

## MEMORANDUM

**RE: Victims Charged with Criminal Culpability in Relation to Orders Issued for Their Protection**

**From: Mike Brigner**

**Date: May 27, 2003**

- I. Legal Theories of Prosecution
  - A. Victim prosecuted under state criminal statute making violation of a protection order illegal
    1. Violating a protection order is a distinct crime in most or all states.
    2. As an example, a copy of the relevant Ohio statute is attached (R.C. 2919.27).
      - a. The required mental culpability is “recklessly”.
    3. The legal loophole that allows victim prosecution is that the criminal statutes say something like “no person shall violate, etc.” No exemption is made for victims explicitly, so prosecutors can argue for charging victims and judges can justify such action.
    4. As long as there is any ambiguity in the law that allows an argument to be made for prosecution of victims, collateral legal action against the judge or prosecutor is unlikely to succeed.
  - B. Victim prosecuted under state criminal complicity statute
    1. Some states call this crime complicity, some “aiding and abetting”. The gist is assistance to a lawbreaker.
    2. This was legal framework of *Bullington* and *Lucas* cases, so the women were not actually charged with “violating their own protection order,” but rather with aiding the primary defendant to violate her protection order. [*Amicus briefs filed in these two cases are provided separately. Note that the Lucas brief contains two references to Barbara Hart works.*]
    3. As an example, a copy of the Ohio complicity statute is attached (R.C. 2923.03).
      - a. The required mental culpability is defined as the same culpability required in the criminal statute for the underlying crime. In this context, the underlying crime is violation of a protection order and the mental culpability is recklessly.
      - b. The lack of intent to violate protection order statutes should be a useful defense for victims. Useful to this defense should be the Ohio case of *State v. Parrish*, 12 Ohio St. 3d 123; 465 N.E.2d 873 (1984) [copy attached separately]. In this case undercover police deputies obtained sexual services at a massage parlor, and paid for them. The deputies filed criminal charges against the other malfeasants in the room, but their evidence was questioned as being the uncorroborated testimony of accomplices to the crimes charged. Ohio’s complicity statute disallows convictions based solely on uncorroborated accomplice testimony. The Ohio Supreme Court ruled that the deputies cannot be deemed accomplices because they had no intent to violate the law.
    4. This is the most difficult of the three legal approaches to counter, because charges under complicity statutes are not being brought under domestic violence laws or domestic

violence protection orders. The public expects that persons who assist other persons in committing crimes will be prosecuted. Thus the counter-argument rely more on policy considerations than legal interpretations.

5. However, and this issue did not appear to get argued in *Bullington* or *Lucas*, a charge of complicity is never brought against a victim in any other criminal action. Complicity to commit assault charges are never brought against assault victims, even if they frequent biker bars and buy beer for violent associates. Complicity to commit bank robbery charges are not brought against banks for keeping a lot of money in one place and inviting the public in. Complicity always involves two persons conspiring to commit a crime against a third party. The very fact that the practice of bringing complicity charges only against victims of domestic violence lends support to the argument that this type of action is a perversion of law, and probably evidence of gender violence.
6. As long as there is any ambiguity in the law that allows an argument to be made for prosecution of victims, collateral legal action against the judge or prosecutor is unlikely to succeed.

C. Victim prosecuted for contempt of court

1. Courts have inherent power, separate from criminal codes, to hold a person in contempt for violation of a court order
2. The law distinguishes direct and indirect contempt
  - a. Direct contempt must occur in the presence of the court and may be punished summarily (without further hearing). In the protection order situation, direct contempt may arise when an individual against whom a PO is issued physically harms or threatens the protected party within sight and sound of the judge. All other PO contempt actions would be indirect.
  - b. Indirect contempt occurs outside the presence of the court and may only be punished after notice and opportunity to be heard. Violations of protection orders would usually fall in this category. This distinction is important because it would be very rare when a judge may proceed with a PO contempt without setting the matter for a separate hearing. Failure to do so would be a denial of due process.
  - c. Legal action or disciplinary action against judges who deny due process in contempt cases may meet with success. Contempt is tricky ground for judges, often involving cases brought by the court itself with no prosecutor, so the judge acts as both prosecutor and judge. This makes crossing a legal or ethical line highly likely. Contempt jurisprudence shows that very few judges study contempt law sufficiently to avoid errors.
  - d. The lack of a prosecutor in most contempt cases means, of course, that these cases are not fruitful ground for pursuing actions against prosecutors.

3. The law also distinguishes civil and criminal contempt
  - a. If the court intends only to coerce compliance with an order (a daily fine, a suspended fine or jail sentence designed to insure future compliance with the order, etc.), it is a civil contempt action.
  - b. If the court intends to punish past violations of a court order with an imposed fine or jail sentence, it is a criminal contempt action. This distinction is important because a criminal contempt action may only be pursued if the alleged contemnor is provided the full range of due process rights afforded all criminal defendants: right to counsel, notice, advisement of rights, hearing conducted under criminal trial rules, opportunity to subpoena witnesses, right to cross examine witnesses, right to present defenses, etc. Again, failure to accord all of these rights to an alleged contemnor would be a denial of due process. Therefore legal or disciplinary actions against judges (but not prosecutors, as explained above) may often be pursued.
4. Contempt was the legal framework for the Kentucky cases. The news reports say that the judge held the victim in contempt for violating her own order. Caution: news reports are notoriously incomplete, if not inaccurate, due primarily to lack of legal understanding by reporters. The stories show that the alleged contempt was indirect (outside the presence of the court) and criminal (because the judge says she imposed jail time). The stories do not indicate that the judge correctly treated the matter as an indirect, criminal contempt procedurally. Therefore both defendants may have been denied due process of law. The contempt convictions could have been appealed, and perhaps could yet be set aside by collateral attack. The judge might be subject to discipline for denying due process to litigants. If coupled with any statements indicating a gender bias, the judge might be sued for civil rights violations under Title 1983.
5. The contempt cases illustrate a judicial misuse of the law that might help support legal or disciplinary complaints against judges. The actions and comments of these judges make it clear that they consider protection orders to be favors dispensed at the sufferance of the judiciary, not as a statutory legal remedy to which citizens have a right. Judges who deny protection orders upon their own whims (often blathered on the record) deny substantive due process to victims. And judges who do things like declare protection orders to be vacated without motion or hearing deny procedural due process.
6. Contempt was also the legal framework for the Iowa case described in the 7/23/02 Szana memo.
7. In the contempt scenario, it is important to distinguish whether the order allegedly being violated is a civil court order or a criminal court order. If it is a civil protection order, wherein the victim sought the order against the perpetrator, the victim actual notice that the order was in effect and was a party to the action. If the case of a civil protection

order, she will usually have actual notice that the order was in effect (in some circumstances the police or prosecutor can ask for a protection order without her presence in court). But in criminal cases, she is not a party to the action; thus attempts to hold her in contempt could be attacked on due process grounds. It is elemental in contempt law that the order being enforced must be a validly issued prior order of which the alleged contemnor had actual notice. In criminal protection order cases, there is no order issued against the victim, and could not be, as she is not a party to the action.

D. Action Possibilities Against Judges and Prosecutors

1. Litigation possibilities are included above.
2. Disciplinary complaints should be filed against a judge whenever it appears the judge ignores due process, fails to provide equal protection, demonstrates gender bias by words or action, or acts without jurisdiction (such as holding a non-party victim in contempt for violating a criminal protection order). Yes, these complaints are usually dealt with lightly and privately. But a pattern of misconduct is hard to ignore, so the more complaints that can be filed, the more seriously state supreme courts must take them. If these complaints get beyond preliminary investigation, they often are deemed public and the threat of public disclosure may temper judicial misbehavior.
3. Disciplinary complaints against prosecutors may be less likely to succeed, except where they have made public comments that show an intent to deny due process or equal protection. The fact that some courts have upheld prosecutions against victims indicate that it is possible to a prosecutor to make a "good faith" argument for pursuing such cases, which is sufficient to avoid disciplinary action. In the contempt cases, which provide the most opportunity for collateral action, prosecutors are usually not involved.

II. Policy Issues

- A. Erin Szajna's memos and the two amicus briefs in the Ohio cases set forth most of the policy issues against prosecuting domestic violence victims. Some of the more prominent policy arguments:
1. Prosecution of victims not intended by legislatures.
  2. Prosecution of victims undermines the intent if not the wording of all domestic violence statutes.
  3. Prosecution of a protected class of persons legislatively intended to be protected by a statute is contrary to law.
  4. Mutual orders of protection have been prohibited in many states, indicating legislative intent that protection orders not apply to petitioner, and arguable denying courts any authority to issue an order against a petitioner.
  5. Prosecuting victims for complicity is tantamount to simultaneously issuing and enforcing a mutual protection order against the victim.

6. If a court lacks authority to issue a protection order against a petitioner, it has not authority to hold a petitioner in contempt for violating a protection order.
7. Courts are on record as declining to enforce mutual orders of protection, as the victim has not been afforded due process: notice, opportunity to present evidence, etc.
8. Protection orders explicitly warn defendants, but not victims of consequences of violation
9. The victim's consent to reconciliation is not a consent to resumed violence.
10. Attempted reconciliation does not invalidate a protection order, as petitioners have no power to change a court order.
11. Consent is disfavored in some statutory and case law as a defense to violation of a protection order by defendants, as petitioners have no power to change a court order.
12. Reconciliation is the norm in domestic violence cases.
13. Victims should not be punished for trying to preserve a relationship.
14. Victims are often threatened or coerced, especially financially, into resuming relationships.
15. The justice system has no business trying to regulate relationships.
16. Prosecution of victims of domestic violence diverts system attention and resources from perpetrators of violence.
17. Protection orders by their own words rarely impose any legal duty upon petitioners.
18. The actions taken by victims for which some have been charged with complicity are entirely lawful actions, criminalized only by the existence of a protection order issued for the victim's protection.
19. Punishing victims as a result of her obtaining a protection order will discourage victims from obtaining protection orders.
20. Punishing victims serves to reward, not punish, violent behavior by perpetrators, and thus may encourage rather than deter further violence.
21. Victims and perpetrators who have children, unresolved divorce issues, or financial entanglements have valid reasons for continuing contact. In the case of children, this is often court-ordered continuing contact.
22. Victims are denied due process when they are subjected to criminal punishment related to a protection order when they have not been served with notice, afforded a hearing, or issued a court order specifying prohibited conduct.
23. Arresting victims conveys the message to victims that they are equally responsible for violence against them.
24. Arresting victims reinforces abusers' violent behavior and control of victims.

### III. Other Responses

- A. What appears most lacking in this debate is any public outrage over the prosecution of domestic violence victims, the undermining of state statutes, the flagrant gender bias. There are no

scathing editorials, sharp judicial rebukes, questioning letters to the editor, threats by city commissioners or state legislators to cut prosecutorial budgets if they have sufficient resources to harass victims of domestic violence, etc. In addition to legal actions, some effort to raise public visibility on this issue seems appropriate.

**§ 2923.03 Complicity.**

(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

- (1) Solicit or procure another to commit the offense;
- (2) Aid or abet another in committing the offense;
- (3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;
- (4) Cause an innocent or irresponsible person to commit the offense.

(B) It is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender.

(C) No person shall be convicted of complicity under this section unless an offense is actually committed, but a person may be convicted of complicity in an attempt to commit an offense in violation of section 2923.02 of the Revised Code.

(D) If an alleged accomplice of the defendant testifies against the defendant in a case in which the defendant is charged with complicity in the commission of or an attempt to commit an offense, an attempt to commit an offense, or an offense, the court, when it charges the jury, shall state substantially the following:

"The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.

It is for you, as jurors, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth."

(E) It is an affirmative defense to a charge under this section that, prior to the commission of or attempt to commit the offense, the actor terminated his complicity, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

**§ 2919.27 Violating protection order or consent agreement.**

(A) No person shall recklessly violate the terms of any of the following:

- (1) A protection order issued or consent agreement approved pursuant to section 2919.26 or 3113.31 of the Revised Code;
- (2) A protection order issued pursuant to section 2903.213 [2903.21.3] or 2903.214 [2903.21.4] of the Revised Code;
- (3) A protection order issued by a court of another state.

(B) Whoever violates this section is guilty of violating a protection order.

(1) If the offense involves a violation of division (A)(1) or (3) of this section, one of the following applies:

- (a) Except as otherwise provided in division (B)(1)(b) of this section, violating a protection order is a misdemeanor of the first degree.
- (b) If the offender previously has been convicted of or pleaded guilty to two or more violations of section 2903.211 [2903.21.1] or 2911.211 [2911.21.1] of the Revised Code that involved the same person who is the subject of the protection order or consent agreement or previously has been convicted of or pleaded guilty to one or more violations of this section, violating a protection order is a felony of the fifth degree.

(2) If the offense involves a violation of division (A)(2) of this section, one of the following applies:

- (a) Except as otherwise provided in division (B)(2)(b) of this section, violating a protection order is a misdemeanor of the first degree.
- (b) If the offender previously has been convicted of or pleaded guilty to two or more violations of this section or of former section 2919.27 of the Revised Code involving a protection order issued pursuant to section 2903.213 [2903.21.3] or 2903.214 [2903.21.4] of the Revised Code, two or more violations of section 2903.21, 2903.211 [2903.21.1], 2903.22, or 2911.211 [2911.21.1] of the Revised Code that involved the same person who is the subject of the protection order, or two or more violations of section 2903.214 [2903.21.4] of the Revised Code as it existed prior to July 1, 1996, violating a protection order is a felony of the fifth degree.

(C) It is an affirmative defense to a charge under division (A)(3) of this section that the protection order issued by a court of another state does not comply with the requirements specified in 18 U.S.C. 2265(b) for a protection order that must be accorded full faith and credit by a court of this state or that it is not entitled to full faith and credit under 18 U.S.C. 2265(c).

(D) As used in this section, "protection order issued by a court of another state" means an injunction or another order issued by a criminal court of another state for the purpose of preventing violent or threatening acts or harassment against, contact or communication with, or physical proximity to another person, including a temporary order, and means an injunction or order of that nature issued by a civil court of another state, including a temporary order and a final order issued in an independent action or as a pendente lite order in a proceeding for other relief, if the court issued it in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection. "Protection order issued by a court of another state" does not include an order for support or for custody of a child issued pursuant to the divorce and child custody laws of another state,

except to the extent that the order for support or for custody of a child is entitled to full faith and credit under the laws of the United States.