consent to, the entry of a CPO. D.C. Code § 16-1004(b)(1). Violation of a CPO (or TPO) is punishable as contempt, an offense that carries a sentence of up to 180 days' imprisonment and a fine of up to \$1000. D.C. Code § 16-1005(f).

While the D.C. Code is silent as to who may initiate a contempt action, the Superior Court Rules Governing Proceedings in the Domestic Violence Unit provide that contempt actions may be initiated "by an individual, Corporation Counsel [now the OAG] or an attorney appointed by the Court for that purpose." SCR-DV 12(d). The rule further provides that a contempt action "may be referred to the United States Attorney for potential prosecution." *Id.*

In *Green v. Green*, 642 A.2d 1275 (D.C. 1994), the Court of Appeals explicitly endorsed the initiation of criminal contempt actions by private parties for violation of CPOs obtained pursuant to D.C. Code § 16-1003. According to the *Green* Court, "there is no constitutional right to a public prosecutor in an intrafamily contempt proceeding." *Id.* at 1281. Rather, the Court inferred and endorsed "a determination by the Council [of the District of Columbia] that the beneficiary of a CPO should be permitted to enforce that order through an intrafamily contempt proceeding." *Id.* at 1279. Elsewhere in the opinion the Court referred to the contempt proceeding as "a private right of action to enforce the CPO." *Id.* at 1279 n.7.

On May 19, 2011, the Court of Appeals revisited the initiation of contempt proceedings by private individuals for violation of intrafamily CPOs. In *Robertson II*, the Court cited approvingly the above language from *Green*, but also noted that "[s]ection 16-1005(f), under which the contempt action in this case was initiated, is a penal statute which addresses a public wrong as opposed to a remedial statute that compensates a civil injury." 19 A.3d at 759. The Court noted that, except as otherwise provided by law, prosecution of penal laws or criminal statutes "shall be conducted in the name of the United States by the United States attorney for the District of Columbia." *Id.* (quoting D.C. Code § 23-101 (2001)). Ultimately, the Court held that a criminal contempt action "had to be brought in the name and pursuant to the sovereign power of the United States," *id.* at 755, and that an individual petitioner, "assisted" by attorneys from the OAG, could lawfully initiate such a criminal contempt action "so long as the beneficiary's CPO enforcement action is brought in the name of the United States," *id.* at 760.

#### III. The Disputed Scope of *Robertson II*

As the Court of Appeals itself has acknowledged, *Robertson II*'s holding that contempt proceedings to enforce intrafamily CPOs must be brought "in the name and pursuant to the sovereign power of the United States" is at least potentially in tension with its earlier holding in *Green* that contempt actions should be viewed as "private right[s] of action." *Robertson II*, 19 A. 3d at 760 n.15. This has led litigants who have had occasion to brief the effect of the *Robertson II* decision in this and similar cases before this Court to suggest a range of possible outcomes flowing from

the new decision.

At one end of the spectrum is the respondent's position in this case: that *Robertson II* is simply not reconcilable with *Green*. By that reasoning, *Robertson II*, as the Court's most recent pronouncement on this issue, is controlling and must be read to effect a *sub rosa* overruling of *Green*. According to this argument, henceforth all criminal contempt prosecutions to enforce civil protection orders must be pursued by the USAO, as the sole authorized representative of the "sovereign power of the United States."

At the other end of the spectrum is the outcome propounded by the OAG. The OAG's position is that the import of the *Robertson II* decision is essentially ministerial: that the decision's admonition that the contempt power must be exercised "in the name and pursuant to the sovereign power of the United States" is satisfied simply by changing the caption on the case. According to OAG, if the name "United States of America" is simply substituted for the name of the individual petitioner, the action can lawfully proceed without any substantive difference from the practice in place prior to the *Robertson II* decision.

This Court is obliged to reject both of these extreme positions. On the one hand, it is impossible for this Court to believe that the Court of Appeals intended a wholesale repudiation of *Green*. First, it is settled law that one panel of the Court of Appeals cannot overrule another panel of the Court; such a result would require a decision of the *en banc* Court. See, e.g., *Gilchrist v. United States*, 954 A.2d 1006, 1013-14 (D.C. 2008). Second, in the midst of the passage that actually announces its ruling, the *Robertson II* Court cites approvingly to *Green*. 19 A.3d at 760. The entire thrust of the *Robertson II* decision is to sanction a contempt proceeding that was initiated by a private party, and proceeded with the involvement of an OAG attorney, but without the involvement of the USAO. It is therefore impossible to read *Robertson II* as fully overturning the principle, announced in *Green*, that a contempt proceeding can go forward without the involvement of the U.S. Attorney's Office.

On the other hand, it is impossible for this Court to believe that the Court of Appeals' newly announced requirement that the contempt action must proceed "in the name and pursuant to the sovereign power of the United States" is entirely devoid of substantive meaning. The sole reason the Court of Appeals issued the *Robertson II* opinion was to revisit and reverse its determination in *In re Robertson (Robertson I)*, 940 A.2d 1050 (D.C. 2008), *cert. granted in part*, 130 S. Ct. 1011 (2009), and *cert. dismissed*, 130 S. Ct. 2184 (2010), *different result reached on reh'g*, 19 A.3d 751 (D.C. 2011), that a contempt action to enforce a CPO constituted "a private action brought in the name and interest of [the private petitioner], not as a public action brought in the name and interest of the United States or any other governmental entity." *Id.* at 1057-58 (internal citation omitted).<sup>5</sup> Having undertaken the time and effort over a period of several months to order a re-briefing of the issues and the publication of a new opinion, in which the panel explicitly overturned its prior holding, it is difficult to imagine that the Court of Appeals was simply interested in instructing future litigants as to how to caption their pleadings. Indeed, the *Robertson II* decision itself downplays the significance of captioning, finding that the contempt proceeding had gone forward appropriately in that case, despite being captioned in the name of the

private petitioner. 19 A.3d at 760 ("Nor does it matter that the contempt action here was not actually captioned in the name of the sovereign, when Mr. Robertson could have had no doubt that the action was being brought as an exercise of the court's authority to vindicate its order."). Clearly, the phrase: "in the name and pursuant to the sovereign power of the United States," must have meaning beyond simply guiding the captioning of pleadings.

#### IV. Intrafamily Contempt Proceedings Post-*Robertson II*

Having rejected the interpretations at either end of the spectrum, it falls to this Court to give meaning to the phrase: "in the name and pursuant to the sovereign power of the United States." The Court is thus tasked with balancing two competing goals. It must apply *Robertson II* in a manner that gives substantive meaning to the decision, while remaining faithful to the precepts of *Green*. In achieving both of these aims, the Court is guided by the touchstone of *Robertson II* – ensuring that contempt proceedings are exercises in the application of sovereignty.

##### A. Preliminary Prosecutorial Consideration from the USAO

As a preliminary matter, it appears to this Court that before a matter can proceed "in the name and pursuant to the sovereign power of the United States," the litigating representative of the United States in this jurisdiction – the United States Attorney's Office for the District of Columbia – must at least be consulted as to its view regarding whether prosecution of the contempt is in the public interest. To the extent that there are contempt cases for which the USAO wishes to assume responsibility for prosecuting, then clearly it should be ceded the right to do so. To the extent that the USAO believes prosecution of particular contempt cases is not in the public interest, it should be heard on that matter (although, as discussed below, that determination need not necessarily be dispositive). There may potentially be a third category of cases, on which the USAO takes no position as to whether the prosecution is in the public interest (that circumstance will also be addressed below).

Accordingly, with respect to this and every other criminal contempt prosecution initiated before this Court pursuant to D.C. Code § 16-1005(f), the Court will solicit the position of the USAO as to whether it wishes to assume responsibility for the prosecution of the contempt and, if not, whether its reason for declining to do so is based on an assessment that prosecution of the matter is, for some reason, not in the public interest.

##### B. Court Appointment of a Prosecutor Following the USAO's Declination

While the USAO undoubtedly enjoys the right to prosecute contempt, as discussed above the Court does not read the *Robertson II* decision to mandate the involvement of the USAO. To the contrary, the settled law in this jurisdiction plainly provides judges of the Superior Court with authority independent of the Executive Branch to see that their orders are followed. Criminal contempt proceedings "are designed 'to preserve the power, and vindicate the dignity of the courts, and to punish for disobedience of their orders . . .'" *Robertson II*, 19 A.3d at 760 (quoting *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 328 (1904)).

Where the USAO declines to prosecute, the Court's independent authority to vindicate its orders permits it to appoint a prosecutor to assess whether it

is in the public interest to pursue criminal contempt charges in connection with alleged violations of a CPO. See *In re Peak*, 759 A.2d 612, 617 (D.C. 2000) ("It is well settled that criminal contempt proceedings may be prosecuted by private attorneys appointed by the court for that purpose."). The principles that should guide court-appointed prosecutors are set forth by the Court of Appeals most comprehensively in *In re Peak*:

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. Criminal contempt proceedings which arise out of civil litigation are between the defendant and the public, rather than a part of the original action. When a private attorney is appointed solely for contempt prosecution, that attorney is appointed to pursue the public interest in vindication of the court's authority. Thus, for purposes of the contempt proceeding, the attorney so appointed represents the sovereign.

*Id.* (internal quotations and citations omitted).<sup>6</sup>

Accordingly, in those cases in which the USAO determines not to assume responsibility for prosecution of an alleged contempt – either because it has determined that such prosecution is not in the public interest, or having been accorded an opportunity to express an opinion on whether the prosecution is in the public interest has declined to do so – this Court will have the option to assign a court-appointed attorney to represent the public interest in determining whether a contempt prosecution is warranted. A determination by the USAO that a contempt prosecution is not in the public interest would certainly be a significant factor in this Court's decision as to whether the prosecution should proceed. As the *Peak* decision makes clear, however, the Court's independent authority to ensure compliance with its orders makes it possible that such matters could proceed notwithstanding such a determination.<sup>7</sup>

##### C. Eligibility to Serve as the Court-Appointed Prosecutor

The next question this Court must confront is who is eligible to represent the public interest if the USAO declines to become involved. As a preliminary matter, it appears evident to this Court that the petitioner cannot be allowed to proceed *pro se*. Petitioners in CPO proceedings are, quite appropriately, seeking to vindicate their individual rights. It is absurd to believe that their actions would be influenced in the slightest degree by an admonishment from the Court that they have been vested with the authority to proceed "in the name and pursuant to the sovereign power of the United States" and should only prosecute a particular contempt action if they find it to be in the "public interest." To the contrary, allowing a petitioner to proceed *pro se* in these circumstances would inextricably conflate the petitioner's private interests with the public interest, rendering the *Robertson II* decision a nullity in the precise manner this Court rejected in the discussion above. *Robertson II* abolished the notion that a petitioner in these circumstances is pursuing a "private right of action," and the Court was careful to note whenever discussing the viability of the prosecution in that case that the action was "initiated . . . by the OAG on behalf of [the petitioner]," 19 A.3d at 755, and that the prosecution went forward "assisted by the

OAG," *id.* at 759-60. In this Court's view, the OAG's participation was essential to the viability of the contempt prosecution in *Robertson II*, and without such participation, the Court of Appeals would have been forced to arrive at a different result.

This Court's holding that a petitioner may not proceed *pro se* in the prosecution of a criminal contempt matter is consistent with the Superior Court Rules Governing Proceedings in the Domestic Violence Unit, which provide that the Court may refer the contempt action to the USAO for potential prosecution, SCR-DV 12(d), or may appoint the OAG or "other attorney to prosecute the contempt charged," SCR-DV 12(e)(2). There is no provision for the contempt action to proceed *pro se*, in contrast to the rule regarding who may initiate a contempt action, which explicitly sets forth that such an action may be initiated by "an individual, Corporation Counsel or an attorney appointed by the Court for that purpose." SCR-DV 12(d) (emphasis added).

In accordance with the rules of the Domestic Violence Unit, this Court will continue to allow petitioners to initiate contempt proceeding on a *pro se* basis by filing motions to adjudicate criminal contempt. But, in those cases in which the USAO declines to participate, the matter cannot proceed on a *pro se* basis past initiation. Rather, the matter will only proceed to arraignment and beyond if the Court assigns a court-appointed attorney to represent the public interest, and the attorney so assigned elects to pursue charges of contempt.

The final question is whether this Court can and/or should appoint an attorney to prosecute a contempt action if that attorney is the same attorney who represented the petitioner in obtaining the CPO. The Court is mindful that, prior to the *Robertson II* decision, it had been routine practice in the Domestic Violence Unit to allow the same attorney to represent petitioners at both stages of the proceedings. The Court is further mindful that attorneys, in contrast to the litigants themselves, are more likely to apprehend the distinction between representing the private interests of a client and representing the public interest. Nevertheless, after careful reflection, this Court has determined that the practice cannot survive the Court of Appeals' clarification in *Robertson II* that contempt proceedings in connection with intrafamily CPOs are not private rights of action, but instead are penal actions conducted "in the name and pursuant to the sovereign power of the United States."

The simple fact is that the "public interest" is conceptually distinct from the petitioner's interest – both on a theoretical level and, more importantly, on a practical level. Successful petitioners in CPO proceedings are routinely motivated by a range of considerations in determining whether to pursue, or to decline to pursue, contempt actions against CPO respondents. Many of these considerations are immaterial to, or at best tangential to, an evaluation of whether the public interest would be advanced by pursuit of a contempt prosecution.<sup>8</sup>

While the range of possible factual scenarios is as wide as the range of human experience, a few examples are necessary. In many instances, it may be in a petitioner's interest to go forward with a contempt prosecution, when a balanced assessment of the public interest would counsel against such a course. Petitioners may be motivated to secure a contempt conviction against a respondent to gain a tactical advantage in a parallel divorce or custody

action. A petitioner who is a spurned romantic partner may be motivated to secure a contempt conviction against a respondent solely out of vindictiveness, or because the petitioner has no other vehicle by which to channel their emotional pain against their former partner. In these instances, the facts may well establish one or more technical CPO violations, which a disinterested prosecutor would seek to remedy through some means short of a criminal contempt prosecution.<sup>9</sup> It is difficult to see how, in such circumstances, a "prosecutor" who represents, or has represented, the petitioner, could come to an unbiased determination as to whether the contempt action should go forward, particularly in the face of demands from the petitioner that the contempt should be charged.

Similarly, there are a myriad of instances in which a petitioner may decline to go forward with a contempt action when it is in the public interest to go forward. Often, a victim will reconcile with his or her domestic partner despite serial instances of violence in the relationship. *See, e.g., In re Shirley*, No. 09-FM-1182, 2011 D.C. App. LEXIS 307, at \*15-16 n.4 (D.C. June 16, 2011) ("Battered Woman Syndrome, or a similar phenomenon, may explain the fact that [r] estraining orders are frequently withdrawn after the restrained party promises to change inappropriate conduct.") (internal quotation and citation omitted). Alternatively, a respondent may offer financial incentives to a petitioner, sometimes in the form of promised increases in spousal or child support, to persuade the petitioner to drop a contempt prosecution. Similarly, a respondent may threaten to file a cross-petition for a CPO or reciprocal contempt charges under an existing CPO as an inducement to the petitioner to drop allegations of contempt. Again, a "prosecutor" who represents, or has represented, the petitioner, would be hard-pressed to flout the wishes of a client or former client and proceed with a contempt prosecution that does not have the client's support.

While there may be differing views as to the frequency with which such considerations arise, this Court has not heard any interested litigant argue that these are merely theoretical concerns. To the contrary, all of these considerations do arise, with some regularity, in the context of these intrafamily contempt proceedings.

Thankfully, this Court is not faced with the difficult question as to whether past contempt actions, prosecuted by attorneys who also represented petitioners in the acquisition of their CPOs, can withstand appellate review. Rather this Court is faced with a much easier question: which attorneys should this Court appoint, on a prospective basis, to represent the public interest in connection with the potential prosecution of pending and future contempt allegations. The answer to that question is clear. This Court will endeavor, in every case that warrants appointment of an attorney to represent the public interest, to appoint in that capacity an attorney that has had no prior connection to any interested party.<sup>10</sup>

## V. Conclusion

For the reasons set forth above, it is hereby this 15th day of August, 2011,

**ORDERED**, that Respondent's Motion to Dismiss is **DENIED**; and it is

**FURTHER ORDERED**, that the Court will hold a **CRIMINAL CONTEMPT STATUS HEARING** on **August 24, 2011**, at 9:30 a.m. in

Courtroom 113 before Judge Nash of the Superior Court. At this hearing, the USAO shall inform the Court whether it will proceed with contempt charges in the above-captioned case; and it is

**FURTHER ORDERED**, that if the USAO declines to proceed with the prosecution of the above-captioned case, then the Court will take such action as is consistent with the foregoing order.

**SO ORDERED.**

[**Editor's Note:** The D.C. Court of Appeals case which prompted Judge Nash's ruling in this matter appeared in the *Daily Washington Law Reporter* as *In Re John Robertson*, 139 D.W.L.R. 1081 (May 27, 2011). This was an amended version of the original decision, which had been issued by the Court some 40 months earlier, on January 24, 2008.]

## Footnotes:

1. The D.C. Court of Appeals' recent decision in *Robertson II* has engendered some uncertainty as to the continuing viability of actions, such as this one, in which criminal contempt charges are initiated by a private party. This Court's attempt to reconcile *Robertson II* with prior decisions of the Court of Appeals will affect dozens of matters currently pending before the Court. Accordingly, in an effort to give general guidance to litigants as to how this Court interprets the current state of the law, this order will address issues likely to recur frequently before this Court, even if such issues are not directly presented in this particular case.

2. Mr. Jones contests the fact that he was properly served with the TPO. Resolution of that factual issue is not necessary to the disposition of Mr. Jones's motion to dismiss.

3. AAG Garcia Missri also filed a praecipe on May 12, 2011, requesting the Clerk of the Court to note in the record her "appearance for Petitioner." Although not explicitly stated, this appearance was apparently as Ms. Porter's counsel for the CPO petition and the criminal contempt motion. This is evidenced by the arguments advanced and representations made by AAG Garcia Missri at the hearing respecting both matters.

4. Mr. Okezie later filed a praecipe on June 2, 2011, entering his appearance as Mr. Jones's counsel for the CPO petition.

5. *Robertson II* capped a circuitous appeal of a conviction for three counts of criminal contempt that, at one point, reached the Supreme Court of the United States on a writ of certiorari. After the Supreme Court dismissed the writ as improvidently granted, the D.C. Court of Appeals granted the respondent's request for a rehearing. Although admittedly not central to its decision, the *Robertson II* Court determined that the "better course" was to address the issue which was the sole focus of the writ of certiorari, which was "[w]hether an action for criminal contempt in a congressionally created court may constitutionally 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." 19 A.3d at 755 n.4, 758. When *Robertson II* was ultimately decided, the only change from the *Robertson I* opinion was the panel's reversal of itself on the issue of whether a criminal prosecution should be considered a private right of action or an exercise of state sovereignty.

6. In a footnote, the *Peak* Court, citing *Green*, observes that "there is no right to a public prosecutor

in an intrafamily contempt proceeding.” 759 A.2d at 617 n.11. It is not precisely clear to what *Peak* or *Green* are referring when using the term public prosecutor. If, by public prosecutor, the Court of Appeals meant that a respondent has no right to be prosecuted by the USAO, such a reading is entirely consistent with *Robertson II* as interpreted herein. If instead those cases mean that there is no right to be prosecuted by a prosecutor representing the public interest, as distinct from the personal interest of the petitioner, it is impossible to reconcile those cases with *Robertson II*. In order to reconcile *Peak* and *Green* with *Robertson II*, this Court must assume that it is the former interpretation that is correct.

7. Granting the USAO what is, in effect, a right of first refusal over contempt prosecutions is consistent with the principles espoused by the United States Supreme Court for the prosecution of contempt in the federal courts. See *Young*, 481 U.S. at 801 (“[A] court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied. Such a procedure ensures that the court will exercise its inherent power of self-protection only as a last resort.”). Even though there is some question as to whether *Young* is controlling on the D.C. Courts given that the ruling was expressly rendered as an exercise of the Supreme Court’s supervisory authority over the federal courts, the D.C. Court of Appeals has adopted the holding of *Young* for contempt matters other than those related to the enforcement of intrafamily CPOs. *Peak*, 759 A.2d at 619-20. In light of the holding in *Robertson II* that intrafamily offense enforcement matters are exercises of state sovereignty just like other standard contempt actions, this court discerns no reason not to embrace in this context *Young*’s prudential concerns regarding appointment of a court-appointed prosecutor.

8. See *In re Shirley*, No. 09-FM-1182, 2011 D.C. App. LEXIS 307, at \*13 (D.C. June 16, 2011) (“[T]he public, not merely the individual complainant/petitioner, has an interest in preventing the intrafamily violence (or threatened violence) that CPOs are designed to forestall.”).

9. For instance, a recent contempt prosecution was initiated by a petitioner when the respondent approached her during church services, and said, “Peace be with you,” at a time when all the congregants were similarly exchanging signs of peace with one another. Depending on the full history of contact between the parties, a disinterested prosecutor might conclude that, even if the petitioner were reasonably discomfited by such contact, a modification to the CPO that ensured such contact was not repeated might advance the public interest to a greater extent than a criminal prosecution.

10. It should be noted that the Chief Judge of the Superior Court has determined that Criminal Justice Act funds may not lawfully be expended to compensate private attorneys appointed by the Court to represent the public interest in connection with the potential prosecution of contempt actions. Accordingly, in cases in which the USAO declines prosecution, and the OAG is conflicted out, or for some other reason declines to serve as a court-appointed prosecutor, judges of the Superior Court will be forced to rely on attorneys accepting appointment on a pro bono basis.

Cite as *Porter v. Jones* 139 DWLR 1777 (Aug. 15, 2011) (Judge Nash)(Sup. Ct. D.C.)

## Legal Notices



### Second Insertions

#### SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

#### CIVIL DIVISION

2011 CA 4313 R(RP)

Judge Laura A. Cordero,

Initial Scheduling Conference: 10/28/11

V.N.N.C., INC.,

Plaintiff,

v.

THE ESTATE OF DOROTHY VOLNER, et al.,

Defendants.

#### ORDER GRANTING PLAINTIFF’S SECOND MOTION FOR ORDER OF PUBLICATION

Before the Court is Plaintiff’s Second Motion for Order of Publication, filed July 7, 2011. For the reasons explained below, the Court will grant Plaintiff’s Motion.

Plaintiff brings this action to obtain a declaratory judgment to quiet title to real property, and to quiet title to the Stock Certificate for 174 shares of V.N.N.C., Inc. capital stock issued to Dorothy Volner. Plaintiff “holds legal title to real property located at 3001 Veazey Terrace, N.W., Washington, D.C. 2008.” Compl. Paragraph 5. According to Plaintiff’s Complaint, a Proprietary Lease Agreement (“PLA”), “along with a stock certificate, signify ownership and right of occupancy in the property owned by V.N.N.C. and permits the owner to exclusively use and occupy the unit(s) specified in the PLA(s).” Compl. Paragraph 6. Around April 1980, Plaintiff “issued an original PLA to Dorothy Volner...for Apartment #213” and “issued an original Stock Certificate to Ms. Volner stating that she was the owner of 174 shares of the capital stock of VNNC.” Compl. Paragraphs 7-8. On February 3, 2011, Ms. Volner passed away. Sec. Mot. for Order of Public. At 2. Plaintiff alleges that Ms. Volner’s Estate “lost of mislaid the original Stock Certificate,” and as a result, the Estate cannot convey the property to Ms. Volner’s heirs “until the Court quiets title to the premises.” Compl. Paragraphs 12, 14.

Plaintiff filed its first Motion for Order of Publication on May 31, 2011 “as a precautionary measure to quiet title to the Premises and to place any unknown parties on notice of Plaintiff’s claims.” Pl. Mot. at 2. However, the Court denied Plaintiff’s Motion for Order of Publication on July 5, 2011 because Plaintiff did not provide the Court with evidence demonstrating that “the identity or location of interested parties is unknown and difficult to determine.” Ord. Den. Mot. for Public. At 2 (citing *Quincy Park Condo. Unit Owners’ Ass’n v. Dist. Of Columbia Bd. Of Zoning Adjustment*, 4 A.3d 1283, 1289 (D.C. 2010)). Additionally, the Court noted that “Plaintiff does not detail any further attempts to locate persons with an interest in the property, nor does Plaintiff attach an affidavit or any documents detailing efforts to locate such persons. In fact, Plaintiff has not attached any exhibits to its Motion.” *Id.* However, in the instant Motion, Plaintiff has provided the Court with sufficient evidence demonstrating that “the identity or location of interested parties is unknown and difficult to determine.” *Id.*

Plaintiff attaches an Affidavit of James N. Markels, Esquire to its Second Motion for Order of Publication. Pl. Ex. 1. Mr. Markels states that he asked representatives of the Plaintiff, the personal representative of the Estate, and the beneficiaries of the Estate whether they “had any information regarding any transfer of interest in the Premises or the Stock Certificate by Ms. Volner or the

Estate.” *Id.* at 1-2. Additionally, Mr. Markels states that he “searched the online records for the D.C. Recorder of Deeds for any recorded instruments regarding Ms. Volner of her Estate,” and attaches the results as Exhibit A, which Plaintiff contends involves “transactions for a different property other than the Premises, roughly 25 years prior to Ms. Volner’s acquisition of her interest in the Premises.” *Id.* at 2. Thus, Plaintiff has adequately demonstrated that “the identity or location of interested parties is unknown and difficult to determine.” *Quincy*, 4 A.3d at 1289. Therefore, the Court will grant Plaintiff’s Motion.

Accordingly, upon consideration of Plaintiff’s Second Motion for Order of Publication, it is this 9th day of August 2011, hereby:

ORDERED that Plaintiff’s Second Motion for Order of Publication is GRANTED; it is further

ORDERED, that Plaintiff will file proof of service of process by publication as to any Unknown Defendants within sixty days of the date of this Order, or by October 7, 2011; it is further

ORDERED, that the initial scheduling conference on September 2, 2011 is continued to October 28, 2011 at 9:30 a.m. in Courtroom A-50; it is further

ORDERED, that notice be given by the insertion of this Order in the *Washington Law Reporter* and *The Washington Times* once a week for three consecutive weeks, and it is

FURTHER ORDERED, that the expense of publication shall be treated as a cost herein.

SO ORDERED. /s/ Associate Judge Laura A. Cordero. Pub. Dates: Aug. 17, 24, 31, 2011.

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