

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: UNITED STATES, Petitioner v.

ALVIN J. DIXON

CASE NO: 91-1231

PLACE: Washington, D.C.

DATE: Wednesday, December 2, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 91-1231

ALVIN J. DIXON :

- - - - -X

Washington, D.C.

Wednesday, December 2, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 a.m.

APPEARANCES:

WILLIAM C. BRYSON, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the Petitioner.

JAMES W. KLEIN, ESQ., Washington, D.C.; on behalf of the
Respondent.

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
WILLIAM C. BRYSON, ESQ.	
On behalf of the Petitioner	3
JAMES W. KLEIN, ESQ.	
On behalf of the Respondent	26
REBUTTAL ARGUMENT OF	
WILLIAM C. BRYSON, ESQ.	
On behalf of the Petitioner	49

1 P R O C E E D I N G S

2 (11:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 91-1231, United States v. Alvin J. Dixon.

5 Mr. Bryson, you may proceed whenever you're
6 ready.

7 Spectators are admonished, the Court remains in
8 session. There's to be no talking in the courtroom.

9 ORAL ARGUMENT OF WILLIAM C. BRYSON

10 ON BEHALF OF THE PETITIONER

11 MR. BRYSON: Mr. Chief Justice, and may it
12 please the Court:

13 The issue in this case is whether the double
14 jeopardy clause bars successive prosecutions for contempt
15 of court and substantive criminal offenses which are based
16 on the same underlying conduct.

17 Our position is that the double jeopardy clause
18 does not bar such successive prosecutions because crimes
19 such as assault with intent to kill or drug trafficking
20 are not the same offense as contempt of court.

21 Now, this case comes to the Court on certiorari
22 to the District of Columbia Court of Appeals. The facts
23 of the case briefly are as follows. Respondents were both
24 proceeded against under contempt of court proceedings for
25 violating court orders that prohibited them from engaging

1 in certain criminal acts.

2 Respondent Dixon was barred by an order that was
3 part of a pretrial release condition that provided that he
4 should not commit any crimes, and Respondent Foster was
5 found to have violated a civil protection order which
6 provided that he must not assault, molest, or threaten his
7 wife.

8 After they were both found in contempt for
9 violating those orders, they were prosecuted criminally
10 for, in Foster's case, assault with intent to kill, and
11 other assaults, and in Dixon's case for the drug
12 trafficking offense that formed the basis for his contempt
13 proceeding.

14 QUESTION: Now, would the prosecutor in those
15 subsequent criminal proceedings prove anything that wasn't
16 already proved at the contempt hearings?

17 MR. BRYSON: In these particular cases, no, the
18 prosecutor would not prove any additional facts. The
19 conduct is the same.

20 QUESTION: So literally it falls within at least
21 the language of Grady v. Corbin.

22 MR. BRYSON: I think literally it probably does
23 fall within the language of the formulation that the Court
24 adopted in Grady. Now, I hasten to add -- this is a major
25 part of our submission here -- that that formulation the

1 Court has already said in Felix was unduly broad and the
2 Court noted in Felix that that formulation should not be
3 followed to the limits of its language.

4 QUESTION: Do you think that this Court in Menna
5 and in Colombo at least indicated that it thought perhaps
6 double jeopardy applied in contempt situations?

7 MR. BRYSON: No, Your Honor, and let me move
8 directly to Menna and Colombo, because the Respondents
9 discuss Menna and Colombo in some detail --

10 QUESTION: Yes.

11 MR. BRYSON: And I think they are easily
12 distinguishable.

13 Both of those cases involved a New York -- a
14 sort of double header New York contempt statute. There
15 was -- and if I can go into the details of those statutes,
16 it's important.

17 One of them was section 750 of the judiciary law
18 of New York, which was contempt, and provided that a court
19 could hold somebody in contempt for a variety of acts,
20 including refusal to comply with an order to testify.

21 There was another provision of New York law,
22 section 600 of the penal law that was in effect in those
23 days, which had almost exactly the same language, also
24 entitled contempt, and provided that courts could penalize
25 people for various things, including failure to testify in

1 response to a direct order of the court.

2 To the extent that there's any suggestion -- and
3 the Court in this case did not -- in -- excuse me, in
4 Colombo and Menna did not reach the underlying double
5 jeopardy questions, but to the extent that there's any
6 suggestion that there was merit to the underlying double
7 jeopardy claims, it was simply saying that you can't
8 prosecute somebody for contempt and then come back and say
9 well, we're going to prosecute you for contempt again,
10 when the two contempt proceedings have exactly the same
11 elements.

12 That case did not at all involve the situation
13 that we have here, where we have a contempt proceeding
14 which has elements A and B, and we have criminal acts
15 which are not part of contempt which have elements D, E,
16 and F. The elements simply do not overlap in this setting
17 and that, in our view, makes all the difference.

18 Now --

19 QUESTION: Mr. Bryson, if I understand what
20 you're saying, the premise of what you're saying is this,
21 that criminal contempt does not have as its element, or as
22 an element, the commission of either one of the two crimes
23 which these respective parties committed.

24 MR. BRYSON: That's correct.

25 QUESTION: But it seems to me that that's really

1 not the point. Isn't the point not whether the generic
2 offense, if you will, of criminal contempt has elements of
3 other crimes, but whether the court order in this case has
4 as its -- whether violation of the court order in this
5 case required proof of a crime, and in fact the court
6 order in this case did forbid a crime and its violation
7 required the proof, so why isn't this like Harris v.
8 United States?

9 MR. BRYSON: Your Honor, because we don't think
10 that the offense in the sense that that term is used in
11 the double jeopardy clause is a violation of this
12 particular court order.

13 The offense is contempt of court. Now, let me
14 give you an analogy --

15 QUESTION: Yes, but it's equally true that there
16 is no offense of contempt of court unless there is a court
17 order and the offense is confined to the elements of that
18 order, isn't that true?

19 MR. BRYSON: Well, the Government certainly, or
20 the court, if the court is proceeding in the contempt
21 proceeding, has to prove that in fact that court order was
22 violated, but it is no different, Your Honor --

23 QUESTION: Well, it does, but may I just ask
24 this -- and I realize I keep interrupting you. I'll stop
25 at some point --

1 MR. BRYSON: It's all right.

2 QUESTION: I promise you. There is one
3 essential respect in which the offense of contempt of
4 court is different -- criminal contempt of court is
5 different from the normal crime, and that is, it has no
6 specific elements.

7 No one can be charged generically with contempt
8 of court. One can only be charged with contempt for
9 violating a specific order, and therefore it seems to me
10 that any contempt analysis has got to include the specific
11 order that was violated, and if that includes the elements
12 of a crime, i.e. because it forbids the commission of any
13 crime, that is the datum that you look to to decide
14 whether you're talking about a Harris situation.

15 MR. BRYSON: Well, I don't think so, Your Honor,
16 and let me give you an analogy that I think applies here.

17 Suppose the crime in question is failure to
18 follow a lawful order of a police officer. That would not
19 incorporate, in effect, all possible human activity that
20 could be subject to a police officer's order as being
21 elements of that crime.

22 The crime is failing to follow an order of a
23 police officer, and if the order of a police officer is
24 don't shoot that man, it doesn't make murder a lesser
25 included offense, in effect, of the offense of failing to

1 follow a lawful order of a police officer. It's the same
2 situation here.

3 QUESTION: Well, it seems to me the trouble is
4 there that the -- at least as generally understood, the
5 offense of failing to follow the order of an officer
6 refers to orders for the commission or the prohibition of
7 discretionary acts, not the incorporation by police
8 officers of the criminal law -- of specific provisions of
9 the criminal law, so I don't think that analogy gets you
10 anywhere.

11 Do you agree with me that there is at least an
12 essential difference between the offense of criminal
13 contempt and the offense, let's say, of burglary, in the
14 sense that there are no specific elements of the offense
15 of criminal contempt? You cannot charge a criminal
16 contempt without something more, i.e., a court order. Do
17 you agree with that?

18 MR. BRYSON: Well, I wouldn't put it that way.
19 No, I don't agree with that, Justice Souter. The offense
20 of criminal contempt does have elements which is violation
21 of a court order. Now, the --

22 QUESTION: But you've got to have a court order.

23 MR. BRYSON: Well, that's right, but in a false
24 statement offense you have to have a false statement. The
25 offense is making a false statement, let's say within the

1 jurisdiction of a Federal agency. The Government has to
2 actually prove what the statement was and then show that
3 it was false. That's no different, I think --

4 QUESTION: But what it's proving in the criminal
5 contempt case is, if you will, the analog of the content
6 of the law, whereas in your example of the false
7 statement, what it is proving is the act which happened
8 also to be a violation of the law.

9 MR. BRYSON: Well, Your Honor, I think it is --
10 when you go -- when you look at the elements of the
11 offense, which is what's critical here, the fact that
12 there is conduct, and really the conduct here is the
13 violation of the particular order, it's -- the facts of
14 the case are -- excuse me -- are the order of the Court
15 and the fact of the violation of that particular order,
16 that doesn't count in the way Blockburger looks at the
17 separate elements of an offense --

18 QUESTION: Well, isn't that the --

19 MR. BRYSON: As an element of a crime.

20 QUESTION: Isn't that the issue in this case --

21 MR. BRYSON: Well --

22 QUESTION: Whether it counts or not?

23 MR. BRYSON: Well, Your Honor, I think it's
24 clear that when you talk about the elements of contempt
25 you're not talking about the details of the particular

1 order and the particular violation of the order that's at
2 issue in the particular case, because otherwise you really
3 are looking at conduct.

4 QUESTION: Mr. --

5 MR. BRYSON: You've adopted a same conduct test.

6 QUESTION: Mr. Bryson, so supposing someone, a
7 spectator during a jury trial in a trial court just gets
8 up and starts yelling, he can be held in contempt, can't
9 he, without showing that he violated any particular order
10 of the court?

11 MR. BRYSON: He could, Your Honor, yes, that's
12 right.

13 Now, I think in response to Justice Souter's
14 question, Justice Souter is limiting the question, as I
15 understand it, to cases in which brands of contempt that
16 involve the violation of an order -- in other words,
17 contempts emerging from injunctions or other orders --

18 QUESTION: In other words, you're not claiming
19 that if there had not been an order here saying don't
20 commit a crime, that he could have been held in
21 contempt -- criminal contempt of court if he had
22 committed --

23 MR. BRYSON: No, we're not claiming that --

24 QUESTION: Okay.

25 MR. BRYSON: That's right.

1 QUESTION: May I just ask you to carry your
2 response to Justice Souter one step further?

3 Why is this different from the felony murder
4 case, then?

5 MR. BRYSON: Oh, I think it's very different,
6 because in felony murder, Your Honor, you have an
7 aggravated form of a lesser offense in which the
8 aggravating statute incorporates by specific reference all
9 the elements of the lesser --

10 QUESTION: Just like the contempt, which
11 incorporates all the different kinds of criminal conduct
12 that could be prohibited.

13 MR. BRYSON: Well, I think it's -- no, Your
14 Honor, I don't think so. Contempt is --

15 QUESTION: Well, what's the difference. That's
16 what I --

17 MR. BRYSON: The difference is that in Harris v.
18 Oklahoma sort of situation, where the statute says anybody
19 who commits, let's say, burglary or robbery and uses a
20 firearm is subject to an aggravated penalty. That is in
21 the nature of a lesser included offense with a greater
22 form, the aggravated form --

23 QUESTION: No, I understand, but supposing the
24 felony murder that says that the crime can be committed if
25 you kill someone in the course of rape, robbery,

1 burglary --

2 MR. BRYSON: That's right.

3 QUESTION: Ten different felonies --

4 MR. BRYSON: Right.

5 QUESTION: Why is that different than contempt,
6 that would be naming one of several alternative violations
7 of law to carry it out --

8 MR. BRYSON: Well, if the statute --

9 QUESTION: That's under -- just in a Blockburger
10 analysis.

11 MR. BRYSON: If you had a contempt statute that
12 said anybody who commits the following five felonies --

13 QUESTION: Any --

14 MR. BRYSON: And does so in violation of a court
15 order, then I think you would have a close analogy to
16 Harris, but that's not the way the contempt statute in
17 this case and contempt statutes --

18 QUESTION: This is --

19 MR. BRYSON: Typically read. They do not
20 provide -- they do not incorporate the specific elements
21 of the underlying felonies, or the underlying crimes.

22 QUESTION: No, but when you have court orders
23 that do, why don't they meet the Blockburger standard
24 everybody talks about here? It seems to me Blockburger
25 is -- the same suggestion I guess Justice Souter was

1 making.

2 MR. BRYSON: Well, it is simply the difference,
3 Your Honor, between an offense and conduct that may
4 constitute an offense as we see it. In other words, the
5 conduct in the case of contempt is the violation of the
6 particular court order that's been entered in --

7 QUESTION: And also a violation of the
8 statute --

9 MR. BRYSON: Well, but the legislature did
10 not --

11 QUESTION: Which is the same in the felony
12 murder. It's the -- it's a killing, and it's also
13 committing one of alternative offenses.

14 MR. BRYSON: But the greater offense
15 incorporates specifically the elements of a lesser
16 offense.

17 QUESTION: Well, so does the contempt here.

18 MR. BRYSON: I think not, Your Honor. The -- it
19 does not incorporate --

20 QUESTION: That's what I don't --

21 MR. BRYSON: The elements of the lesser crimes.
22 It simply says any court order, whatever it is, whether
23 it's a crime, whatever it is, if you violate a court order
24 you've committed a crime.

25 To say that that makes a lesser included offense

1 of everything that a person could do that could possibly
2 be subject to a court order, it seems to me is to --

3 QUESTION: And also would be an independent
4 violation of law.

5 MR. BRYSON: Twist the notion of lesser included
6 offenses.

7 QUESTION: And also be an independent violation
8 of law.

9 MR. BRYSON: That's right, but that is to carry
10 the notion of lesser included offenses, Your Honor, we
11 think to the point that it no longer has any meaning, in
12 the sense that this Court has used it in Grady and Harris.

13 QUESTION: Mr. Bryson, what could the prosecutor
14 have done here when receiving knowledge of what, for
15 example, Mr. Dixon had done? Could Dixon have been
16 detained and jailed pending the criminal proceedings?

17 MR. BRYSON: Yes. Yes. Your Honor, there were
18 several possibilities. First, Dixon --

19 QUESTION: Because there is a concern here. I
20 mean, these cases can involve people who feel that their
21 life and safety is threatened and they need some
22 protection.

23 MR. BRYSON: Absolutely. The first --

24 QUESTION: Now, what could the prosecutor have
25 done?

1 MR. BRYSON: Well, the two cases present
2 different options for the prosecutor.

3 In Dixon, in a sense the prosecutor has more
4 options because the prosecutor is more directly in control
5 of the situation. In this case, the prosecutor in Dixon
6 went to the court and said, we would like a modification
7 of the terms of the bail release, and suggesting an
8 increase in the bond. The court said no, I think this is
9 serious enough that it is deserving of contempt
10 proceeding.

11 The court could also have simply revoked the
12 release of Dixon on the murder charge which he was --

13 QUESTION: So the court deprived the prosecutor,
14 possibly, of the option of going ahead with the criminal
15 charges if double jeopardy attaches.

16 MR. BRYSON: That is the problem in this
17 setting, is that the court is in a position that it can
18 deprive the prosecutor of proceeding with the criminal
19 case.

20 Now, that problem is even more serious in the
21 Foster-type setting, because you've got two very important
22 interests at stake. On the one hand, you have the
23 interest of the woman, typically, in -- who has the civil
24 protection order and who's being assaulted by her husband.
25 She wants immediate relief and is entitled to immediate

1 relief -- going into court, asking for a contempt
2 adjudication which may be the only way that she can get
3 the assaultive behavior to stop.

4 Everything else has been tried. They've gotten
5 a civil protection order. It doesn't work. She needs
6 quick, effective relief, so she goes in for contempt, and
7 that's a very sympathetic situation in which to grant
8 contempt.

9 But it may well be that the prosecutor is not in
10 a position at that point to go forward with criminal
11 charges, or it may well be that the prosecutor doesn't
12 even have notice that she's proceeding on the contempt
13 angle and therefore if Dixon and Foster is correct -- the
14 decision below in Dixon and Foster is correct, the
15 prosecutor will be foreclosed from bringing very serious
16 criminal charges in a situation in which the defendant is
17 subject to no more than 6 months imprisonment under the
18 family court contempt proceedings that are at issue here.

19 Now, of course, there's another general contempt
20 statute in the District of Columbia which was not invoked
21 here which provides for longer contempt incarceration, but
22 6 months is the limit that someone in Foster's position
23 was exposed to, even though the conduct he engaged in was
24 much more serious than a 6-month sentence would suggest.

25 QUESTION: Mr. Bryson, let me just be sure

1 about -- of course, your theory applies even if they've
2 taken -- asked for a contempt punishment of a couple of
3 years. Your theory would still be the same.

4 MR. BRYSON: That's correct.

5 QUESTION: And your theory would also be the
6 same if in the first proceeding the defendant were
7 acquitted.

8 MR. BRYSON: Yes, Your Honor, that's right.

9 Now, that -- let me turn to why it is that we
10 think --

11 QUESTION: Suppose he were acquitted on the
12 basis of identity. It was -- the assault -- in the Foster
13 case the assault was committed by someone else, he still
14 could be tried on the assault charge if he --

15 MR. BRYSON: Well, that would depend on the
16 resolution of the collateral estoppel claim. Of course,
17 he would, as he did below, claim with respect to some of
18 the --

19 QUESTION: There is an Ashe v. Swenson
20 collateral estoppel argument.

21 MR. BRYSON: There is an issue.

22 QUESTION: Yes.

23 MR. BRYSON: Now, we -- that isn't before the
24 Court and how that is resolved is -- of course depends in
25 part on how the Court addresses this question, but that

1 would be an argument that he no doubt would make in that
2 setting.

3 But there's an even greater danger, let me point
4 out, of an acquittal in the following setting. Suppose
5 what you've got is a Foster-type situation in which the
6 contempt proceeds first, and the basis for the contempt is
7 an attempted murder by Foster against his wife, and the
8 judge acquits Foster not on the ground that the murder
9 didn't take place or that Foster didn't commit the murder,
10 but on the ground that Foster didn't have notice of the
11 order.

12 In that situation, if this -- if the lower court
13 decision is right in this case, and these are the same
14 offense, then we would not be able to proceed with the
15 attempted murder charge in the criminal case because the
16 offense would already have been prosecuted, even though --

17 QUESTION: Even if the prosecutor never knew
18 about the contempt proceedings.

19 MR. BRYSON: Even if the prosecutor never knew
20 about the contempts. That is the ultimate horrible case,
21 and that case doesn't come up very often and it's not
22 presented here, but I think that is the implication.

23 QUESTION: Mr. Bryson, I don't understand why
24 you would be estopped in that case, because in the
25 instance in which you've just described there would indeed

1 have been an element not peculiar to the criminal statute
2 itself, i.e., notice of the court order, and therefore the
3 acquittal of the criminal contempt would not necessarily
4 imply a finding inconsistent with any of the elements of
5 the criminal offense alone.

6 MR. BRYSON: No, it wouldn't, Your Honor, but if
7 you have one --

8 QUESTION: You're saying --

9 MR. BRYSON: The double jeopardy clause says you
10 can't prosecute twice for the same offense. Once you
11 cross the river and say the contempt is the same
12 offense --

13 QUESTION: No, I misunderstood you. I thought
14 you were just saying on estoppel principles apart from --

15 MR. BRYSON: No. No, Your Honor, I'm suggesting
16 a much broader problem, which is once you say that it is
17 the same offense, then unless this Court simply changes
18 the double jeopardy rule with respect to same offenses,
19 the implication surely is that the defendant cannot be
20 proceeded against under the quote, lesser offense of
21 attempted murder.

22 QUESTION: Well --

23 MR. BRYSON: That's the mischief of --

24 QUESTION: Maybe the mischief is letting judges
25 issue orders prohibiting the commission of crimes. I

1 mean, maybe they shouldn't do that.

2 MR. BRYSON: Well, Your Honor, I think --

3 QUESTION: You have a law against it anyway.

4 The fellow knows he's going to go up the river for a
5 number of years. Why do you have to lay on top of that a
6 judicial order telling him, don't commit a crime?

7 MR. BRYSON: Well, Congress has required it in
8 the case of the Bail Reform Act, that one of the
9 provisions that has to go into these bail orders is, don't
10 commit any crimes.

11 QUESTION: Well, maybe that was a bad idea.

12 MR. BRYSON: Well, maybe it is a bad idea. Your
13 Honor --

14 QUESTION: Well, but that's not subject to a
15 contempt power, is it --

16 MR. BRYSON: Yes.

17 QUESTION: Or am I incorrect on that?

18 MR. BRYSON: Yes.

19 QUESTION: Under the Bail Reform Act there's a
20 contempt --

21 MR. BRYSON: Well, certainly under the D.C. act.
22 I believe --

23 QUESTION: No, I'm talking about the
24 congressional act.

25 MR. BRYSON: I'm not certain, Your Honor,

1 whether it's -- also there's a specific contempt provision
2 in the Bail Reform Act, but I believe so. I believe in --
3 section 3147 I believe has a contempt, but I can't tell
4 you for sure on that because I just don't recall.

5 QUESTION: Mr. Bryson, your horrible example
6 about failing to prove notice to the greater --

7 MR. BRYSON: Yes.

8 QUESTION: That would apply to any greater and
9 lesser offense situation --

10 MR. BRYSON: That's right.

11 QUESTION: In which the Government fails to
12 prove the element that is --

13 MR. BRYSON: That's right.

14 QUESTION: Unique to the greater offense.

15 MR. BRYSON: That's right.

16 QUESTION: But do you disagree with that general
17 rule?

18 MR. BRYSON: No. I think the general rule is
19 true, and that's why it's important to confine this notion
20 of greater and lesser offenses to situations in which --

21 QUESTION: Well, it's important to confine the
22 double jeopardy clause as much as we can, of course, yes.

23 MR. BRYSON: They really are greater and lesser
24 offenses, that's right.

25 QUESTION: Mr. Bryson, the Government in its

1 brief, I think, one of it's arguments is that contempts
2 have traditionally been regarded as separate from the
3 substantive offenses, and you cite a number of cases. Are
4 you going to leave that argument to your brief, or are you
5 going to discuss it during your oral argument?

6 MR. BRYSON: I was going to discuss it briefly.

7 I think it is important to lay the historical
8 background for this rule and to note how well-founded this
9 rule is in both this Court's cases and in the common law,
10 and I will just say that the Debs case and in particular
11 the Chapman case from this Court makes quite clear that
12 this Court regards -- at least up until Grady v. Corbin
13 has always regarded contempt and the substantive offense
14 as being separate offenses, and that's consistent with the
15 common law approach to the problem.

16 It's quite clear under common law the contempt
17 was regarded as a separate offense from substantive crimes
18 that were based on the same conduct, and that has been the
19 position of every court of appeals and every State supreme
20 court up until Grady v. Corbin. This is a well-
21 established principle of double jeopardy law.

22 QUESTION: But have there been any cases from
23 this Court between Debs and Chapman and Grady that support
24 that?

25 MR. BRYSON: No, Your Honor.

1 QUESTION: There was a gap of what, 100 years,
2 is it, or 90 years?

3 MR. BRYSON: Well, no, I think that Chapman was
4 the earlier part of this century, but it's certainly been
5 50-plus years, that's right.

6 The issue did not come up. I think there is a
7 reason that the issue did not come up, which was because
8 as all of the lower court cases were saying, were
9 accepting the proposition that this was settled law. It
10 became unsettled only because of Grady v. Corbin.

11 QUESTION: But it is clear that the law of
12 contempt has changed rather dramatically since 1897.

13 MR. BRYSON: The procedural --

14 QUESTION: That's exactly right.

15 MR. BRYSON: Part of the law of contempt, that's
16 right.

17 QUESTION: Requiring jury trial and so forth,
18 yes.

19 MR. BRYSON: But not the substantive law of
20 contempt, Your Honor. It always was understood contempt
21 had the same elements that it does now, and it was a
22 crime. There's no question that it's always been --
23 criminal contempt has always been regarded as a crime, so
24 the substantive status of contempt was always the same.

25 It has -- additional procedures have attached to

1 contempt such as jury trial, but the substance of the
2 offense has been the same, and therefore presumably the
3 analysis of whether it's the same offense as a substantive
4 crime would have stayed the same.

5 Now, the Court in Grady changed all this, at
6 least as perceived by the lower courts, with the
7 formulation that the Court adopted in Grady, which was the
8 formulation that this Court talked about in Felix, that to
9 establish an essential element of an offense charged in
10 the second prosecution, the State will prove conduct that
11 constitutes an offense for which the defendant has already
12 been prosecuted.

13 Now, read broadly, that formula we concede would
14 appear to cover this case, but that is an extremely broad
15 formulation which has proved very difficult to apply. We
16 have urged the Court and do continue to urge the Court
17 either to limit that formulation by limiting Grady to its
18 context, or overruling Grady.

19 Now, the Court has already done the first in
20 Felix. What the Court has said is that the formulation in
21 Grady cannot be applied broadly, cannot be applied outside
22 of the context of Grady, that -- the Court said that taken
23 out of context and read literally the language from the
24 formulation supports the defense of double jeopardy, but
25 we decline to read the language so expansively because of

1 the context in which Grady arose and because of
2 difficulties that have already arisen in its
3 interpretation.

4 The context of Grady was a lesser-included
5 offense context, or, as the Court expressed it, if not
6 technically a lesser-included offense, at least a species
7 of lesser-included offense.

8 In Grady and in Vitale before it, the reckless
9 driving by or traffic infractions that were the first
10 prosecuted provided a basis on which you could infer at
11 least either the establishment of recklessness, the
12 element of the greater offense, or at least go a long way
13 to establishing that.

14 As we've argued here, it's very different in
15 contempt, because without knowing a fact of the case, the
16 fact of what's in the court order, the violation -- a
17 violation such as assault with intent to kill or drug
18 trafficking does not tend to establish any element of
19 contempt.

20 I would like to reserve the rest of my time for
21 rebuttal.

22 QUESTION: Very well, Mr. Bryson. Mr. Klein,
23 we'll hear from you.

24 ORAL ARGUMENT OF JAMES W. KLEIN
25 ON BEHALF OF THE RESPONDENT

1 MR. KLEIN: Mr. Chief Justice and may it please
2 the Court:

3 The United States wants to prosecute Mr. Dixon
4 and Mr. Foster for breaking the law after they have
5 already been prosecuted for breaking these same laws in
6 violation of court orders. I have three points to cover
7 with respect to the application of the double jeopardy
8 clause in these circumstances.

9 First, if we could set aside just for a moment
10 the special features of contempt, I think it would be
11 clear that further prosecution here violates the double
12 jeopardy clause under pre-Grady principles, and we think
13 that the controlling principles are those in Harris and
14 actually with respect to Dixon the principles of Brown v.
15 Ohio.

16 As a matter of law, the offenses now being
17 prosecuted were component offenses or elements of the
18 offenses that were prosecuted first, so we don't think the
19 Court needs to talk about conduct at all. We think a
20 facial examination of the applicable laws takes this Court
21 to the principles of Harris or Brown.

22 My second point would be that there should be no
23 change in the Court's general rule that a comprehensive
24 offense and a component offense are the same offense for
25 double jeopardy purposes simply --

1 QUESTION: You don't contend, do you, Mr. Klein,
2 that these offenses don't meet the Blockburger test?

3 MR. KLEIN: Well, I think, actually, with
4 respect to Dixon, where the court's order was -- I'm
5 sorry, with respect to Foster, where the order was do not
6 commit an assault and do not commit a threat as defined by
7 the District of Columbia Criminal Code, that yes, these
8 are like -- these meet Brown and therefore Blockburger.
9 They are tradition, included offenses.

10 With -- I'm sorry.

11 QUESTION: Well, when I say, meet the
12 Blockburger test, I mean that each contains an element
13 that the other doesn't.

14 MR. KLEIN: Well, I do -- I think that they fail
15 the Blockburger -- I always get confused which is meeting
16 and which is --

17 QUESTION: Well, it is an ambiguous question, at
18 which side of the fence you're looking at at trial.

19 MR. KLEIN: That's right. I think that one of
20 these cases, Foster, could be decided under the principles
21 of Brown, that the crimes now being prosecuted constitute
22 elements of the crimes previously prosecuted, and in
23 Dixon, where the Court's order was, it is a crime to
24 commit any crime, that that is comparable to the
25 relationship of the two laws in Harris v. Oklahoma which

1 was the felony murder statute.

2 And I think that the comparison -- and this is
3 really very important, and I think this is why Grady
4 really isn't needed to decide the relationship in this
5 case, is that we can make that comparison between the
6 definition of the offenses being prosecuted simply by a
7 facial examination of the laws, one a judge-made law, of
8 course, that being the contempt, and the other a statutory
9 law, but we don't have to ask about conduct or what the
10 prosecutor's theory of the case was.

11 QUESTION: Well, does your position mean that
12 any time a criminal defendant having been convicted and
13 let's say placed on probation on typical terms, which is
14 that you be law-abiding, and then the probationer is
15 brought in back to the sentencing court because of
16 committing some criminal offense, not remaining law-
17 abiding, and so the probation is revoked.

18 Now, would you say double jeopardy prevents any
19 subsequent prosecution there as well?

20 MR. KLEIN: Absolutely not, Your Honor, because
21 the standard procedure --

22 QUESTION: Why not?

23 MR. KLEIN: The standard procedure there would
24 be to utilize -- would be to revoke the probation and to
25 put the person -- incarcerate the person. That would not

1 be --

2 QUESTION: But the probation would be revoked by
3 proving the commission of the offense, so you're right
4 back where you are in this situation.

5 MR. KLEIN: The difference, Your Honor, is that
6 the revocation of probation is not a criminal proceeding
7 the way a prosecution for criminal contempt is.

8 QUESTION: Well, why is Foster's prosecution
9 treated that way? The U.S. Attorney wasn't involved in
10 that. Mrs. Foster came in and prosecuted that.

11 MR. KLEIN: Because this Court has said
12 repeatedly in Young v. -- excuse me, in the Providence
13 Journal case, and in the Young case, that a criminal
14 contempt prosecution, regardless of who actually handles
15 the prosecution, is a criminal prosecution on behalf of
16 the sovereign.

17 And in fact we think that -- and that was said
18 twice, and in fact that goes back to Gompers, 50 or 60
19 years before, that a criminal contempt prosecution is
20 between the public and the defendant and it is not part of
21 the underlying civil proceeding, which is what there was
22 in Foster, and that it is a -- that the criminal contempt
23 is a crime in the ordinary sense, regardless of who
24 prosecutes it, and we think that the answer, Your Honor,
25 to --

1 QUESTION: Well, I wonder if that's accurate in
2 the context in which these things arise. Mrs. Foster went
3 to court in connection with a domestic proceeding to get
4 some protection. Why should the subsequent contempt
5 proceeding be treated like a criminal prosecution?

6 MR. KLEIN: Well, no one has doubted in this
7 litigation to this point, and I didn't hear the Government
8 doubt it this morning, that that was in fact a criminal
9 prosecution, a criminal contempt prosecution.

10 The judge at Mr. Foster's trial said it was a
11 criminal prosecution. He said that the Government --
12 excuse me, he said that the attorney there, who was
13 representing the Government, would have to prove the
14 contempt beyond a reasonable doubt, and the sentence that
15 was imposed was a determinate sentence, which is as I read
16 this Court's jurisprudence always of tremendous importance
17 in deciding whether the proceeding is remedial and civil
18 or punitive and -- not punitive, but criminal, because the
19 sentence is to punish for the affront to the court's
20 dignity.

21 And I think that that's really the critical
22 point here, which is that the sole purpose of the criminal
23 contempt is to vindicate the authority of the court and
24 not to protect private litigants, and -- for the
25 litigants, including victims, have other recourse.

1 QUESTION: Mr. Klein, accepting that point, is
2 there -- do you agree that there is a distinction between
3 the Dixon and the -- what is it, the --

4 QUESTION: Foster.

5 QUESTION: I can't read -- Foster cases in the
6 sense that in the Dixon case the authority of the court in
7 this case to grant pretrial release could have been
8 vindicated by revoking the pretrial release for the
9 commission of the crime, whereas in Foster there doesn't
10 seem to be any practical way -- the domestic relations
11 case, there doesn't seem to be any practical way that the
12 court could enforce its order except by means of some kind
13 of a criminal contempt sentence. A civil contempt
14 proceeding, for example, I suppose simply would not have
15 been efficacious.

16 MR. KLEIN: I assume that's true. I think that
17 distinction obviously exists, but I don't think that it's
18 a distinction that has any bearing on the double jeopardy
19 question in this case, because in each of these cases, and
20 as the cases come before the Court now, there was a
21 criminal prosecution. For whatever reason, the courts
22 decided to go ahead with contempt.

23 Those judgments are -- they're final, they're
24 presumably legitimate, and both Dixon and Foster have
25 stood trial and faced the Government on --

1 QUESTION: Oh, indeed they did, I don't dispute
2 that. I mean, the point of my question was, I guess, that
3 to the extent that there is going to be any necessity
4 analysis, that would be a predicate for different results
5 in the two cases.

6 MR. KLEIN: Well, I think that one might be able
7 to say that if we were back at the earlier stage and
8 asking the question whether the court should go ahead and
9 punish for contempt, there would arguably be greater
10 necessity in the one in Foster than in the other, but in
11 terms of whether Foster and Dixon have a right to claim
12 double jeopardy at this point, I think that the cases are
13 entirely the same.

14 QUESTION: Mr. Klein, what you say makes sense
15 to me but for the long tradition of the country. How do
16 you explain that tradition? What -- I mean, it's just a
17 novel proposition, that you can't do what was done here.

18 MR. KLEIN: Well, I think I would lose this case
19 a hundred years ago. I obviously don't think I should
20 lose it today.

21 Ever since the Court decided Debs, it has been
22 asking itself why should the interest that underlies the
23 contempt power produce different results? What does that
24 amount to?

25 QUESTION: Debs is the watershed, you think.

1 MR. KLEIN: I think that Debs is the watershed.
2 It's not been straight downhill. It's a bit like hiking
3 where you come down, and then unfortunately you have to go
4 back up more than you like.

5 It has been a struggle, but the path from Debs
6 to Bloom is unmistakable. It is the course of this Court
7 repeatedly asking that question and increasingly coming to
8 the conclusion that contempt should be treated as a crime
9 in the ordinary sense, and I think that there are two
10 principles underlying that statement.

11 That is not a slogan. It's anything but a
12 slogan. It is a hard-won principle that I think reflects
13 first the Court's sense that, unless the contempt power is
14 tightly tethered to the Bill of Rights, it is
15 inconceivable that the exercise of that power can be
16 restricted to the least power necessary.

17 And there is a second component, and the second
18 component is the Court's recognition -- I think that Bloom
19 is the crowning point here -- is the Court's recognition
20 that in terms of the impact of a contempt prosecution on
21 the individual, in terms of the effect on individual
22 liberty of the sort that the Bill of Rights is directed
23 to, that contempt is in many ways indistinguishable, and I
24 think that's especially true here.

25 QUESTION: Well, I think you're right that

1 contempt was considered something quite separate from
2 criminal prosecution originally and that it's changed with
3 Debs, but the question is, shall it be considered the same
4 as a criminal prosecution for all purposes?

5 We faced that question a few years ago and
6 decided, for example, that the court can appoint its own
7 prosecutor for contempt, thus raising the problem that the
8 Government poses in this case -- the prosecutor doesn't
9 even have to know that a contempt proceeding is going on.

10 So we are inevitably confronted with the
11 question, having decided that contrary to what the common
12 law tradition had been we're going to treat contempt as a
13 criminal matter, are we going to treat it as a criminal
14 matter for all purposes?

15 Now, we certainly haven't treated it as a
16 criminal matter for purposes of whether the court can
17 appoint the prosecutor.

18 MR. KLEIN: I agree, but I --

19 QUESTION: Why not make an exception for double
20 jeopardy as well, or else maybe --

21 MR. KLEIN: Because the rule that I think
22 underlies Bloom, and which is really the result of the
23 history, is that contempt will be treated as a crime in
24 the ordinary sense unless there's a compelling necessity
25 to carve out a special rule for contempt, and there is no

1 necessity, and this Court's decision in Young, Your
2 Honor --

3 QUESTION: The necessity is that the Court can
4 be imposing a slap on the wrist for contempt and depriving
5 the prosecutor of the ability on behalf of the people to
6 put the person away for a much longer term.

7 MR. KLEIN: I disagree. I think that the
8 Government greatly misreads Young and the import of the
9 decision in Young. Young puts the prosecutor in the
10 driver's seat.

11 Young says, at least in the Federal courts --
12 and any other jurisdiction now has a model that it could
13 follow -- Young says these prosecutions must be referred
14 in the first instance to the public prosecutor, and then
15 the prosecutor can control the timing of when the contempt
16 prosecution is brought.

17 The prosecutor should do what prosecutors
18 normally do before they bring a case. They should see
19 what other offenses would be jeopardy-barred if not
20 brought at the same time.

21 QUESTION: But I mean, what happens sometimes is
22 the court wants to vindicate its dignity and the
23 prosecutor says, I'm not as interested in vindicating your
24 dignity as I am in putting this person away. I do not
25 want to prosecute for the contempt. If there's going to

1 be this double jeopardy consequence, I choose not to.
2 What does the court do then?

3 MR. KLEIN: The prosecutor has a choice. If the
4 prosecutor is concerned about the double jeopardy
5 implications, the prosecutor simply says, yes, I will
6 accept responsibility for the contempt prosecution and I'm
7 going to bring it, judge, when I'm ready to bring the
8 prosecution on the substantive charge and the Government
9 elects not to bring the contempt prosecution, that's not
10 the Government being preempted, that's the Government
11 making a decision to share prosecutorial power.

12 QUESTION: So you have to bring together the
13 contempt prosecution and the substantive criminal offense
14 prosecution.

15 MR. KLEIN: Yes, Your Honor. Yes.

16 QUESTION: Well, that's a novel doctrine.

17 MR. KLEIN: Well, it's not --

18 QUESTION: It's totally novel.

19 MR. KLEIN: Well, it's novel in the sense that
20 the Court has not --

21 QUESTION: I never heard of it being done. Have
22 you ever heard of it being done?

23 MR. KLEIN: Yes, and we cite at least one
24 case --

25 QUESTION: One case.

1 MR. KLEIN: We cite at least one case where the
2 Government brought an indictment charging criminal
3 contempt and there's no problem with adding a count in an
4 information or an indictment alleging contempt.

5 QUESTION: And there could be two punishments if
6 Blockburger is met.

7 MR. KLEIN: Absolutely, Your Honor. I mean, I
8 think it's very important that I make clear, we are not
9 challenging the power of the court to impose separate
10 punishments in these cases.

11 QUESTION: But if under the holding of the court
12 below, I suppose, if the criminal prosecution occurred
13 first, then the court couldn't subsequently bring a
14 contempt proceeding.

15 MR. KLEIN: If the court allowed the --

16 QUESTION: It would work both ways --

17 MR. KLEIN: Yes.

18 QUESTION: The double jeopardy.

19 MR. KLEIN: Yes, it would work both ways.

20 QUESTION: So only if the prosecution were
21 brought by the prosecutor simultaneously, the two, could
22 there be any possibility of both goals being achieved.

23 MR. KLEIN: That's right. There has to be a
24 cooperative venture, but I think, Your Honor --

25 QUESTION: That certainly is a surprising

1 development in the law, wouldn't you say?

2 MR. KLEIN: Well, I don't think it's a
3 surprising development if the Court is prepared to say, as
4 I think the Court's jurisprudence is leading it to say,
5 that contempt is a crime in the ordinary sense for these
6 purposes and that these cases -- that one is simply a
7 component part of the other.

8 QUESTION: Well, Bloom was decided, what, 25
9 years ago. I mean, it's not as if it were decided last
10 year. One would have expected to see a rash of these
11 double prosecutions that you refer, if that's now
12 required. But you say you have one case.

13 MR. KLEIN: The question was -- no, no. The
14 question was just, is it possible, and is there any
15 support for the authority -- excuse me, any support for
16 the proposition that a contempt prosecution can be brought
17 at the same time as another offense, and my answer is yes,
18 that there's nothing unusual about it. What's the
19 hardship?

20 QUESTION: Well, you're talking -- you say you
21 only have one example of it being done.

22 MR. KLEIN: Well, it's -- well, I -- that's
23 right, but that's because no one has contested it as a
24 possibility. I mean, the Government --

25 QUESTION: Well, maybe no one has contested the

1 double jeopardy aspect of the thing.

2 MR. KLEIN: Well, this doesn't arise very much,
3 Your Honor. These cases are really sort of oddball cases.
4 The whole issue has arisen only twice that we know of in
5 Federal court in the last 65 years, and both times the
6 courts came out in our favor.

7 So there is apparently no Federal practice, no
8 entrenched practice of having two prosecutions, because
9 the only district courts that have looked at it in 65
10 years have said, you can't do that. If you want to bring
11 them, bring them together.

12 So it's not a State -- it's not a Federal
13 practice, Your Honor.

14 QUESTION: Mr. Klein, your model of coordinated
15 law enforcement might work fine for Dixon. How does it
16 work for Foster?

17 Because isn't the point -- leaving aside the
18 rhetoric of the court's dignity, and so on, isn't the
19 point of a court that is administering a domestic
20 relations case load, as the Foster court was, that it's
21 got to be able to vindicate itself in a hurry if it's
22 going to have any effectiveness in enforcing its orders at
23 all?

24 So that in Foster's case, if in fact the assault
25 had been committed, and if we assume, as I think we do

1 commonly assume, that there's got to be some kind of a
2 criminal rather than civil contempt remedy, it wouldn't
3 have been any answer to the concern of the court -- the
4 legitimate concern of the court for the prosecutor to say,
5 well, I'll bring in information and we'll put this down on
6 the trial calendar and I will include a contempt count as
7 well as a substantive assault count.

8 I don't know how many weeks or months would go
9 by in the District of Columbia, but the fact is, if that
10 were the procedure the trial court would be left with no
11 immediate means to -- in effect to vindicate its order and
12 no immediate means to have an effective order. Isn't that
13 fair to say?

14 MR. KLEIN: That's true. The court could not
15 achieve immediacy, but I think this Court has already come
16 to the conclusion that if a contempt does not occur in the
17 courtroom, then immediacy is not an essential part of the
18 court's ability --

19 QUESTION: Well, isn't the consequence, though,
20 of applying that kind of a rationale in this situation
21 that the possibility of enforcing these kinds of domestic
22 relations injunctions is pretty well foregone?

23 Because you can't -- I mean, as a practical
24 matter you can't enforce them unless you can -- unless you
25 have some credible interrum mechanism, and the truth is

1 that a prosecution weeks or months later is far less
2 effective than a criminal contempt trial which can be
3 begun on pretty short notice.

4 MR. KLEIN: That's true, Your Honor, but it's
5 true of -- that's true of crime generally. I mean, the
6 fact that somebody's charged with a homicide --

7 QUESTION: Yes, but we've got a separate -- I
8 mean, as the other side has said, there is a separate
9 interest here. We're trying to run the courts
10 effectively, and that seems to me a separate and
11 legitimate interest in addition to the general public
12 interest in the enforcement of crime.

13 MR. KLEIN: Right, and I think, Your Honor, that
14 the courts should in these instances put pressure on the
15 Government to bring any substantive criminal prosecution
16 swiftly, and the question is, does the court's interest
17 have to be vindicated so much more quickly than the
18 general public interest?

19 QUESTION: Well, it's not so much the court's
20 interest. The fact is, the only way to make these orders
21 effective in order to vindicate the interests of the
22 people who are getting beaten up is in fact to have some
23 very rapid procedure for retribution if they are violated.
24 That isn't just the court's interest, that is the interest
25 of the victims.

1 MR. KLEIN: Well, I think that's putting a lot
2 of weight on the purpose of criminal contempt, and I think
3 that --

4 QUESTION: Well, how else are you going to
5 enforce these orders?

6 MR. KLEIN: Well, the orders themselves can't be
7 enforced except by criminal contempt --

8 QUESTION: Oh.

9 MR. KLEIN: And I agree -- the orders
10 themselves. But the victims of domestic violence can be
11 protected through many other mechanisms that don't require
12 the court either to recast and expand the purposes of
13 criminal contempt or require the bending of the double
14 jeopardy rules. Number 1, the prosecutors should make
15 domestic violence a priority.

16 QUESTION: I guess somebody who's subjected to
17 domestic violence who is not fortunate enough to be
18 engaged in the process of a lawsuit at the time has to
19 wait for the wheels of the normal criminal process to
20 grind away, right?

21 MR. KLEIN: They do, and the question, Your
22 Honor, is why do they --

23 QUESTION: And we consider it okay in that
24 context.

25 MR. KLEIN: That's true, but I want to make the

1 point that --

2 QUESTION: I'm trying to help you, Mr. Klein.

3 (Laughter.)

4 MR. KLEIN: I understand, Your Honor, and that
5 was my point about a homicide. When someone is charged
6 with a homicide, the public is threatened during the
7 pendency of the trial and the Government can't come in and
8 quickly prosecute the person for the underlying assault --

9 QUESTION: I suppose the judge could immediately
10 haul the assaultive spouse before the court and charge him
11 with criminal contempt and hold him without bail.

12 MR. KLEIN: That's right, your Honor. I think
13 in fact -- it may sound surprising, coming from a public
14 defender -- that preventive detention has to be an answer
15 in these cases. It is the traditional -- somewhat
16 traditional noncriminal means of preventing future harm
17 during the pendency of a trial, and I --

18 QUESTION: So you agree that preventive
19 detention would work in the example that I was giving.

20 MR. KLEIN: Yes, Your Honor, and I think in fact
21 preventive detention is actually particularly appropriate
22 when you're talking about a class of people who have
23 already broken a court order.

24 QUESTION: But you referred to it as a
25 noncriminal sanction. Certainly a pretrial -- I take it

1 you're referring to a pretrial detention.

2 MR. KLEIN: Yes, Your Honor.

3 QUESTION: Pretrial detention isn't available
4 except as an incident to a criminal -- a serious criminal
5 prosecution, is it?

6 MR. KLEIN: That's right, and serious criminal
7 contempt, and not only that, Your Honor, but many
8 jurisdictions are making it a crime to violate a domestic
9 violence order. I think we put in our brief, some 38
10 States have done that, and that is a serious crime.

11 The other part of the answer I was trying to --
12 I was giving Justice Souter was that the Government should
13 speed up the prosecution of domestic violence. In the
14 Dixon case, which was a drug case, they returned an
15 indictment in 6 days, and in the Foster case --

16 QUESTION: For litigants, however, right?

17 MR. KLEIN: But in --

18 QUESTION: It's a very small part of the whole
19 problem, if that is a major problem. You're really just
20 talking about vindication of the court. That's the only
21 thing that's special.

22 Outside of that, you have people who are being
23 subjected to violence. It's just as bad whether you're
24 engaged in litigation at the time or whether you're not
25 engaged in litigation at the time. If it takes 2 years to

1 prosecute it, that's terrible for both categories of
2 people, isn't it?

3 MR. KLEIN: I agree, Your Honor.

4 QUESTION: So the only distinctive
5 characteristic is the dignity of the court somehow.

6 MR. KLEIN: I agree, the question referred to
7 that as the rhetoric of the court's decision, and if there
8 was a concern there, I wanted to deal with it.

9 Justice O'Connor, I think you were given some
10 inadvertently slightly wrong information in response to
11 one of your questions.

12 In the Dixon case, the prosecutor moved to
13 modify Dixon's pretrial release, and he cited in his
14 motion the indictment, and he came before the court and
15 they started the proceeding.

16 At some point the judge said, I don't think that
17 I would have a basis to modify his bail if my concern is
18 flight, and then the judge said to the prosecutor -- and
19 this is critical to the facts -- are you seeking
20 preventive detention, and the relevant provision is in our
21 brief. It's D.C. Code Section 23-1329(c).

22 That would have allowed for the preventive
23 detention of Dixon on the showing that he had violated a
24 condition of his release. There would have been a lesser
25 showing than was needed to prove the contempt. One was

1 clear and convincing evidence of the violation.

2 The prosecutor said, no, I don't want to seek
3 preventive detention, and it was --

4 QUESTION: How long can preventive detention
5 last under the D.C. Code, and what are the grounds for it?

6 MR. KLEIN: I think under the provision we're
7 talking about -- I could be wrong. I don't think that
8 there's a time limit with respect to this particular
9 preventive detention component.

10 QUESTION: That's unusual, because at least in
11 Federal law it's been very much circumscribed.

12 MR. KLEIN: But Your Honor, there wouldn't have
13 been a problem here anyway, because the Government already
14 had the indictment in hand, so in terms of joining
15 everything together, the prosecutor could simply have
16 said, Your Honor, I don't know that I want to go ahead
17 with a criminal contempt prosecution, but if that's what
18 we're going to do, let's proceed on the indictment, and
19 they could have done it all together.

20 I agree that Foster looks somewhat different.
21 If there's going to be a system, if the States are going
22 to have a system of private prosecution, then it's going
23 to be harder for them to comply with the double jeopardy
24 clause.

25 But this Court set up a system in Young. This

1 Court said, the cases should be referred to the public
2 prosecutor, and then in Young, what we have was a full-
3 scale policy decision by the United States Attorney's
4 Office for the District of Columbia not to treat contempts
5 arising out of civil protection order violations as if
6 they were criminal, and this Court said in Young, they're
7 not part of the civil proceeding, they are criminal.

8 If the U.S. Attorney or any prosecutor is going
9 to squander the power that Young says the prosecutor
10 should have, then I don't think it's legitimate for the
11 prosecutor to be able to come back later and say that we
12 were preempted. That's just bad prosecutorial policy, and
13 that's what happened in both of these cases, and that's
14 why these cases I think are something of an oddball.

15 These were not cases of the court's insisting on
16 vindicating its authority right now. The record in Foster
17 in particular shows the judge saying, can you reach a
18 settlement, have you talked to the U.S. Attorney's Office
19 about it? I don't really care about any of that. So we
20 didn't have the court's viewing the vindication of their
21 authority as requiring immediate action.

22 I think that when we pull back from this case
23 for a moment the Government is saying, it's easy, just
24 treat contempt as different, but I think the Government is
25 asking the Court to do something quite extraordinary.

1 QUESTION: Mr. Bryson was correct. He missed it
2 by just one section. It's 3148 of the Bail Reform Act.
3 It does provide for criminal contempt as one of the
4 sanctions for violating a bail order, which it seems to me
5 gives some added focus to the discussion that we've been
6 having.

7 MR. KLEIN: Just -- that's true. There's always
8 been, at least in the past couple of Federal statutes, a
9 provision for contempt, and there is no tradition -- I'm
10 fairly certain of this, Justice Kennedy -- no tradition at
11 all of using contempt to violate for new crimes committed
12 while on release. In fact --

13 QUESTION: Thank you, Mr. Klein.

14 MR. KLEIN: Thank you, Mr. Chief Justice.

15 QUESTION: Mr. Bryson, you have 4 minutes
16 remaining.

17 REBUTTAL ARGUMENT OF WILLIAM C. BRYSON

18 ON BEHALF OF THE PETITIONER

19 MR. BRYSON: Very briefly, first, with respect
20 to the Young case, I think it's important to remember that
21 Young was a supervisory power case that applied only to
22 the Federal courts.

23 This problem that we're talking about,
24 particularly the Foster case, which I think is the more
25 widespread problem that this legal issue touches on, is

1 essentially a State law question.

2 It is no accident that this arises from the
3 local courts in the District of Columbia. This has been a
4 problem that has come up in the local State courts much
5 more frequently than it has in the Federal courts, and in
6 those courts something like 41 different States have
7 adopted a contempt provision as a means of enforcing civil
8 protection orders. It is a very important part of the
9 procedures, and it isn't something that can easily be
10 rolled into the criminal prosecution process.

11 The individuals who are subject to these civil
12 protection orders have already shown themselves not to be
13 some people that are moved by the existence of general
14 criminal liability for assault, and so forth, because when
15 a civil protection order is obtained, it's generally on a
16 showing that there has been an assault, or at least very
17 clear threats of assault already.

18 They also are not moved, even after the civil
19 protection order, by the fact that there is a civil
20 protection order, because they have violated it, so they
21 need to have some very specific and strong remedy. That's
22 what contempt is for, and that's why it is so important to
23 not water down the effect of contempt in this setting, and
24 I would add one other point.

25 QUESTION: Mr. Bryson, may I just interrupt you

1 for a minute?

2 What do you say to the suggestion that criminal
3 contempt can be charged, preventive detention can be
4 imposed in the Foster situation, and prosecution can take
5 place subsequently in the normal course, so that as a
6 practical matter you get the offender away from the
7 victim?

8 MR. BRYSON: Well, contempt can clearly be
9 charged, but in many States preventive detention is not
10 available for offenses such as simple assault, and in fact
11 I don't believe --

12 QUESTION: If that is so, isn't that the problem
13 of the State, not the problem of the double jeopardy
14 clause?

15 MR. BRYSON: Well, I'm not sure the solution to
16 the current problem is to get around the problem by
17 creating the capacity for preventive detention for minor
18 offenses and then using it for long periods of time, such
19 as 6 months.

20 I think that's really using preventive detention
21 to serve a purpose to get around the problem, that you
22 really are holding him in contempt but you're calling it
23 preventive detention and thereby avoiding the double
24 jeopardy clause. I don't think that's really a
25 satisfactory result, jurisprudentially.

1 QUESTION: Yes, but to the extent that you're
2 concerned that you need to make the contempt proceedings
3 officially serious, is there any limit on the court's
4 power to impose the same punishment they would impose they
5 would impose in a criminal prosecution?

6 MR. BRYSON: If the court has a statute, a
7 general contempt statute that has no limit on the amount
8 of time that can be made the sentence, that's right, there
9 would be no restriction.

10 But typically in these situations, that's not
11 the case, and here the statute under which the proceeding
12 was brought, the contempt statute in this particular case,
13 had a limit of only 6 months to it -- at least, the
14 proceeding under the Intrafamily Act.

15 QUESTION: Yes, but there can be more than one
16 6 months consecutively, can't it be?

17 MR. BRYSON: For various acts, that's right.

18 QUESTION: Yes. Yes.

19 MR. BRYSON: And to be sure, to acknowledge the
20 point made by respondents, there is a separate contempt
21 statute in the District of Columbia that could conceivably
22 have been invoked but was not in this case.

23 If the Court has nothing further, thank you.
24
25

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bryson.
2 The case is submitted.

3 (Whereupon, at 12:01 p.m., the case in the
4 above-entitled matter was submitted.)
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CERTIFICATION

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United States v Alvin J. Dixon
Case # 91-1231 December 2, 1992

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BY Ann-Marie Federico

(REPORTER)