No. 05-FM-001429

DISTRICT OF COLUMBIA COURT OF APPEALS

WILLIAM H. ROY, III,

Respondent-Appellant,

v.

TAMARA MCCLURKIN,

Petitioner-Appellee.

Appeal from the Superior Court of the District of Columbia,
Family Division (No. CPO1273-05), The Honorable Maurice Ross

BRIEF OF PETITIONER-APPELLEE TAMARA MCCLURKIN

Barbara McDowell (D.C. Bar # 414570)
THE LEGAL AID SOCIETY
OF THE DISTRICT OF COLUMBIA
666 11th Street, N.W., Suite 800
Washington, D.C. 20001
Telephone: (202) 661-5972
Facsimile: (202) 727-2132

Randolph D. Moss (D.C. Bar # 417749)
Brian M. Boynton* (D.C. Bar # 483187)
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 663-6000
Facsimile: (202) 663-6363

Counsel for Petitioner-Appellee Tamara McClurkin

May 26, 2006

RULE 28(a)(2)(A) STATEMENT

The parties to this case, at trial and on appeal, are Petitioner-Appellee Tamara McClurkin and Respondent-Appellant William H. Roy, III. Ms. McClurkin was represented at trial by John Perkins and Michael Coe of Crowell & Moring LLP and is represented on appeal by Barbara McDowell of The Legal Aid Society of the District of Columbia and Randolph D. Moss and Brian M. Boynton of Wilmer Cutler Pickering Hale and Dorr LLP. Mr. Roy was represented at trial by Dorsey Jones and is represented on appeal by William Francis Xavier Becker. There were no intervenors or amici curiae at trial, and there are none on appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION

A Civil Protection Order ("CPO") entered on May 24, 2005 prohibited Respondent-Appellant William H. Roy, III from contacting Petitioner-Appellee Tamara McClurkin "either directly or indirectly through a third party." App. 17.[1] The very next day, Mr. Roy called Ms. McClurkin's grandmother and asked her to give a message to Ms. McClurkin: unless she dropped the CPO proceedings she had brought against him, he would pursue a lawsuit he had instigated seeking to have her family evicted from their apartment. Mr. Roy admitted making this call and conveying this message. Mr. Roy's trial counsel conceded that Mr. Roy violated the CPO by making the call and that the violation warranted a criminal contempt conviction. The Superior Court, in turn, found beyond a reasonable doubt that Mr. Roy had committed a "clear violation" of the CPO and found Mr. Roy guilty of criminal contempt. Sept. 13, 2005 Tr. 105:12-14. Yet, Mr. Roy now appeals this conviction.

Because the evidence presented at trial proved beyond a reasonable doubt that Mr. Roy willfully violated the CPO, the Superior Court committed no error of any kind. Mr. Roy's contentions on appeal—that the CPO did not prohibit him from calling Ms. McClurkin's grandmother and that he could not have known the grandmother would hold the phone in a way that allowed Ms. McClurkin to hear him—completely miss the point. Mr. Roy violated the CPO because he *indirectly* contacted Ms. McClurkin *through a third party*, not because the CPO prohibited contact with Ms. McClurkin's grandmother and not because Ms. McClurkin happened directly to hear the message Mr. Roy intended to convey to her indirectly through her grandmother. But even if there were any doubt as to the propriety of the Superior Court's

[1] Citations to "App." are citations to the Appendix of Petitioner-Appellee Tamara McClurkin filed concurrently with this brief.

determinations—and there can be none—Mr. Roy's appeal could not possibly succeed under the extremely deferential standard applicable where a party not only fails to raise below the objection he presses on appeal, but affirmatively *invites* the Superior Court to make the very decision he then challenges. Mr. Roy's criminal contempt conviction on a single count of violating the CPO must be affirmed.

STATEMENT OF FACTS

From approximately December 2004 to early May 2005, Ms. McClurkin and Mr. Roy dated and at times lived together. Sept. 12, 2005 Tr. 16:18-17:12; Sept. 13, 2005 Tr. 8:22-9:8. After the relationship between Mr. Roy and Ms. McClurkin ended, Ms. McClurkin returned to living with her daughter, her parents, and her grandmother. Sept. 12, 2005 Tr. 23:10-21. Mr. Roy continued to live in an apartment in the same building. Sept. 13, 2005 Tr. 9:3-6.

On May 4, 2005, Ms. McClurkin filed a Petition and Affidavit for Civil Protection Order seeking entry of a Temporary Protection Order ("TPO") and a CPO ordering Mr. Roy not to abuse, threaten, or harass her or her family, to stay away from her and her family, and not to contact her by telephone, in writing, or in any other manner, directly or indirectly through a third party. App. 11-14. In support of the Petition, Ms. McClurkin stated under oath that she "fear[ed] for her life and the life of her family" and that Mr. Roy had "verbally and emotionally abused [her] on numerous occasions in the past." App. 12. Specifically, Ms. McClurkin averred that on or about March 28, 2005, after she had temporarily ended their romantic relationship, Mr. Roy called her while she was at his cousin's house, "threatened to kill [her] and himself," "threatened to throw a M[o]l[o]tov Cocktail bomb into the window and kill everyone at his cousin's home," and then came to the cousin's home, requiring her to call the police. *Id.* She

also averred that on May 1, 2005, Mr. Roy had "threatened to kill [her] and himself, if [she] ever left [him]." App. 11.

The Superior Court granted Ms. McClurkin's request for a TPO the day she filed it, May 4, 2005, ordering Mr. Roy not to assault, threaten, stalk, harass, or physically abuse Ms. McClurkin or her child, to stay away from Ms. McClurkin, and not to contact her (including "indirectly through a third party"). App. 15. The next day, on May 5, 2005, Mr. Roy filed a lawsuit seeking to have Ms. McClurkin's family evicted from their apartment. Sept. 12, 2005 Tr. 25:4-10, 45:4-24; Sept. 13, 2005 Tr. 25:12-15, 95:21-98:22. On May 17, 2005, the TPO was extended to May 24, 2005. *Id.*

On May 24, 2005, the Superior Court held a trial on Ms. McClurkin's petition for a CPO. App. 8. The Court found "good cause to believe that [Mr. Roy] ha[d] committed or threatened an intrafamily offense within the meaning of [the] D.C. Code" and granted the petition pursuant to D.C. Code § 16-1005(c). App. 16-18. The CPO again ordered Mr. Roy not to assault, threaten, harass, or stalk Ms. McClurkin or her child and to stay away from Ms. McClurkin, her daughter, and her parents. App. 16-18. Most relevant here, the CPO stated: "Respondent shall not contact Petitioner in any manner, including but not limited to: by telephone, in writing, [or] in any other manner, either directly or indirectly through a third party . . . ." App. 17. The CPO indicates that Mr. Roy "was served with a copy" of the order "in open court." App. 18. Mr. Roy did not appeal the entry of the CPO, and does not challenge its entry in this appeal.

Also on May 24, 2005, pursuant to Rule 12(d) of the Rules Governing Proceedings in the Domestic Violence Unit of the Superior Court of the District of Columbia, Ms. McClurkin filed a Motion To Adjudicate Criminal Contempt, which averred that Mr. Roy had violated the TPO in a number of respects and had violated the CPO that very day. App. 19-21. Three days later,

Mr. Roy's conduct forced Ms. McClurkin to file another Motion To Adjudicate Criminal Contempt in which she described three occasions on which Mr. Roy had indirectly contacted her, in violation of the CPO, in the days immediately following its entry. App. 22-24.[2] One of those incidents, according to the Motion, involved a telephone call by Mr. Roy to Ms. McClurkin's grandmother on May 25, 2005, in which Mr. Roy asked the grandmother "to tell the Petitioner" that if she dropped the criminal contempt charge filed against him on May 24, returned certain property to him, and came back to live with him, he would drop the eviction proceedings he had instigated against Ms. McClurkin and her family. App. 23. It was this incident that gave rise to Mr. Roy's criminal contempt conviction at issue in this appeal.

The hearing on Ms. McClurkin's Motions To Adjudicate Criminal Contempt was held before Judge Maurice Ross on September 12 and 13, 2005. Counsel for Ms. McClurkin indicated that Ms. McClurkin was prepared to withdraw all but four of the then pending counts of contempt against Mr. Roy if the Court agreed to conduct a bench trial. Sept. 12, 2005 Tr. 5:17-22. The first of the four counts that remained was based on Mr. Roy's telephone call to Ms. McClurkin's grandmother on May 25, 2005. *Id.* at 6:13-7:3. Only this count is at issue in this appeal.[3]

The evidence relevant to the lone count at issue was in large part undisputed. Ms. McClurkin testified that on May 25, 2005, the day after the CPO was issued, "Mr. Roy called [her] grandmother and told [her] grandmother to tell [her] to drop the case." *Id.* at 21:7-15. Ms. McClurkin was able to testify competently on this point because when Mr. Roy called the

---

[2] In addition to these two Motions, Ms. McClurkin also filed Motions To Adjudicate Criminal Contempt on June 16, 2005, July 8, 2005, and September 8, 2005. *See* App. 25-31.

[3] Mr. Roy was acquitted of the other three counts. Sept. 13, 2005 Tr. 102:10-107:25.

apartment she shared with her grandmother (for the second time that day) her grandmother held the telephone up so both of them could hear Mr. Roy. *Id.* at 22:6-14, 23:22-24:2; *see also id.* at 27:15-23. Mr. Roy told the grandmother to tell Ms. McClurkin that unless she dropped the CPO proceedings against him, came back to live with him, apologized, returned some jewelry he had given her, and paid him rent, he would pursue the eviction action he had filed. *Id.* at 21:10-15, 22:6-12, 23:22-24:12, 27:15-23.

On cross-examination, Mr. Roy admitted calling Ms. McClurkin's grandmother, although he contended that he called within "two or three days" of the issuance of the CPO, not the very next day. Sept. 13, 2005 Tr. 39:14-40:2. Mr. Roy claimed he called Ms. McClurkin's grandmother to obtain information from her in connection with his efforts to have the family evicted. *See id.* at 41:13-42:4. But he admitted that during the call he "offer[ed] to drop [his] May the 5th complain[t] in exchange for Ms. McClurkin's" dropping the proceedings against him. *Id.* at 42:23-43:3. When asked to admit he was communicating a message to Ms. McClurkin, Mr. Roy answered that he was "communicating through the grandmother." *Id.* at 43:4-8. He also conceded that "in [his] heart" he wanted to get the message to Ms. McClurkin. *Id.* at 43:9-21. Mr. Roy never disputed Ms. McClurkin's testimony that he told her grandmother to convey his message to her.

Following the presentation of evidence, counsel for the parties made their closing arguments. With respect to the lone count at issue here arising from the May 25 call to Ms. McClurkin's grandmother, counsel for Mr. Roy stated as follows:

> I will concede the first count where Mr. Roy called the grandmother and told the grandmother to relay a message to Tamara. I don't think there is any question that's a violation of the civil protection order because he could not contact her even through a third party. But other than [that], I would ask, Your Honor, to find Mr. Roy not guilty of three counts.

Id. at 100:3-9.

After the arguments, the Superior Court issued its decision. With respect to the count arising from the May 25 call to Ms. McClurkin's grandmother, the Court made the following findings of fact: "[Mr. Roy] called Ms. McClurkin's grandmother and he relayed the message which she overheard that he would dismiss the eviction lawsuit if she dismissed the CPO. He acknowledged doing that, he acknowledged doing that to get a message to Ms. McClurkin." *Id.* at 105:8-12. The Court concluded that this conduct constituted "a clear violation of the order of indirect contact" and that it was "proven beyond a reasonable doubt." *Id.* at 105:12-14. Accordingly, the Court concluded that Mr. Roy was "guilty on that count." *Id.* at 105:14. On November 8, 2005, a judgment of conviction was entered sentencing Mr. Roy to 180 days in jail, which was suspended in its entirety, and to two years of supervised probation. App. 32.

Notwithstanding his counsel's concession that the evidence supported a conviction on the count involving the May 25 call to Ms. McClurkin's grandmother, Mr. Roy filed a Notice of Appeal of his conviction on that count. App. 33-34.[4]

ARGUMENT

On an appeal from a finding of criminal contempt, this Court's review is deferential. The Court of Appeals must view the evidence in the light most favorable to sustaining the judgment and cannot disturb the Superior Court's factual findings unless they were without evidentiary support or plainly wrong. In the circumstances of this case, however, this Court's review is even less searching than usual. Not only did Mr. Roy's trial counsel fail to raise the arguments Mr. Roy now presses on appeal, but counsel affirmatively *conceded* Mr. Roy's guilt with respect to

[4] On May 9, 2006, Judge Bartnoff extended the Civil Protection Order against Mr. Roy for another year.

the sole count at issue in this appeal. Thus, even if the Superior Court erred—which it did not—any error was invited by Mr. Roy and cannot be set aside now absent a showing that this is an exceptional situation where a clear miscarriage of justice would otherwise result—a showing Mr. Roy cannot possibly make. Indeed, Mr. Roy does not contend that he can meet the deferential standard applicable to invited errors or even the plain error standard.

The evidence of Mr. Roy's guilt is overwhelming. On May 24, 2005, the Superior Court ordered Mr. Roy not to contact Ms. McClurkin indirectly through a third party. But Mr. Roy admitted, and the evidence demonstrated, that within days of entry of the order he called Ms. McClurkin's grandmother and asked her to convey a message to Ms. McClurkin—a plain violation of the CPO. On appeal Mr. Roy argues that the CPO did not identify Ms. McClurkin's grandmother and that he could not have known the grandmother would hold up the telephone and allow Ms. McClurkin to hear the conversation. But these arguments entirely miss the point. Mr. Roy was prohibited from *indirectly* contacting *Ms. McClurkin*. The identity of the third party he chose to relay his threatening message to Ms. McClurkin was irrelevant. Similarly, the fact that Ms. McClurkin actually heard the conversation had nothing to do with Mr. Roy's violation of the CPO. He was convicted for violating the *indirect* contact provision, not the *direct* contact provision. Accordingly, whatever the standard of review—and certainly under the exceedingly deferential standard that is applicable here—Mr. Roy's conviction should be affirmed.

I. BECAUSE MR. ROY'S TRIAL COUNSEL CONCEDED HIS GUILT, THE SUPERIOR COURT'S DETERMINATIONS MUST BE REVIEWED UNDER AN EXCEEDINGLY DEFERENTIAL STANDARD

A. "On appeal of a finding of criminal contempt, [this Court] must view the evidence in the light most favorable to sustaining the judgment." *Jones v. Harkness*, 709 A.2d 722, 723 (D.C. 1998) (internal quotation marks omitted). "The trial court's findings may not be disturbed

unless they are without evidentiary support or plainly wrong." *Id.* (internal quotation marks omitted); *see also Ba v. United States*, 809 A.2d 1178, 1182 (D.C. 2002) (The Court "may not reverse the trial court's findings of a CPO violation unless they are without evidentiary support or plainly wrong." (internal quotation marks omitted)). "Judicial review is deferential, giving full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Davis v. United States*, 834 A.2d 861 (D.C. 2003) (internal quotation marks omitted).

Generally, "[w]hether the acts in which the defendant was found to have engaged constitute [a CPO violation] . . . is a question of law" to be reviewed *de novo*. *Ba*, 809 A.2d at 1182-1183. But "[w]here an issue is raised for the first time on appeal," this Court "review[s] only for plain error." *Nixon v. United States*, 728 A.2d 582, 587 (D.C. 1997); *see also Coates v. United States*, 705 A.2d 1100, 1104 (D.C. 1998); D.C. Super. Ct. Crim. R. 52(b). To satisfy the plain error standard, the "error must be (1) obvious or readily apparent, and clear under current law; and (2) so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the trial." *Coates*, 705 A.2d at 1104 (internal quotation marks omitted); *see also United States v. Olano*, 507 U.S. 725, 732-737 (1993).

When a party has not just failed to object at trial but has, in fact, *invited* the trial court to make the ruling challenged on appeal, an even more deferential standard is applicable. *See McClain v. United States*, 871 A.2d 1185, 1192 (D.C. 2005) ("Courts are especially reluctant to reverse for plain error when it is 'invited.'"); *Cowan v. United States*, 629 A.2d 496, 503 (D.C. 1993) (same); *Braxton v. United States*, 852 A.2d 941, 948 (D.C. 2004) ("[A]ny error in not interviewing Juror No. 7 was invited, and even if Braxton's attorney were complaining of it on appeal, which she is not, we would not entertain such a contention."). This Court has

"repeatedly held that a defendant may not take one position at trial and a contradictory position on appeal." *Brown v. United States*, 627 A.2d 499, 508 (D.C. 1993) ("Because defense counsel specifically asked the court not to give an instruction on this point, we will not consider appellant's present claim that the court erred in failing to give it."); *see also Brown v. United States*, 864 A.2d 996, 1001-1002 (D.C. 2005). Indeed, the Court has stated that a defendant "is bound by the position his counsel took below and may not now recant it[,] unless he demonstrates that his counsel was ineffective." *Byrd v. United States*, 502 A.2d 451, 453 (D.C. 1985); *see also Mitchell v. United States*, 569 A.2d 177, 180 (D.C. 1990) ("appellant is bound by the position that his counsel took at trial").[5]

This Court discussed review of "invited" errors at length in *District of Columbia v. Wical Ltd. Partnership*, 630 A.2d 174 (D.C. 1993). The Court explained that "[c]ourts do not look with favor on abrupt reversals of direction by litigants as they proceed from one court to the next." *Id.* at 182. "In general, parties may not assert one theory at trial and another on appeal." *Id.* (internal quotations omitted). This rule is "an essential one" because "enormous confusion and interminable delay would result if counsel were permitted to appeal upon points not presented to the court below." *Id.* (internal quotations omitted). The Court concluded that although there is not an "absolute" bar to considering claims of error that were invited, review is appropriate only in "exceptional situations where a clear miscarriage of justice would otherwise result." *Id.*

---

[5] Mr. Roy does not contend that his trial counsel was ineffective. *See* Brief with Appendix on Behalf of the Appellant William H. Roy, III ("Appellant's Brief") at 2 (noting that Mr. Roy was "ably represented by Dorsey Jones, Esquire" at trial); *see also* Sept. 13, 2005 Tr. 111:7-10 (THE COURT: "You know Mr. Jones is a good attorney." MR. ROY: "I know he is. I appreciate everything that he did."); *id.* at 115:4-6 (THE COURT: "You listen to Mr. Jones. He went to Georgetown Law School. He is well-educated and you, but you are making his job hard."). Indeed, trial counsel's strategic decision not to contest the single count that clearly had been proven may well have helped him obtain an acquittal for Mr. Roy on three of the four counts at issue at trial as well as a relatively lenient sentence (with jail time suspended).

(internal quotation marks omitted). Review is even more deferential than "plain error" review. *Id.* ("our review is not merely for 'plain error'").

B. The exceedingly deferential standard applicable to invited errors unquestionably applies to Mr. Roy's claim of error in this case. At no point did Mr. Roy raise before the Superior Court the arguments he presses on appeal—that he did not willfully violate the CPO because Ms. McClurkin's grandmother was not listed in the CPO and he could not have known that the grandmother would hold up the telephone so Ms. McClurkin could hear the conversation. At the close of Ms. McClurkin's case-in-chief, Mr. Roy moved for acquittal on three of the counts against him but not on the count at issue here, the count arising from the May 25 call to Ms. McClurkin's grandmother. *See* Sept. 12, 2005 Tr. 114:15-16 ("I won't make an argument on the phone call point. I'll just leave it at those three."). Even more striking, as noted above, during closing arguments, Mr. Roy's counsel actually conceded that conviction on the count at issue here was appropriate. He stated:

> I will concede the first count where Mr. Roy called the grandmother and told the grandmother to relay a message to Tamara. I don't think there is any question that's a violation of the civil protection order because he could not contact her even through a third party. But other than [that], I would ask, Your Honor, to find Mr. Roy not guilty of three counts.

Sept. 13, 2005 Tr. 100:3-9.

In these circumstances, even if the Superior Court erred in convicting Mr. Roy—which it did not—that error was invited by Mr. Roy. As a result, Mr. Roy's conviction may be set aside only if any error by the Superior Court was even more obvious and prejudicial than the type of "plain error" that can be corrected notwithstanding a defendant's failure to raise it below. Mr. Roy must show that his case presents an "exceptional situation" and that sustaining his

conviction would result in a "clear miscarriage of justice." As discussed below, this standard cannot possibly be met in this case.

II. UNDER ANY STANDARD OF REVIEW, MR. ROY'S CONVICTION MUST BE UPHELD BECAUSE UNDISPUTED EVIDENCE DEMONSTRATED A WILLFUL VIOLATION OF THE EXPRESS TERMS OF THE CIVIL PROTECTION ORDER

A. Section 16-1005(f) of the D.C. Code provides that "[v]iolation of any temporary or final order issued under this subchapter . . . shall be punishable as contempt." It further provides that "[u]pon conviction , criminal contempt shall be punished by a fine not exceeding $1,000 or imprisonment for not more than 180 days, or both." D.C. Code § 16-1005(f). Section 16-1005(g) mandates that "[a]ny person who violates any protection order issued under this subchapter . . . shall be chargeable with a misdemeanor." *Id.* § 16-1005(g).

To hold a party in criminal contempt for violating a CPO, it must be proven "beyond a reasonable doubt that [the] defendant engaged in: (1) willful disobedience (2) of a protective court order." *Ba*, 809 A.2d at 1183.[6] "Since § 16-1005(g) is a general intent statute, '[p]roof of the intent element . . . only requires proof that the [defendant] intended to commit the actions constituting [violation of the court order].'" *Id.* (quoting *Grant*, 734 A.2d at 177 n.6) (third alteration in original); *see also Jones*, 709 A.2d at 724 ("Generally, [willful] means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law." (alteration in original, internal quotation marks omitted)). A defendant must be "on notice of the specific conditions" of the relevant court order he is charged with violating. *Vaas v. United States*, 852 A.2d 44, 46 (D.C. 2004); *see also In re*

---

[6] Where a party is held in criminal contempt for violating a court order outside of the presence of the Court, obstruction of the "orderly administration of justice" need not be shown. *Baker v. United States*, 891 A.2d 208, 214-215 (D.C. 2006); *Grant v. United States*, 734 A.2d 174, 177 (D.C. 1999).

Jones, No. 01-FM-1462, 2006 WL 1277771, at *3, *5 (D.C. May 11, 2006). Ordinarily, however, demonstrating that the defendant was on notice requires only a showing that he was served with the order setting forth the requirement violated. *See In re Dixon*, 853 A.2d 708, 712-713 (D.C. 2004) ("To argue that appellant did not understand the implications of the CPO when he was personally served with a copy of it is, on this record, essentially frivolous.").

B. Here, there can be no doubt that the elements of a criminal contempt violation were met. First, it is clear that Mr. Roy violated the CPO by indirectly contacting Ms. McClurkin through a third party, her grandmother. The CPO, which was issued May 24, 2005, provided: "Respondent *shall not contact Petitioner* in any manner, including but not limited to: by telephone, in writing, [or] in any other manner, either directly or *indirectly through a third party* . . . ." App. 17 (emphasis added). The Superior Court concluded, however, that on May 25, 2005, Mr. Roy "called Ms. McClurkin's grandmother and *he relayed the message* which she overheard that he would dismiss the eviction lawsuit if she dismissed the CPO." Sept. 13, 2005 Tr. 105:8-10 (emphasis added). The court found that Mr. Roy acknowledged making the call and "acknowledged doing that *to get a message to Ms. McClurkin.*" *Id.* at 105:10-12 (emphasis added).

These factual findings were fully supported by the testimony adduced at trial. Ms. McClurkin, who overheard the telephone call to her grandmother (with whom she lived), *see* Sept. 12, 2005 Tr. 22:4-14, 23:22-24:2, 27:15-23, testified that "Mr. Roy called my grandmother and told my grandmother *to tell me* to drop the case," *id.* at 21:10-12 (emphasis added). Indeed, on cross-examination, Mr. Roy admitted calling Ms. McClurkin's grandmother after the CPO was issued and admitted that he "offer[ed] to drop [his] May the 5th complain[t] in exchange for Ms. McClurkin's" dropping the proceedings against him. Sept. 13, 2005 Tr. 39:14-40:2, 42:23-

43:3. Mr. Roy conceded that he was communicating a message to Ms. McClurkin "*through* the grandmother" and that "in [his] heart" he wanted to get the message *to Ms. McClurkin*. *Id.* at 43:4-8, 43:9-21 (emphasis added).

Second, the evidence revealed that Mr. Roy's conduct was "willful" and that Mr. Roy had notice of the CPO prohibition he violated. As discussed above, the relevant case law requires only that Mr. Roy have intended his action—calling Ms. McClurkin's grandmother to convey a message to Ms. McClurkin—and have been on notice that that action was in violation of the CPO. *See Ba*, 809 A.2d at 1183; *Grant*, 734 A.2d at 177 n.6; *Jones*, 709 A.2d at 724; *Vaas*, 852 A.2d at 46. The CPO itself indicates that Mr. Roy "was served with a copy" of the order "in open court," App. 18, and Mr. Roy acknowledged at the hearing that he knew it had been issued, *see, e.g.*, Sept. 13, 2005 Tr. 19:3-16. The text of the order, moreover, plainly prohibits the precise conduct Mr. Roy engaged in, "contact[ing]" Ms. McClurkin "indirectly through a third party." App. 17. It is therefore clear that Mr. Roy was on sufficient notice. *See Dixon*, 853 A.2d at 711-712 (service of order setting forth prohibition sufficient to demonstrate defendant on notice).

The nature of Mr. Roy's indirect contact with Ms. McClurkin reinforces the Superior Court's conclusion that Mr. Roy acted willfully. Mr. Roy did not simply say "excuse me" as he passed Ms. McClurkin on the sidewalk. The evidence indicates that Mr. Roy's message for Ms. McClurkin—to be transmitted through her grandmother—was much more threatening: if she did not, among other things, drop the criminal contempt proceedings she had instigated against him and come back to live with him, then he would press forward with his attempt to have her family evicted from their apartment. *See* Sept. 12, 2005 Tr. 21:12-15, 22:6-12, 23:22-24:12; Sept. 13, 2005 Tr. 42:23-43:3 (Mr. Roy's admission that he called to offer to drop his suit if she would

drop hers).[7] This attempted coercion not only violated the text of the CPO but also contravened its purpose, affording Ms. McClurkin relief from Mr. Roy's threatening conduct.[8]

The arguments Mr. Roy raises on appeal rest on a fundamental misunderstanding of the nature of his conviction. Mr. Roy first argues that he did not willfully violate the CPO because he contacted Ms. McClurkin's grandmother, and the grandmother was "not identified or sufficiently referenced as a person to be protected within the terms of the CPO." Appellant's Br. at 5; *see also id.* at 7-8. But Mr. Roy was not convicted for contacting Ms. McClurkin's grandmother. Rather, he was convicted for "indirect[ly] contact[ing]" Ms. McClurkin. Sept. 13, 2005 Tr. 105:7-14. Indeed, Mr. Roy's trial counsel understood this point all too well, stating during his closing argument: "I will concede the first count where Mr. Roy called the grandmother and told the grandmother to relay a message to Tamara. I don't think there is any

---

[7] For this reason, this Court's decision in *In re Jones* is inapposite. There, this Court concluded that the respondent had not willfully violated the no contact provision of a CPO when he said "watch out" to the petitioner as they left the well of the courtroom following the hearing at which the CPO was issued. *See* 2006 WL 1277771, at *1-2, *3-5. Because the trial court had been unable to determine whether the respondent's words had been a threat or an "apology of excuse me," the trial court relied on the respondent's violation of the "stay away" provision of the CPO to demonstrate his willfulness. *See id.* at *3-4. But this Court concluded that the respondent had no way of knowing that his actions—passing the petitioner as he left the well of the courtroom—would violate the stay away provision of the CPO. Compliance with the CPO's requirement that the respondent stay 100 feet from the petitioner was impossible in the courtroom, yet the judge had instructed the parties "to approach the bench simultaneously to pick up the court's order" and "to remain in the courtroom to communicate with one another about paternity and child support issues (contrary to the literal language of the no contact provision)." *Id.* at *4. Here, of course, Mr. Roy was faced with no similar "contradictory" instructions. Mr. Roy faced only an order instructing him not to contact Ms. McClurkin "indirectly through a third party"—which is exactly what he did, the day after the order was entered.

[8] It is often important for CPOs not only to require the respondent to stay away from the petitioner, but also to prohibit all contact, direct and indirect. Among other things, a victim may be induced by such contacts to return to the abuser, placing herself back into a situation of physical danger. Even if the victim does not do so, such conduct can perpetuate her emotional abuse and prevent her from putting the relationship behind her.

question that's a violation of the civil protection order because he could not contact her even through a third party." *Id.* at 100:3-8.

Mr. Roy also argues that he could not have willfully violated the CPO because "[i]t was the grandmother who placed the telephone receiver to the ear of petitioner" and she did so without his knowledge. Appellant's Br. at 6; *see also id.* at 4-5, 8. Mr. Roy's violation of the CPO, however, did not turn on Ms. McClurkin's overhearing of Mr. Roy's conversation with her grandmother. As Mr. Roy's trial counsel recognized, *see* Sept. 13, 2005 Tr. 100:3-8, and as the Superior Court concluded, it was the fact that Mr. Roy called the grandmother in order "to get a message to Ms. McClurkin" that gave rise to a violation of the "*indirect contact*" provision of the order, *id.* at 105:11-14 (emphasis added). Talking directly to Ms. McClurkin would have been "direct" contact with her, not "indirect contact through a third party." App. 17. It was relevant that Ms. McClurkin heard Mr. Roy's conversation only because Ms. McClurkin's elderly grandmother did not testify at trial. When Ms. McClurkin initially testified about Mr. Roy's conversation with her grandmother, Mr. Roy's trial counsel (understandably) raised a hearsay objection. *See* Sept. 12, 2005 Tr. 21:7-17. When Ms. McClurkin explained that she had in fact heard the conversation herself, that objection was overruled. *See id.* at 21:18-22:14. Thus, whether Mr. Roy knew or could have known that Ms. McClurkin's grandmother would hold the phone up to her ear is completely beside the point.[9]

---

[9] Mr. Roy notes in a footnote to his brief that Ms. McClurkin's May 27, 2005 Motion To Adjudicate Criminal Contempt alleges that Mr. Roy called her grandmother on May 25, 2005 but that Mr. Roy testified that the call occurred two or three days after the CPO was issued on May 24, 2005. *See* Appellant's Br. at 8 n.3. Mr. Roy concedes, however, that this discrepancy between the allegations of the Motion and his testimony "may not necessarily be fatal to the charging documents." *Id.* In any event, the Superior Court appears to have credited Ms. McClurkin's testimony that Mr. Roy's call was on May 25, 2005. *See* Sept. 12, 2005 Tr. 21:7-10; Sept. 13, 2005 Tr. 105: 7-10.

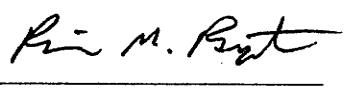
* * * * *

Because it is clear that the Superior Court committed no error of any kind in convicting Mr. Roy of criminal contempt based on his violation of the CPO, the Superior Court's decision must be affirmed regardless of the applicable standard of review. But even if the Superior Court were deemed somehow to have erred, that error was not even plain, much less so obvious and extremely prejudicial as to permit a reversal here, where Mr. Roy's trial counsel conceded his guilt. As discussed directly above, Mr. Roy's only arguments on appeal rest on a fundamental misunderstanding of his conviction and provide no basis for questioning the Superior Court's decision. Mr. Roy certainly has not demonstrated that this case presents the kind of extraordinary situation that would allow him to prevail.

CONCLUSION

For the reasons set forth above, Mr. Roy's criminal contempt conviction should be affirmed.

Respectfully submitted,



Randolph D. Moss (D.C. Bar # 417749)
Brian M. Boynton* (D.C. Bar # 483187)
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 663-6000
Facsimile: (202) 663-6363

Barbara McDowell (D.C. Bar # 414570)
The Legal Aid Society of the District
of Columbia
666 11th Street, N.W., Suite 800
Washington, D.C. 20001

Telephone: (202) 661-5972
Facsimile: (202) 727-2132

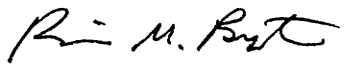
Counsel for Petitioner-Appellee Tamara McClurkin

CERTIFICATE OF SERVICE

I, Brian M. Boynton, hereby certify that on May 26, 2006, I caused a true and correct copy of the foregoing Brief of Petitioner-Appellee Tamara McClurkin to be served by Federal Express on:

William Francis Xavier Becker
Mercantile Potomac Bank Building, 2nd Floor
260 E. Jefferson Street
Rockville, MD 20850
(301) 340-6966

Counsel for Respondent-Appellant William H. Roy, III



Brian M. Boynton