SUPREME COURT OF NEW JERSEY
DOCKET NO.

VIVIAN CRESPO Plaintiff vs. ANIBAL CRESPO Defendant	CIVIL ACTION On Certification to the Superior Court of New Jersey, Appellate Division. Sat Below: Hon. Clarkson S. Fisher, Jr. Hon. Christine L. Miniman Hon. Linda G. Baxter

PETITION FOR CERTIFICATION ON BEHALF OF DEFENDANT ANIBAL CRESPO

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STATEMENT OF THE MATTER INVOLVED

This matter involves a Final Restraining Order (FRO) entered against defendant Anibal Crespo on April 22, 2004 pursuant to the Prevention of Domestic Violence Act (the Act). On June 18, 2009, the New Jersey Appellate Division reversed the July 18, 2009 Order of the Honorable Francis B. Schultz, J.S.C., because the standard of proof provided by the Act, the preponderance of evidence standard as opposed to the clear-and-convincing standard, violated the defendant's right to due process (Da19). (He also noted that the Act's "practice and procedure" components violate the separation of powers doctrine, but this finding had no affect on his decision to vacate the FRO.) Characterizing the competing private interests at stake as "victims' interests in being protected from domestic violence against defendants' liberty interests in being free to say what they wish and go where they please" (Da), and describing the governmental interest at stake as "interest in eliminating domestic violence and in affording immediate and effective protection to victims of domestic violence" (Da36), the Appellate Division concluded that the relevant case law does not require "a burden of persuasion that more effectively eliminated the chance of a mistaken adjudication at the steep price of permitting countless more meritorious claims to be lost at the hands of the clear-and-convincing standard" (Da37-38).

In footnote seven of their decision, the court stated: "Defendant has also argued that the Act improperly converts what is a criminal prosecution into a civil proceeding, damages his reputation, and interferes with his right to raise his children, to speak freely with his wife and children, and to enjoy the marital

home. We find these arguments to have insufficient merit to warrant discussion in a written opinion" (Da39). The rights of defendants shrugged off in that statement were obviously not taken into account when the panel weighed the competing interests in their standard of proof analysis. Likewise, in ruling that the United States Supreme Court's holding in District of Columbia v. Heller, 128 S. Ct. 2783 (2008) does not apply not to the states but that even if it does, barring defendants found guilty of domestic violence pursuant to the Act from owning firearms is permitted under Heller, they missed an important point of the defendant's Second Amendment argument, which is that defendants should not be deprived of a fundamental right as the result of a summary hearing in front a family court judge mandated to apply the mere preponderance standard. The panel left open the issues of whether the lack of notice and the right to counsel could be grounds to vacate an FRO, but decided in the case before it the record did not indicate prejudice and therefore those grounds were inapplicable. It followed the trial level decision Depos v. Depos, 307 N.J.Super. 396 (Ch. Div. 1997), which held that defendants do not have a right to discovery in FRO hearings. On the issue of jury trials, it ruled that because an FRO action is at root an action in equity, the right to a jury does not attach. Lastly, as stated above, it failed to discuss the defendant's argument that the Act improperly converts what is a criminal prosecution into a civil proceeding.

QUESTIONS PRESENTED

1. Does the Act improperly convert what is a criminal prosecution into a civil proceeding?

2. Do equity courts have jurisdiction over domestic violence?

3. Does the individual right to bear arms recognized in the Second Amendment limit the states and if so, is that right violated by the Act?

4. Can parental rights be said to be violated by FROs even if they are not completely terminated?

5. Does the Act provide defendants sufficient due process, that is, should it provide better notice, more preparation time, the right to discovery, the right to free counsel, a clear and convincing standard, and/or the right to a jury trial?

ERRORS COMPLAINED OF

In a May 4, 2009 op-ed in the Massachusetts Lawyers Weekly, Ned Holstein, chairman of the group Fathers & Families, wrote:

> [C]ivil libertarians should be alarmed by domestic violence law. A criminal act--domestic violence--is relabled a civil offense, thereby stripping the defendant of all the protections available to criminal defendants. The "defendant" is summarily "convicted" and then pays a fearsome price: instant eviction, loss of access to and control of his assets, and enforced separation from his children.

Holstein in Lawyers Weekly: 'Restraining Orders Are Used To Keep Innocent Men From Their Kids' (2009) (Da191). A few years earlier, political scientist Stephen Baskerville observed:

> Rhetorically, advocacy groups ... emphasize that domestic violence is a "crime." Yet in legal proceedings, domestic violence is often adjudicated not as a criminal but as a civil matter. Because of this distinction of words, the civil liberties protections that are guaranteed by the Constitution to all Americans accused of crimes are simply deemed ... not to apply.

Family Violence in America: The Truth about Domestic Violence and Child Abuse (2006) (Da108).

The argument expressed in essence by Hostein and Baskerville, that domestic violence laws improperly convert what is a criminal prosecution into a civil proceeding, was deemed by the Appellate

Division to so devoid of merit that it warranted no discussion whatsoever (Da39). The panel's contention in this regard strains credulity, to put it mildly.

It is black letter law that

> [t]he Legislature cannot, by a mere change of name or form, convert that which is in its nature a prosecution for a crime into a civil proceeding and thus deprive parties of their right to a trial by jury. So imperative is the right of a defendant charged with crime to a jury trial that if denied it, he is not required to show that he was injured by reason of the deprivation, and without making any such showing, he is entitled to have his conviction set aside. Such a conviction is invalid for any purpose.

47 Am Jur 2d, Jury, § 47.

The Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to N.J.S.A. 2C:25-33, grants enormous power to the Family Part of the Chancery Division of the Superior Court. N.J.S.A. 2C:25-28 of the Act permits a "victim" to file a complaint alleging the commission of an act of domestic violence. Upon the filing of the complaint, the "victim" is allowed to seek emergency, *ex parte* relief in the form of a temporary restraining order (TRO). N.J.S.A. 2C:25-29. If the judge is satisfied that it is warranted, a TRO is granted.

Pursuant to N.J.S.A. 25:29(a), within 10 days of the filing of the complaint, a *summary* hearing is to be held to determine whether the allegations in the complaint occurred. Depos, 307 N.J.Super. at 399. The standard of proof is by a preponderance of the evidence. If it determines that an act of domestic violence occurred, defined by N.J.S.A. 25:19 as one of fourteen enumerated crimes, ranging from harassment to homicide, the court is simultaneously authorized and directed, by N.J.S.A. 25:29(b), to

"grant any relief necessary to prevent further abuse." The judge may bar a defendant from ever setting foot in a particular house again, yet make him pay the mortgage payments; bar him from seeing his children; give the plaintiff temporarily exclusive possession of the defendant's car, checkbook, and other personal effects; bar the defendant from ever speaking to any individual that the plaintiff does not want him to speak to; forever bar him from possessing firearms; and make the defendant pay a "civil penalty" of $500.00. If the defendant refuses to comply with any aspect of the judge's order, he can be tried for contempt and imprisoned. N.J.S.A. 2C:25-30. Lastly, he is labeled an abuser and his name is put on a list of domestic abusers known as the New Jersey Judiciary's Domestic Violence Central Registry for future judicial and law enforcement utilization. N.J.S.A. 2C:25-33.

In Cesare v. Cesare, 302 N.J.Super. 57 (App. Div. 1997), reversed 154 N.J. 394 (1998), the Appellate Division set aside the domestic violence order that had been entered by the trial court on the apparent grounds that a husband had committed either a terroristic threat or harassment. Importantly, it commented:

> While terroristic threats and harassment are crimes, the thrust of the Act is to somehow transmogrify those crimes into some lesser offense not a "crime," but nonetheless with potential serious penal consequences, when the victim signs the complaint. See N.J.S.A. 2C:25-28. Because of the referenced to criminal acts as being acts of domestic violence and the internal conflicts in the statute and its placement in the Penal Code, some brief comment is in order. The Act, although codified in the Penal Code, effectively requires what might otherwise be criminal acts to be then treated as if born of a civil cause of action and under the burden of proof standard for civil cases, i.e., a preponderance of the evidence, see N.J.S.A.

> 2C:25-29, rather than proof beyond a reasonable doubt as in criminal cases. Thus, to be found to have committed an act of domestic violence, a party must have committed what is in effect or would have been a crime under the Penal Code.
>
> The Penal Code in N.J.S.A. 2C:25-28 treats domestic violence complaints signed by non-law enforcement officers, i.e., persons claiming to be victims, and alleging what are criminal acts, as something other than a criminal offense and directs the use of the lesser burden of proof of preponderance of the evidence. N.J.S.A. 2C:25-28. The result is to circumvent the protections normally accorded an accused in a criminal case, including the right to a jury trial....

Id. at. 66-67. Because it found that the trial court had erred as a matter of law in finding that the defendant had committed an act of violence, it did not rule on the constitutionality of the Domestic Violence Act. It did note, however, that "a closer examination of the Act and whether the Legislature can properly make what would be a criminal act for some, an act not criminal for others, perhaps even depending on who signs the complaint, and whether this implicates constitutional issues, are left for another case." Id. at 67.

The Appellate Division decision was reversed by the New Jersey Supreme Court in Cesare v. Cesare, 154 N.J. 394(1998). The Supreme Court ruled that the trial court had not erred in entering the domestic violence order. Unfortunately, it did not address the constitutionality of the Domestic Violence Act. "Yet, happily, all constitutional questions are always open." Gideon v. Wainwright, 372 U.S. 335, 346 (1963)(Douglas, concurrence).

In 1916, the New Jersey Legislature passed a law remarkably similar to the Prevention of Domestic Violence Act. This law, entitled "An act declaring all buildings and places wherein or upon

which acts of lewdness, assignation or prostitution are permitted or occur to be nuisances, and providing for the abatement thereof by the court of chancery" was declared unconstitutional by the New Jersey high court of appeal, then known as the Court of Errors and Appeals, in Hedden v. Hand, 90 N.J.Eq. 583 (1919), because it attempted to give the court of chancery the authority to abate the criminal offenses enumerated in the title. The high court stated: "It is difficult from a plain reading of the statute to escape the conclusion that it attempts to add to the equitable powers possessed by the court of chancery, the power to deal with a certain class of criminal cases by the writ of injunction, and the summary process of contempt." Id. at 589. It stated further:

> It is clear that if the legislature may bestow on the court of chancery jurisdiction to grant an injunction and abate a public nuisance of a purely criminal nature, then there can be no valid argument against the power of the legislature to confide the entire criminal code of this state to a court of equity for enforcement. It is apparent that such a court would render nugatory the provisions of the constitution which guarantee the right of a presentment by grand jury, and a trial by jury, to one accused of a crime.

Id. at 593.

In sum, it concluded:

> Keeping in view that the maintenance of disorderly houses was a crime at common law and was punishable and abatable in the courts of criminal jurisdiction only, it is clear that the effect of making such a crime punishable and abatable in the court of chancery is to deprive a defendant of his constitutional right to have an indictment preferred against him by a grand jury of the county in which such nuisance is alleged to exist and a trial by jury. It is idle to entertain the thought for a single moment that the legislature can change the nature of an offence by changing the forum in which it is

to be tried.

Id. at 596.

It is a long established principal of law that "[c]ourts of equity have no jurisdiction in matters of crime." Peter C. Hennigan, Property War: Prostitution, Red-Light Districts, and the Transformation of Public Nuisance Law in the Progressive Era, 2004 Yale J.L. & Human. 123, 133 (2004), quoting Seymour D. Thompson, Injunction Against Criminal Acts, 18 Am. L. Rev. 599, 599 (1884).

As Hennigan explains,

> Since the abolition of Star Chamber in 1641, courts of equity have not exercised criminal jurisdiction. In the United States, the abolition of criminal equity was made permanent in the Sixth Amendment, which entitles the accused in criminal prosecutions to a trial by jury.... When confronted with attempts to revive criminal equity, courts could rely upon a well-developed line of argumentation that had its origins in the historical experience with the Court of Star Chamber....[1]

Id. at 133-34.

This fundamental axiom was ably expressed by the U.S. District Court for the District of Nebraska in United States v. Lot 29, Block 16, Highland Place, City of Omaha, Neb., 296 F. 729 (D. Neb. 1924), a case that dealt with a provision in the National

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1. Dean Roscoe Pound once said: "the powers of the star chamber were a trifle in comparison with those of our juvenile courts and courts of domestic relations." Hon. Patrick R. Tamilia, Symposium: They Grow Up So Fast: When Juveniles Commit Adult Crimes: In Search of Juvenile Justice: From Star Chamber to Criminal Court. 29 Akron L. Rev. 509, 510 (1996) (citation omitted). The Star Chamber, so named because of the star pattern painted on the ceiling of the room in Westminster Palace where the king of England's council met, was essentially a court of equity that was given jurisdiction over criminal matters. Intended to be a streamlined alternative to the common-law courts, it "became a byword for unfair judicial proceedings." The Columbia Encyclopedia, 6th Ed. (2001).

Prohibition Act, better known as the Volstead Act, that allowed for the use of equity courts to suppress the illegal sale of alcohol.

> Obviously, it would greatly simplify criminal procedure if all persons whom the chancellor deems guilty of criminal offenses could thereafter be laid under injunctive process, and all subsequent accusations against them could be dealt with by the chancellor, instead of by the tedious, uncertain, costly, and laborious process of jury trials. There is nothing new about this idea, and up to a short time before the Constitution of the United States was adopted there was undoubtedly a strong and aggressive party in the English Parliament still urging and insisting upon a revival of the powers of the Court of Star Chamber. That court proceeded in criminal causes without any of those restraints that hamper and retard the law courts in their jury trials.... But there is reason to believe that the simple declaration, "All crimes shall be tried by jury," was incorporated in the Constitution of the United States with a very determined purpose to absolutely prevent any court of criminal jurisdiction like that of the Star Chamber Court ever coming into existence in this country.
>
> But, if equity courts, as such, may function for the suppression of crime, as provided in ... [the National Prohibition Act], if such courts may, without a jury, inquire into alleged crimes against the liquor law, and may issue their injunctions because they find that in the past such crimes have been committed, and may thereafter punish for contempt, it would seem that all of the important powers of the Court of Star Chamber are assumed in this indirect way....
>
> If, to suppress the liquor traffic, this power can be conferred upon equity courts, it can also be conferred to suppress the drug traffic, and I can see no very sound reason why it could not be used to suppress any crime in the calendar of crimes. If it can be so used, then the constitutional provision that all crimes shall be tried by jury would have no force ex propria vigore, but only by grace of Congress. We would have jury trials where Congress permits, but need have none where a procedure by injunction is provided for. The fact is the limitation of equity powers is so fundamentally a part of the equity system that

> the equity system cannot exist in disregard of those limitations. The court of equity may, in certain cases, abate existing nuisances, even though the nuisance is made up of criminal acts, and where it is proven that nuisances will continue, unless enjoined, equity may issue injunctions, but there is the natural and necessary limit of equity powers. When it is sought to confer powers upon a court of equity contrary to these limitations, the attempt must fail, because neither directly nor indirectly can the constitutional safeguards against one man power in criminal cases be erased.

Id. at 736-37. On the basis of this analysis, it declared the particular provision of law before it "unconstitutional and void." Id. at 738.

The laws invalidated in the Nebraska case and in Hedden were part of a trend begun in the late nineteenth century in which "legislatures increasingly authorized injunctions against criminal activity...." ACLU Amicus Brief in United States of America v. Oakland Cannabis Buyers' Cooperative and Jeffrey Jones (2000), http://www.aclu.org/scotus/2000/22233lg120001001.html. Against this trend, the American Civil Liberties Union observed,

> prominent commentators voiced loud opposition. In their view, the statutes allowed government to pursue exactly the same law enforcement goals as they would have in a criminal prosecution, without having to observe the bothersome requirements of criminal procedure. They coined the phrase "government by injunction" to characterize their protest. See Forrest R. Black, "The Expansion of Criminal Equity Under Prohibition," 5 Wisc.L.Rev. 412 (1930); "Recent Cases, Injunctions," 43 Harv.L.Rev. 499 (1930); Edwin S. Mack, "The Revival of Criminal Equity," 16 Harv.L.Rev. at 392; Charles Noble Gregory, "Government By Injunction," 11 Harv.L.Rev. at 489; William H. Dunbar, "Government By Injunction," 13 L.Q.Rev. at 356-57.

Id. In essence, the Hedden court sided with commentators like

Black, Mack, Gregory, and Dunbar and stated in different words what Justice Walbridge A. Field had stated in a dissent in a Massachusetts Supreme Court case involving an injunction against the sale of alcohol, "The Legislature cannot ... change the nature of things by affixing to them new names." Carleton v. Rugg, 22 N.E. 55, 31 (Mass. 1889)(Field, J., dissenting). By so doing, the Hedden court was a notable holdout against the "innovation" of criminal equity.[2]

A more recent holdout is the Supreme Court of Arkansas. In Bates v. Bates, 303 Ark. 89 (Ark. 1990), in a case much like the present matter,

> Appellee Michael Bates allegedly abused his wife, appellant Merle Bates. She filed a petition in chancery court pursuant to the Arkansas Domestic Abuse Act of 1989. Ark. Code Ann. §§ 9-15-101 to -211 (Supp. 1989). In the petition she sought an order to restrain appellee from committing future acts of domestic abuse and from entering their residence or her place of work, and to require him to pay child and ... support.... The petition was denied. The chancellor held that the act created a new cause of action and unconstitutionally placed jurisdiction of the new cause of action in chancery court.

Id. at 90. The Supreme Court of Arkansas affirmed, stating that "except in narrow circumstances" (not present in the case before it), "equity will not enjoin the commission of a crime because the remedy at law is adequate" and added: "If the rule were otherwise, the constitutional right of trial by jury would be infringed." Id.

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2. Hennigan writes: "Relying upon old English cases, the [Hedden] Court, in a sudden departure from trends in public nuisance law, revived the criminal equity concern...." Hennigan, 2004 Yale J.L. & Human. at 188-89. It was in the spirit of Hedden that the Appellate Division was urged to invalidate the Prevention of Domestic Violence Act, a modern day example of government by injunction. As it turned out, it did not even mention Hedden.

at 93. Sounding like the Hedden court, the Bates court stated further:

> If we were to perceive the issue and take the steps the appellant and some of the *amici* briefs suggest, the jurisdiction of chancery court could be extended almost beyond imagination. For example, drunken driving is a serious problem. Even the Supreme Court of the United States has lamented the frightful carnage it spews upon our highways. South Dakota v. Neville, 459 U.S. 553, 558 (1983). The criminal laws have not stopped drunken driving, but we cannot use that fact as a reason to approve extending the jurisdiction of the chancery court to issue an "order of protection" against persons accused of, but not convicted of, drunk driving. Drug sales to children is a comparable problem, as is burglary. We cannot subvert the Constitution of Arkansas and allow the creation of a cause of action totally foreign to the equity jurisdiction of the chancery court just because we perceive and abhor a particular social ill. We are pledged to support the Constitution of Arkansas, and our duty is to follow it in this case as in any other.

Id. at 94.

At the trial level, the New Jersey Attorney General asserted that "Hedden is bad law" as "Hedden was decided prior to the institution of the New Jersey Constitution of 1947," since which time "the courts of equity have enjoyed concurrent jurisdiction over criminal offenses...." In support of this remarkable position, the Attorney General cited Bor. of Alpine v. Brewster, 7 N.J. 42 (1951). In Bor. of Alpine v. Brewster, however, the court distinguished the case before it from Hedden, stating: "the injunctive power given by the statute here under review is but a civil remedy for the enforcement of zoning in the common interest, and not the means of punishing criminal offenses in derogation of constitutional right." Id. at 53. It did not overrule Hedden nor

did it state that the Hedden holding had been repealed.

The 1947 Constitution, establishing that "the Law Division and the Chancery Division shall each exercise the powers and functions of the other division when the ends of justice so require, and legal and equitable relief shall be granted in any cause so that all matters in controversy between the parties may be completely determined" (Article VI, Section III, paragraph 4), modernized the New Jersey judicial system by creating "one stop shopping." No longer does a litigant need to go to one court for equitable relief and another court for economic damages. Nowhere does it grant equity courts jurisdiction over criminal matters. As it stands today, the principle recognized and preserved by Hedden--that "courts of equity have no jurisdiction in matters of crime"--endures.

An act of domestic violence, as defined by N.J.S.A. 2C:25-19, is a crime. Yet, the Domestic Violence Act authorizes a Chancery Division judge to make a finding of fact *at a summary proceeding* that an individual committed an act of domestic violence. Then, in order to penalize a defendant for being an abuser, N.J.S.A. 2C:25-29 authorizes the judge to impose basically everything but prison time, and even that can be imposed if the defendant deviates just slightly from the order. In New Jersey, the Chancery Division has been transformed into an alternative to the criminal courts. Pursuant to Hedden, which has never been overruled, the Appellate Division should have struck down the Prevention of Domestic Violence Act.[3]

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3. A trial or appellate judge is privileged to disagree with Hedden but he or she is not free to disobey.

Along similar lines, the Appellate Division also erred when it ruled that because an application for an FRO is at root an action in equity, a defendant does not have the right to a jury. To recall a point made by the court in Lot 29, Block 16, Highland Place, City of Omaha, Neb., while "[t]he court of equity may, in certain cases, abate existing nuisances, even though the nuisance is made up of criminal acts, and where it is proven that nuisances will continue, unless enjoined, equity may issue injunctions, ... *there is the natural and necessary limit of equity powers.*" 296 F. at 737 (emphasis added). That limit is exceeded in FRO hearings.[4]

Furthermore,

> The essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by

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4. Simply declaring a defendant to be an abuser may exceed the limit. According to legal scholar Joshua Dressler,

> When the factfinder--ordinarily, a jury--determines that a person is guilty of an offense, the resulting conviction is an expression of the community's moral outrage, directed at the criminal actor for her act. The hardship suffered as a result of the criminal conviction may be no greater (or even less) than that which results from a civil judgment; *it is the societal condemnation and stigma that accompanies the conviction that most of all distinguishes the civil from the criminal process.*

Joshua Dressler, Understanding Criminal Law, 1-2 (1995) (emphasis added). Curiously, the Appellate Division ruled that an FRO does not impact a defendant's reputation, a conclusion it supported by nothing more than the assertion that the defendant's contention that the entry of an FRO damages a defendant's reputation is not sufficiently meritorious to warrant discussion (Da39). Domestic violence, properly defined, is reprehensible. Imagine a grade school teacher being given a court order adjudging a student's father to be a wife-beater. Obviously, the stigma on him would be tremendous. It is unknown how the appellate panel could find otherwise.

> unlawful action; equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision.

27A Am Jur 2d, Equity § 2.

> A basic principle of the law of equitable remedies is that the relief granted should be no broader than necessary to cure the effects of the harm caused. Relief thus must be tailored to the actual injury claimed, and not be more broad than demanded by the actual injury. Chancellors thus have only those remedial powers necessary to the particular case.
>
> ....
>
> While remedial powers of equity courts must be adequate to the task, they are not unlimited and orders should be appropriate.

27A Am Jur 2d, Equity § 241.

The remedies provided for in the Prevention of Domestic Violence Act far exceed the equity powers of the Chancery Division. The power to grant a *permanent* restraining order, that is, an order lasting the lifetime of a defendant that enjoins him from simple activities like visiting his children in the house where they live, visiting them at school, or going to religious events like First Communions, goes far beyond the type of remedies traditionally granted by courts of equity. Yet this is precisely the scope of the injunctions imposed, even for the lowly crime of harassment. This is certainly overkill in terms of protecting the petitioners (assuming FROs protect) and is certainly punitive.

Following an FRO hearing, the Court cannot follow the mandate of centuries of precedent and craft a flexible and delimited remedy for the particular circumstances before it. It apparently cannot, for example, limit the restraining order to a specific time period, such as three months. The judge is required by the Act, if he or she finds that a certain criminal act was committed, to impose a

permanent restraining order. What is more, the orders, which generally are in the form of preprinted sheets with a checklist of remedies, are hardly thought-out and case-specific. They are clearly meant to be issued in an assembly line fashion. After all, the Act requires that the FRO hearings are *summary* hearings,[5] allowing for the possibility of a judge granting several FROs a day. While FRO actions are equity-ish in that they result in injunctive relief, they go so far beyond the jurisdiction of equity courts that the argument a defendant facing a FRO cannot have a jury trial because FRO actions are actions in equity fails.

Moving on to the Second Amendment, whatever one may think of selective incorporation--the doctrine by which most of the rights guaranteed by the federal Bill of Rights have been held by the United States Supreme Court to limit state and local governments as well as the federal government through the Due Process Clause of the Fourteenth Amendment--it has become the law of the land. In

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5. Columnist Glenn Sacks and Mike McCormick, the Executive Director of the American Coalition for Fathers and Children, describe summary hearings in a 2007 op-ed.

> The hearings to make the orders permanent are often just a formality for which no more than 15 minutes are generally allotted. In fact, the State of California's website gives the following advice for men who are contesting restraining orders:
> "Practice saying why you disagree with the charges. Do not take more than three minutes to say what you disagree with. You can bring witnesses or documents that support your case, but the judge may not have enough time to talk to the witnesses."

Biden's Bill Will Exacerbate Domestic Violence Problems (2007) (Da176). If such a hearing were to have a just outcome, it would be purely coincidental.

Heller, the Supreme Court suggested that were it to address whether the Second Amendment limits the states by way of the doctrine, it would "engage in the sort of Fourteenth Amendment inquiry required by our later cases." 128 S. Ct. at 2813. Presser v. Illinois, 116 U.S. 252 (1886), the decision the Appellate Division relied on for the proposition that the Second Amendment is not a limitation upon the power of the states, is not one of those "later cases." As the Ninth Circuit Court of Appeals pointed out in Nordyke v. King, 563 F.3d 439, 448 (9th Cir. 2009), Presser "involved direct application and incorporation through the Privileges or Immunities Clause, but not incorporation through the Due Process Clause." Engaging "in the sort of Fourteenth Amendment inquiry required by [the Supreme Court's] later cases," id., the Nordyke court concluded that the Second Amendment does indeed limit that states. The reasoning of the Nordyke court is persuasive and should be followed by New Jersey. The Appellate Division erred by not following it. (Assuming Heller applies to New Jersey, the question then becomes whether FRO hearings provide sufficient due process in order for the right to bear arms to be stripped away from someone and if so, whether a finding that any of the enumerated crimes was committed can justify taking away the right or whether a crimes like harassment is too minor to justify that penalty.)

Another fundamental right affected by FROs is the right to raise one's children. To quote the trial court,

> One of the most significant impacts on defendants growing out of a Final Restraining Order is the defendants' inability to be with or maintain their relationship with their children. Many Final Restraining Orders contain significant limitations on the defendants' ability to be with their children

(Da17).

Addressing the trial level decision last year, Glenn Sacks and Mike McCormick wrote:

> Jane Hanson, executive direction of Partners for Women and Justice and Justice in Montclair, argues that Superior Court Judge Francis B. Schultz is wrong in ruling that the DVPA violates parents' "fundamental" right to "be with or maintain their relationship with their children." Yet when a restraining order is issued, fathers can be (and sometimes are) arrested for calling their own children on the phone or going to their Little League games.
>
> Moreover, by removing the father from the home, a custody precedent is set with mom as primary caregiver and dad as occasional visitor--a precedent which harms fathers' ability to gain joint custody of their children in divorce proceedings.

Restraining Orders Can Be Straightjackets on Justice (2008) (Da189). Phyllis Schlafly, a leading defender of parental rights, expressed the ideas in stronger terms in discussing the trial level decision, stating: "Once a restraining order is issued, it becomes nearly impossible for a father to retain custody or even to get to see his own children." One Brave Judge Resists Feminist Agenda (2008) (Da185).

Speaking generally about the restraining order systems of the various states, Massachusetts attorney Gregory A. Hession notes that "[r]estraining orders especially impact the children. These orders are frequently used as a quick and dirty custody hearing.... The children often have no understanding of why they are being kept from their father because the father cannot even speak to them" Restraining Orders Out of Control (2008) (Da179). Worse, as Illinois attorney Scott Lerner observes in regard to Illinois domestic violence statute, which appears to be similar to New

Jersey's, "If a parent is willing to abuse the system, it is unlikely the trial court could discovery their improper motives in an order of protection hearing." Sword or Shield? Combating Order of Protection Abuse in Divorce, Illinois Bar Journal, November 2007, 590-95, 592 (Da172).

The Appellate Division intimates in footnote seven that FROs do not negatively affect parental rights. This conclusion seems to rest on the belief that as long as parental rights are not completely terminated, they do not trigger due process concerns. As philosopher Donald C. Hubin points out, however, there are a number of rights included in the bundle of rights that constitute parental rights, such as "the right to physical possession of the child" and "the right to discipline the child." Parental Rights and Due Process, 1 J Law Fam Stud. 123, 125 (1999). "[I]t is not necessary for the entire bundle to be suspended or revoked in order for there to be serious infringements on one's rights." Id. at 137. (It would appear that if the New Jersey Supreme Court were to take this case, it would need to define the point at which an infringement of parental rights becomes serious enough to demand more due process than that provided by the Act.)

In addition to failing to take into consideration many of the rights of defendants affected by the entry of FROs, including parental rights, the Appellate Division also evidenced the mistakenly belief that protective orders actual protect. On the contrary, scientific research, as opposed to politically correct legislative findings, reveals that restraining orders are ineffective in preventing physical violence. Cathy Young, Domestic Violence: An In-Depth Analysis (2005), 24 (Da75). Because of the

panel's starting premises, it did not discern the Act's due process deficiencies noted in the defendant's appellate briefs, e.g., the lack of notice/time to prepare for FRO hearings and the denial of the right to discovery. In particular, it failed to properly balance the competing interests in its standard of proof analysis. Judge Schultz, in contrast, displayed a much better understanding of the interests at stake. His analysis should have been upheld.

COMMENTS AS TO APPELLATE DIVISION DECISION

Throughout the Appellate Division's decision, the panel evinced a dismissiveness about the effects FROs have on defendants and their children. In part, it was this dismissiveness that prevented it from adequately addressing the important questions before it. At the same time, it failed to give the claims made by proponents of restraining orders the critical examination they deserve.

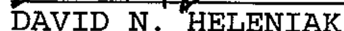
REASONS FOR CERTIFICATION

As shown above, the within matter involves a plethora of constitutional issues that demand resolution by New Jersey's highest court. Moreover, the injustices suffered by Anibal Crespo and thousands of others just like him demand to be recognized.

CERTIFICATION

I certify that this Petition presents substantial questions and if filed in good faith and not for the purpose of delay pursuant to R. 2:12-7(1).

O'DONNELL, McCORD & DeMARZO
Attorneys for Defendant

BY: 
DAVID N. HELENIAK

Dated: 7/20/09