Seeking Dismissal of Charges Against a Battered Woman for Violation of Civil Protection Order or Criminal No Contact Order

Sample Brief

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September 2011

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Funding for this project was made available through the US Department of Health and Human Services, Grant #90EV0375. The viewpoints contained in this document are solely the responsibility of the author(s) and do not represent the official views or policies of the department and do not in any way constitute an endorsement by the Department of Health and Human Services

SAMPLE BRIEF

SEEKING DISMISSAL OF CHARGES AGAINST A BATTERED WOMAN FOR VIOLATION OF CIVIL PROTECTION ORDER OR CRIMINAL NO CONTACT ORDER

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Issue Presented

Is a government agency permitted to arrest and/or prosecute a battered woman, listed as a protected party, for allegedly violating a civil protection order or criminal no contact order entered on her behalf?

Short Answer

Such action violates an individual's constitutional rights under the 1st, 5th and 14th Amendments and exceeds the jurisdictional authority of the sitting court. Additionally, this action directly contradicts the legislative intent behind such statutes, which were created solely to *protect* battered women, and thoroughly defies the public's interest, as well as that of individual victims, in the *proper* enforcement of protection orders and criminal no contact orders.

(The hypothetical facts included below set-up the arguments used in this Brief. Counsel, of course, should replace these hypothetical facts with the actual facts of counsel's case.)

Facts

On March 17, 20____, Sample City police received a 911 call from Monika Smith, during which the dispatcher repeatedly heard a woman screaming and a man yelling and threatening to kill her. When the police arrived at Monika's house, they were met at the door by Chad Brown, whom they soon identified as Monika's boyfriend who shared the residence with her. Once inside, the police saw that the main room of the house was in shambles, with furniture overturned and broken glass on the floor. The police found Monika in the bathroom, huddled in the corner, holding a towel to her bleeding forehead and lip. During their investigation, the police learned that Mr. Brown

had punched Monika in the face several times and repeatedly threatened to kill her, as he tore through the house looking for his shotgun, which Monika had hid a few days earlier. Monika had locked herself in the bathroom and called for help. The police arrested Mr. Brown and charged him with aggravated domestic assault.

The next day at Mr. Brown's initial appearance, however, he was permitted to post bond and was released from custody. The judge issued a no contact order as part of the criminal case, which specifically prohibited Mr. Brown from having contact with Monika or returning to their home. Monika also obtained a civil protection order, based on the same assault, which provided various additional protections and remedies not at issue in the current matter.

Over the next month, Mr. Brown repeatedly violated both orders, calling Monika numerous times and showing up at her residence on at least five different occasions. When Monika called the police to report the violations, however, Mr. Brown fled the residence. Unable to locate him, officers finally requested a warrant for his arrest on one charge of violating the no contact order. On each visit to the home, the police repeatedly admonished Monika, chastising her for "letting" Mr. Brown into the house. Disheartened by the police response and their inability to arrest him, Monika stopped calling for help despite Mr. Brown's repeated appearances at the home and his continual surveillance of her activities.

On June 20, 20_____, police stopped Mr. Brown on suspicion of reckless driving and located both Mr. Brown and Monika in his car. The officer arrested Mr. Brown on the outstanding warrant and, after further conversation with him and Monika, also arrested Monika on a charge of "aiding and abetting" Mr. Brown in violating the

outstanding orders by getting into, and staying in, his car. It is this unlawful arrest and the prosecution's subsequent attempt to seek with contempt proceedings against Monika that brings this matter before the court at this time.

Statute Involved

Appellate rules may require counsel to identify and/or include any state statute at issue in the case, which should be done here or as designated in the appellate rules.

Argument

I. THE ARREST AND PROSECUTION OF BATTERED WOMEN FOR ALLEGED VIOLATIONS OF COURT ORDERS ENTERED FOR THEIR PROTECTION RUN DIRECTLY AFOUL OF THE MOST BASIC CONSTITUTIONAL PROTECTIONS OF DUE PROCESS AND EXCEED THE AUTHORITY OF THE SITTING COURT.

The 5th and 14th Amendment of the Constitution ensures that no individual may be deprived of the rights of "life, liberty, or property without due process of law."[3] Without notice, an opportunity to be heard or findings of fact in the initial order, battered women who are arrested and prosecuted in these situations find their physical liberty in jeopardy. In addition, the prohibition against mutual protection orders further compounds the due process violations as courts essentially create artificial mutual orders in such cases. Summarily charging a battered woman for violating a protection blatantly ignores these most basic constitutional protections; therefore, battered women should not be charged for violating their own civil protection order or criminal no contact order entered on their behalf.

[3] U.S. CONST. amend. V; U.S. CONST. amend. XIV.

A. Arresting a Battered Woman for Violation of a Protective Order Impinges on Her Fundamental Rights to Due Process and Exceeds the Court's Jurisdictional Authority.

In civil protection order proceedings, respondent/batterers receive copies of petitions which set forth the facts and issues involved; have the right to appear at a hearing, with an attorney if they choose, and to question any witnesses and present any evidence. In such matters, the court makes specific findings of jurisdictional authority over the respondent/batterer as well as factual determinations of risk and harm; the court further sets forth any provisions to be included in a protective order orally or in writing, and the respondent/batterer receives a copy of any final court order. Even in the case of criminal no contact orders, the arrested batterer is present in the court, has an opportunity to address the judge about any no contact prohibitions, and receives a copy of any court orders issued. Unlike her batterer, however, a battered woman receives almost none of these protections and, most importantly, has no findings made against her of any threat she may pose and receives no warnings about possible consequences for violating the court's order. It was this lack of basic due process protections that led the appellate court in *Bullington* to deny the state's attempt to convict a battered woman as an "aider and abettor" of a protection order violation. "It appears to us that any would-be complicitor [the battered woman] would have to be given the same procedural due process notices before the complicitor could be charged as a violator of the order."[4] The lack of these pivotal constitutional protections prohibited the state from prosecuting the battered woman as an aider and abettor to the abuser's violation of the protective order.

[4] *City of North Olmsted v. Bullington,* 139 Ohio App.3d 565, 569 (Ohio 2000).

As with the case before this court, a battered woman is unlikely to have any notice that she is subject to criminal penalties for the violation of a protective order issued on her behalf. By design, protective orders are focused on the batterer and controlling the batterer's violent and threatening actions; the orders list the type of acceptable behavior of a batterer under a protective order. In a typical Criminal No Contact Order case, the battered woman is rarely present or even aware of the offender's hearing or the contents of the protective order. Without notice of the protective order issued on her behalf, the victim cannot be aware of any criminal consequences if she is in contact with the offender.

While the Iowa Supreme Court did find that a domestic violence victim had sufficient notice of possible criminal consequences for violation of a civil protection order, it did so solely in reliance on testimony from police officers that the victim knew of the order's existence.[5] There were no other facts in evidence to demonstrate more specifically what the victim actually knew about the terms and possible consequences of the order or what information she had received from the trial court about *her* possible complicity in any violation of the order.

While victims may know the existence of protective orders, few if any receive notice that they can be charged for violating the terms of the protective order. This argument is particularly significant in cases involving criminal no contact orders; rarely are victims even aware of the no contact orders because they are issued when victims are not present during the offender's hearing. The offender receives notice of the charges

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[5] *Henley v. Iowa District Court*, 533 N.W.2d 199 (Iowa 1995) (protected party of protection order was subject to prosecution for aiding the perpetrator's violation of her protection order and her actions satisfied the willfulness requirement for the contempt charge).

against him before the hearing and during the hearing, which guarantees procedural due process notices. This violates her right to proper notice under the 5th and 14th Amendment; therefore she should not be charged with violating the criminal no contact order.

Not only does charging a victim for violating the protective order a violation of her right to reasonable notice, it also violates her right to be heard. Due process under the 5th and 14th Amendment "requires that a person be given a meaningful opportunity to be heard."[6] A protected parties charged with violation of the order entered on her behalf has received no hearing about any risk she poses to the respondent/batterer; there have been no findings of fact as to acts of abuse committed by her. Without proper opportunity to be heard, the battered woman cannot explain why she should not be arrested for the charges against her. While the offender is guaranteed his procedural due process through his hearing, a battered woman does not receive the same meaningful opportunity to be heard. Therefore, the battered woman does not receive her due process rights and should not be charged with the violating the protective order.

Moreover, courts are without jurisdiction to hear a charge against a battered woman for a criminal no contact order violation since she is not a party to the order. Subject matter jurisdiction is a court's ability "to hear and determine cases of the general class to which a particular proceeding may belong."[7] The court in *In re Gardiner* held that "the effect of action taken by a court without jurisdiction of the subject matter is that the action is void."[8] If a court does not have subject matter jurisdiction, any finding of

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[6] *Bays v. Bays* 779 So. 2d 754, 759 (La. 2001).
[7] *Christie v. Rolscreen Co.* 448. N.W.2d 447, 450 (Iowa 1989).
[8] *In re Gardiner,* 287 N.W.2d 555, 559 (Iowa 1980).

contempt "would be illegal and subject to challenge in this certiorari action."[9]

While in *Hutcheson*, the Iowa Supreme Court held many years ago that the district court had subject matter jurisdiction regarding the victim's contempt charge for aiding and abetting his girlfriend's violation of her no-contact order even though he was not a party to the abuser's no-contact order, such a ruling is inapplicable here as Monika's situation is clearly distinct from that of Mr. Hutcheson. The court stated that an individual who is not a party to a court order "may be held in contempt if he is in privity with the party, or acts in concert with the named party, has been particularly applied where the nonparty was a relative of the named party."[10] In fact, in ruling against Hutcheson, the court seemed greatly concerned by the fact that he was a licensed attorney in the state, and thus especially vexed by an attorney's repeated violations of a court's order. In the instant case, there is no evidence that Monika acted in privity with her abuser, who is the only party to the no contact order, and therefore, the court does not have subject matter jurisdiction to hear or charge Monika with contempt. Unlike the facts in *Hutcheson*, there is no evidence here that Monika repeatedly sought contact with Mr. Brown; in fact, the record fails to show that Monika initiated any type of contact with her abuser at all.

In this case, police officials found Monika with her abuser and made an assumption that she actively assisted the batterer and either initiated or at least failed to make efforts to terminate the contact. Such inaccurate assumptions reflect our past understanding and limited knowledge as to the coercion, fear and constraints on choice that battering imposes. We now know that women return to their abusers for

[9] *Hutcheson vs. Iowa District Court*, 480 N.W.2d 260, 261 (Iowa 1992).
[10] Id. at 264.

various reasons, discussed below, that a woman's contact with her abuser may not be volitional.[11] Rather, contact with a battered woman's abuser may be a result of intimidation and/or inadequacies of enforcing orders that are supposed to protect victims. A battered woman may be forced to "allow" contact by the batterer in an effort to stay safe, especially when her requests for help have proven futile. While Monika and her abuser previously held an intimate relationship, this sole factor is an insufficient ground to assume volition and willfulness in her actions.

In further contrast to the *Hutcheson* matter, Monika does not have a legal background; she was not present at Mr. Brown's initial appearance; she has no knowledge of the terms of the criminal no contact order issued to her abuser. She has no standing, authority, or control over the case; thus the court has no jurisdiction or authority to order her to do anything. Moreover, as Monika is not a party to the criminal action issued against the offender, charging her exceeds the court's jurisdiction. She is beyond the scope of the statute's reach as a nonparty to the original action.[12] Therefore, the court simply lacks jurisdiction and may not hear a charge against a battered woman for violating the criminal no contact order.

Even considering Monika's civil protection order, the court lacks authority to hold her in contempt for violation of its terms. No due process protections have been provided and the court has made no findings of harm or potential threat specifically as to Monika. Although the *Henley* court rejected the victim's lack-of-

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[11] Cari Fais, "Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence," 108 COLUM. L. REV. 1181, FN 93 (2008).

[12] The legislature could have chosen to subject protected parties to the court's jurisdiction in its domestic abuse protections, but clearly chose not to. See *City of North Olmsted v. Bullington*, supra at n. 2.

jurisdiction argument,[13] its ruling demonstrates a failure of the court to understand that, because the protective order enforcement system is inadequate in protecting battered women, battered women often must make instantaneous choices about their safety and survival in moments of threat and danger. For Monika, she may have had knowledge of the order, but she made the best decision according to her circumstances. Thus, while Monika clearly know of the civil protection order's existence (and its prohibitions on Mr. Brown's actions), she found herself forced to make decisions about her safety – decisions with which others, like law enforcement, may disagree. Given law enforcement's repeated failure to protect her when her batterer continued to violate the court orders, Monika, like many other battered women, had little choice. It is not that Monika seeks to flout the court's rulings; rather, given the limited choices created by ineffectual legal responses, other short-term choices must be made.

In conclusion, Monika did not receive appropriate notice of the possibility of the charges against her. She was not given a hearing as to any court prohibitions on *her* behavior before being summarily arrested and charged. Furthermore, in the criminal arena, the court does not have jurisdiction to hear a charge against Monika for violating the criminal no contact order as she is not a party to the original action against the offender. Therefore, Monika did not receive her guaranteed rights under the 5th and 14th Amendment of procedural due process and the court may not hold her in contempt or otherwise convict her.

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[13] *Henley v. Iowa District Court,* 533 N.W.2d at 202 ("contempt orders may be enforced against nonparties who act (1) with knowledge of the order, and (2) in concert with the person to whom the court's order is directed.")

B To Convict a Protected Party for Violation of a Protection or Criminal No Contact Order Requires the Court to Create a Judicial Fallacy of "Artificial" Mutual Orders, Which Are Specifically Prohibited.

Charging a victim for violating a protective order essentially ignores state statutes that restrict the issuance of mutual protective orders. "Mutual" orders require that both the offender and victim "refrain from activities identified in a protective order."[14] Most state codes, including that of our state, require a separately- filed petition and a separate finding of abuse or threat before an original petitioner can be subjected to a protective order. As our statute provides, "absent the filing of separate petitions and separate findings of fact by the court as to each party, a court shall not issue a mutual protection order." COUNSEL'S STATE CODE SECTION 17-20 (2003). Charging Monika as an aider and abettor to her abuser's violation of protective orders fails to uphold the requirement that the party must file a separate petition for a protective order. By convicting Monika for violating a protection or no contact order, the court is creating an artificial mutual order, which subjects her (after the fact) to the same restraints as her abuser even though Mr. Brown never filed for any protective order for himself. As the *Lucas* court concluded, arresting a victim for violating her protection order "is tantamount to issuing and enforcing a mutual order against the victim without going through the mandated process."[15]

Mutual orders and judicially-created, artificial mutual orders create significant due process problems, many of which have already been established in detail in prior sections of this brief. Since a court issues a protection order or enforces terms of restraint

[14] *State v. Lucas*, 100 Ohio St. 3d at 5 (Ohio 2003).
[15] Id.

on the victim, without requiring an abuser to file a separate petition or other findings of fact, the victim does not receive reasonable notice of the charges for which she may be liable. The *Bullington* court noted that issuing mutual orders would "cancel each other out, thereby making the TPO meaningless."[16] To ensure that protective orders and statutes prohibiting mutual orders are properly enforced, Monika should not be charged for violating the protective order.

C. Failure to Properly Enforce Protective Orders as Evidenced by the Charging of a Battered Woman Violates Her 1st Amendment Right to Petition the Government for Assistance.

The 1st Amendment provides the right "to petition the Government for a redress of grievances".[17] Monika's interest lies in the ability to petition the police for assistance in the midst of being assaulted by Mr. Brown, or during his violation of the court orders, without fear of her arrest for being in contact with abuser. Such an interest specifically has been held to be protected by the 1st Amendment. As the court stated in *Meyer v. Board of County Com'rs of Harper County, Okla*, "filing a criminal complaint with law

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16 *City of North Olmsted v. Bullington*, 139 Ohio App.3d at 569.

17 Several cases explicitly provide that filing a lawsuit such as a civil protective order, is protected petitioning activity. Research conducted in partnership with Prof. Tamara Kuennen, Sturm College of Law, University of Denver, June – July 2011. *See also* GEORGE W. PRING & PENELOPE CANAN, SLAPPS GETTING SUED FOR SPEAKING Out 16 (Temple University Press, 1996) ("Today, [the right] covers any peaceful, legal attempt to promote or discourage government action at any level (federal, state, or local) and in any branch (legislative, executive, judicial, and the electorate).") (citations omitted). Charging Monika for violation of the no contact order and protection order is a violation of her First Amendment right to petition. While some courts have addressed the right to petition in the context of domestic violence, there is a lack of precedent of how the public concern test applies to petitioning activity for battered women. In establishing a First Amendment right to petition claim, Monika must file it as a §1983 case, demonstrating " that: (1) she has an interest protected by the First Amendment; (2) defendants' actions were motivated or substantially caused by her exercise of that right; and (3) defendants' actions effectively chilled the exercise of plaintiff's First Amendment right." *See*, *e.g.*, *D'Angelo-Fenton v. Town of Carmel*, 470 F.Supp.2d 387 (S.D. N.Y. 2007). Previous cases have defined "chilling effect on rights." In *Vierria v. California Highway Patrol*, 644 F.Supp.2d 1219 (E.D. Cal. 2009), the court stated that, "To establish First Amendment claim, proper inquiry asks whether official's acts would chill or silence person of ordinary firmness from future First Amendment activities.

enforcement officials" is an application of the right to petition and "denying the ability to report physical assaults is an infringement of protected speech."[18]

Monika's attempts to report incidences of violence and violations of court orders clearly represent conduct protected by the First Amendment. Her repeated pleas for help from law enforcement, however, met with no response and arguably resulted in retaliation against her, as evidenced by her arrest. The evidence of this retaliation lies in law enforcement's repeated unwillingness to fully and effectively enforce the court's protective orders and not taking measures to locate Mr. Brown at each reported violation or to seek warrants for his arrest, for each reported violation, as authorized by statute.[19] This retaliation becomes even more blatant when we recall the numerous chastisements the police gave Monika when she sought their protection. Monika's interest in exercising her First Amendment right to petition the police for assistance in a domestic abuse incident without fear of retaliation of the police – that is, being improperly arrested for violation of the protective order - fulfills the first element of her § 1983 claim. Monika's exercise of her right to petition police officials for aid prompted the police official's action of arresting her for violating the protection order. Without Monika's seeking of state assistance through her civil protection order and contacting 911 for help, the police would have had no contact with her and thus she would not have been arrested. Arresting Monika for aiding and abetting her abuser's violation infringes on her right to file for a protective order; if she knows she may be arrested, she may be discouraged in filing for a protective order. Had Monika not "petitioned" law

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18. *Meyer v. Board of County Com'rs of Harper County, Okla,* 482 F.3d 1232, 1243 (10th Cir.,2007).

19 Id., (the court found evidence of retaliatory intent found in the deputy's resistance to the victim's effort to file a complaint against her abuser).

enforcement by calling for help, the police would not have responded to her home and chastised her for being in contact with her abuser, discouraging her from calling the police for help during other violent disputes.

Law enforcement's repeated unwillingness to respond adequately to Monika's pleas for help, tied to her arrest for violation of the protective orders, creates a significant chilling effect on the exercise of her 1st Amendment right to petition for help. Even before her arrest, Monika's attempt to obtain help and protection were rebuffed by law enforcement, discouraging her efforts to communicate with them.[20] One can only conclude that, from law enforcement's perspective, Monika's repeated calls were viewed as a nuisance rather than signs of the dangerous situation they actually were. It is precisely this improper enforcement of the protective orders, with its extreme manifested by the arrest of Monika, which created a chilling effect and infringed upon her rights to "petition the government" for assistance. Any action by a state entity that limits such action or punishes because of the exercise of the right is a constitutional violation of the 1st Amendment to petition the government for assistance. Charging victims for violations of protective orders severely limits a victim's ability to petition the government for help when reporting incidents of domestic abuse. Because of the police's response, Monika stopped calling the police for help, even when her abuser continually violated the protective order. Consequently, the lack of proper enforcement of protective orders and the fear of being arrested by police officials keeps Monika, and other battered women, from petitioning the police for aid in the future.

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[20] In *Forro Precision, Inc. v. International Business Machines Corp*., 673 F.2d 1045, 1060 (9th Cir. 1982), the Ninth Circuit ruled that the right to petition could be applied to a citizen's right in communication with the police. The court found that, "the public policies served by the free flow of information to the police…are equally strong." The court stated, "it would be difficult indeed for law enforcement authorities to discharge their duties if citizens were in any way discouraged from providing information."

The state alleges its interests in ensuring the safety of domestic violence victims must be met by enforcing the terms of those orders, and that such enforcement includes arresting protected parties. But the *proper* enforcement of such court orders demands the arrest and prosecution of offenders subject to specific restraints by court order and who have chosen, often repeatedly, to violate them. The terms of the protective orders issued against Mr. Brown in these matters impose no restraints on Monika and her conduct; there is no requirement to restrain Monika for someone else's protection, as is clearly needed in regards to Mr. Brown. As a victim and protected party, Monika cannot nullify the protection order by giving her consent; only the court may develop and enforce the terms of the protective order. Therefore, Monika's behavior is irrelevant to the abuser's violation of the protection order. The court may not, on the one hand, refuse to dismiss the court order when the victim wants to reconcile, yet, on the other, hold that she is in contempt of the court order. If the ultimate result of battered women seeking court protection and calling the police for help is the potential for their own arrest, the state only ensures that this "remedy" will become useless.

The state's purported interest in arresting Monika for her protection represents a thinly veiled disguise for a system's overall frustration with a particular class of cases and victims. In *Bullington*, the court recognized that, "the city showed a certain degree of impatience with the victim of this case…The protection order is targeted for a specific offender…Neither the city nor police officers may alter those facts to fit a particular basis or assumption."[21] Similarly, the government's interest in future deterrence of a victim's unrestricted actions should not overrule a battered

[21] *City of North Olmsted v. Bullington,* 139 Ohio App.3d at 571.

woman's right to safety. The focus remains on the abuser; protection orders restrain the abuser, not the victim. The government's true interests rest in ensuring the protection of victims and the enforcement of protection orders/no contact orders. Monika's interest lies in the ability to petition the police for help without fear of her own arrest and prosecution. It is Monika's interests, and the constitutional protection to which she is entitled, which must take priority.

II. CHARGING AND CONVICTING VICTIMS OF DOMESTIC VIOLENCE FOR VIOLATING COURT ORDERS DESIGNED TO PROTECT THEM VIOLATES THE LEGISLATIVE INTENT OF SUCH STATUTORY CREATIONS.

A. In Enacting Such Statutory Schemes, Legislatures Sought to Provide Safety to Such Victims, Thus Making Them Members of a Protected Class and Not Subject to Traditional Enforcement Mechanisms for Violations of Protective Orders.

Arresting battered women for "assisting their abuser" in violating the protective order blatantly contradicts the intent of state legislatures in creating such protective statutes. In such domestic violence statutes, legislatures focus "absolutely on the behavior of the offender with intent to punish the offender's behavior and not the behavior of the victim, whom the order is designed to protect."[22] To punish the victim's unrestricted and noncriminal behavior only makes the victim liable for the actions of her offender. Many legislatures, such as Ohio's General Assembly, recognized the struggles victims endure to safely deal with their abusers and that a victim may even "allow" the abuser back into her home. These states have included non-waivable language when creating statutes. In enacting protections for domestic violence victims, our legislature, like so many others,

[22] Id. at 570.

made the specific choice to address and attempt to prohibit dangerous conduct *by offenders*.

Like Ohio, our statute includes the following specific language: "If the offender violates a protection order" and "If the protection order violated by the offender."[23] The statutes clearly reference only the abuser, the individual against whom no contact provisions have been imposed. There is no mention of the involvement of other parties or the victim. The issue of punishing the victim for violating the statute is not addressed and it is this silence that is significant. In *Gerbadi v. United States*, the U.S. Supreme Court recognized the authority of legislatures (or Congress) to excuse some potentially criminal behaviors when those actions are committed by individuals for whom the statute is designed to protect. As the *Gerbadi* court stated, "We place it rather upon the ground that we perceive in the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished."[24] Like *Gerbadi*, our legislature's choice in the state statute to *NOT* punish the victim's conduct evidences a desire to hold victims immune from punishment in these cases. The state may not charge Monika as a primary actor for her abuser's violation of the court orders because the state statute simply does not provide for such a method of enforcement.

A charge for aiding and abetting requires an act done volitionally – that is, a person's intentional and voluntary assistance. Mere presence is not enough to prove an aiding and abetting charge. In our case, there is simply no evidence that Monika intentionally encouraged Mr. Brown to violate the court's orders. The state cannot

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[23] Ohio Rev. Code Ann. § 2919.27 (A)(4). *[Note: Cite to the specific state statute involved which references terms of restraining only offenders]*

[24] *Gebardi v. U.S.*, 287 U.S. 112, 123 (1932).

establish, as a matter of law, the required mens rea of the charge – that Monika intentionally and voluntarily aided Mr. Brown in violating the protective orders by her mere presence in his car.

Further, if a woman is charged for aiding and abetting her abuser's violation, there is a requirement of some level of volition, as well as, an act on her part. According to our statute, a person is criminally liable for aiding and abetting "if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Mere presence is not enough to establish aiding and abetting. There is no evidence that Monika intentionally or even encouraged Mr. Brown to violate the protection order. The state may not charge her as a primary for her abuser's violation because the state statute does not provide for such enforcement. Nor can the state charge her for aiding and abetting because it would violate the legislature's intent in creating the aiding and abetting statute. It is unlikely that the state could establish the required mens rea, of intentionally aiding her abuser, or voluntariness of her conduct.[25]

Battered women are members of the protected class that protective orders are designed to protect, so they may not be charged for conspiring with the abuser to violate the protection order. As the *Bullington* court noted, "the victim of a TPO is a member of the protected class designated for protection from violent abusers. Consequently, the victim may not be charged as an aider and abettor in the violation of a TPO by an

[25] In a case eerily similar to this one, the Ohio Supreme Court recognized the legislative authority to limit the state's ability to punish only offenders for violating protective order provisions. As the court held in *State v. Lucas*, 100 Ohio St. 3d at 7, "The General Assembly has made an invitation by the petitioner for the respondent to violate the terms of a protection order *irrelevant* to a respondent's guilt." (emphasis added) Similarly, our legislature's purpose in creating the statute is to make the victim's behavior unrelated in the abuser's violation of the protective order. The intent in creating protective orders is to restrain the behavior of the abuser; the legislature's intent was to not punish the battered woman. Therefore, battered women should not be charged for violating the protective orders designed to protect them.

offender."[26] As such, the legislature could not have intended that those entitled to the state's protection end up being punished for somehow contributing to the offender's violation. [27] State legislatures write statutes specifically with the intention of protecting battered women. Since battered women are members of the class sought to be protected by domestic violence statutes, they cannot be charged for violating the protective orders. The *Gerbadi* court also recognized the affirmative legislative policy to not punish protected victims in its interpretation of the Mann Act. addressed the issue of protected class in connection with the Mann Act. As the court held, "[i]t would contravene that policy to hold that the very passage of the Mann Act effected a withdrawal by the conspiracy statute of that immunity which the Mann Act itself confers."[28] To allow this protection or immunity to be undone by the complicity or aiding and abetting charge contravenes the very statute that grants the protection.[29] Similarly, we should read the statute at hand as providing immunity for battered women like Monika, who are members of the protected class, who sought protection from violence through the mechanism created by the legislature.

B. Victims of Domestic Abuse Do Not "Willfully" Disobey the Terms of Protective Orders, Thus a Contempt Charge Cannot Be Proven Beyond a Reasonable Doubt.

A required element in a charge of contempt is *willfulness*. "Only willful disobedience of a known court order will justify a conviction for contempt." [30]

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[26] *City of North Olmsted v. Bullington*, 139 Ohio App.3d at 570.

[27] *U.S. v. Annunziato*, 293 F.2d 373, 379 (2d Cir. 1961) (rationale of the protected class argument is that in creating statutes with criminal penalties, the legislature could not have intended that those entitled to the state's protection be punished).

[28] *Gebardi v U.S.*, 287 U.S. at 123.

[29] *State v. Lucas*, 100 Ohio St. 3d at 7.

[30] *Henley v. Iowa District Court*, 533 N.W.2d at 202.

Webster's dictionary defines "willfulness" as an act "done deliberately: intentional."[31] In other cases, courts have defined "willful" to include "intentional and deliberate with a bad or evil purpose or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemnor had the right or not."[32] These definitions of willfulness require a higher level of intent or *mens rea* that must be proven to support a finding of contempt.

In the instant case, there is no evidence that the Monika's actions were intentional, that she had an evil purpose without regard to the rights of others or that she willfully acted in a way which caused Mr. Brown to violate the protective order. There is also no evidence that Monika even had a known duty in regards to the criminal no contact order as there is no evidence that she ever had knowledge of the order's existence or its specific terms. Monika made no effort nor assumed any authority to changes the terms of the court's orders. She did not initiate contact with Mr. Brown and she did nothing to encourage him to violate the prohibitions of the orders. She sought only, and repeatedly, to be protected against Mr. Brown's illegal conduct. She simply cannot be held responsible for a duty to restrain herself in the same manner as Mr. Brown, who remains charged with an aggravated domestic assault crime and subject to the restraints of two protective court orders. In our case, the prosecution simply cannot muster the facts required to fulfill the definition of willfulness, as defined by our state statute or other court decisions like *Henley*.[33] Monika's contempt charge for supposedly violating the protective orders cannot stand as a matter of law.

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[31] http://www.merriam-webster.com/dictionary/willfulness

[32] *Henley v. Iowa District Court*, 533 N.W.2d at 202.

[33] The *Henley* court's decision failed to recognize what we now know of the realities of battered women involved in domestic violence situations. There is an indefinite number of reasons why battered women

C. There is Insufficient Evidence to Establish That Monika Violated the Protective Order as a Matter of Law.

This argument is case-specific and is circumstantial to the evidence of this case. Examples of what else might be discussed:

- *Specific state statute language*
- *Was the contact really within the amount of feet described in statute prohibited by the protection order?*
- *Does statute limit to only offender?*
- *Is victim a party to the original complaint? [i.e., in our case, Monika is not a party with any authority in the criminal case]*
- *Does statute contain language such as "willfully"? [i.e., there is insufficient evidence for any fact-finder to assert that Monika willfully, and beyond a reasonable doubt, violated the court's order. Monika lacks culpability since there is no evidence that her actions are within the definition of the state's definition of "willfulness." See detailed discussion of "willfulness" addressed below.]*

CONCLUSION

Charging a battered woman for allegedly violating a civil protection order or criminal no contact order entered on her behalf infringes upon her constitutional rights under the 1st, 5th and 14th Amendments. Furthermore, this action directly negates the

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choose to contact offenders including: shared custody of children, medical emergencies, and economic assistance. Not only are battered women physically abused, they may also be mentally and economically abused. Research shows that economic abuse is an abuser's sabotage of a battered woman's attempt to find, get, and keep a job, denial of any type of income, and theft from the battered woman. Fais, "Denying Access to Justice," supra at n. 11. This causes many battered women to be dependent on their abusers and encourages them to stay or return to abusers. Furthermore, there is a correlation seen in domestic violence and homelessness. Research shows that "[f]ifty percent of all homeless women and children are fleeing domestic violence." Id. at FN 96, citing Lenora M. Lapidus, "Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence," 11 Am. U. J. Gender Soc. Pol'y & L. 377, 381 (2003) (citing Department of Justice findings); see also K.J. Wilson, WHEN VIOLENCE BEGINS AT HOME: A COMPREHENSIVE GUIDE TO UNDERSTANDING AND ENDING DOMESTIC ABUSE 8 (1997) (noting that 95% of domestic violence is committed by men against women). Because battered women do not have other places to live, battered women have chosen to return to their abusers.

legislative intent behind statutes created solely to *protect* battered women and is in complete disregard of the public's interest, as well as that of individual victims, in *properly* enforcing protection orders and criminal no contact orders. Therefore, a government agency must not be permitted to arrest and/or prosecute a battered woman, listed as a protected party, for allegedly violating a civil protection order or criminal no contact order entered on her behalf