FILED

SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

RANDOLPH S. TORRES,
Defendant-Appellant.

Supreme Court Case No.: CRA06-004
Superior Court Case Nos.: CM0284-06/CM0870-05

OPINION

Cite as: 2008 Guam 26

Appeal from the Superior Court of Guam
Argued and submitted on July 2, 2007
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice;[1] and, RICHARD H. BENSON, Justice *Pro Tempore*.

CARBULLIDO, C.J.:

[1] This matter comes before us from the denial of Defendant-Appellant Randolph S. Torres's motions to dismiss two separate criminal charges for knowingly violating a protective order, Superior Court Crim. Case Nos. CM 0870-05 ("Criminal Case I") and CM 0284-06 ("Criminal Case II"). Torres argues that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and section 1421b(d) of the Organic Act of Guam, 48 U.S.C. § 1421b(d), bar the criminal charges. He contends that the trial court erred in failing to acknowledge as initial jeopardy two previous contempt sanctions brought against him in a domestic proceeding.

[2] We agree with Torres's contention that the purpose of the contempt sanctions was punitive, the sanctions put the defendant in jeopardy, and a second criminal punishment of the same underlying offense is therefore barred. We find that the trial court erred when it denied Torres's motion to dismiss the criminal cases. Accordingly, the trial court's denials of Torres's motions to dismiss Criminal Cases I and II are reversed, and we remand the cases for dismissal by the trial court.

I. FACTS

[3] The events of a domestic case between Defendant-Appellant Torres and his former girlfriend Berniece Garrido form the basis of Torres's double jeopardy claim. Appellant's Br. at 7 (Mar. 12, 2007). The relationship between Torres and Garrido ended when Torres allegedly

[1] Prior to the issuance of this Opinion, Justice Robert J. Torres assumed the role of Chief Justice while Chief Justice F. Philip Carbullido assumed the role of Associate Justice.

set Garrido's alarm clock on fire. As plaintiff in the domestic proceeding, Garrido obtained a Preliminary Order of Protection ("protective order") from the court enjoining Torres "from threatening, abusing, harassing or disturbing the peace and physical well-being of the Plaintiff" or from approaching within five hundred feet of her. Appellant's Excerpts of Record ("ER"), tab ER1 at 1 (Prem. Order of Protection, Nov. 17, 2005). The order remained effective until September 22, 2006. *Id.*

[4] Torres reportedly violated the protective order on two separate occasions, resulting in the two criminal cases underlying this appeal. The same events also resulted in two contempt sanctions ordered by the court in the domestic case. The first incident, underlying Criminal Case I, occurred on December 1, 2005. Garrido reported that Torres visited and called her residence in violation of the order. ER, tab ER3 at 4 (Viol. of a Court Order, Dec. 2 2005). Torres turned himself in to the Guam Police that same day for his violation of 9 GCA § 30.40(a) of the Crimes and Corrections Code, which makes it a criminal misdemeanor to knowingly violate a protective order. In a magistrate hearing the following day, the Attorney General formally charged Torres with a violation of a court order under 9 GCA § 30.40(a)(1). ER, tab ER2 at 3 (Magis. Compl., Dec. 2, 2005). Torres spent twelve days in jail, after which he was released on his own recognizance.

[5] On March 29, 2006, more than three months later, the lower court in the domestic case issued an order finding Torres in contempt of court for his December 1, 2005 violation of the protective order. ER, tab ER3 at 5-6 (Order Re: Contempt, Mar. 29, 2006). While this domestic proceeding was separate from the criminal case, the contempt finding was based on the same factual circumstances surrounding the misdemeanor charge of Criminal Case I. The lower court ordered Torres to serve a period of twelve days of incarceration with credit for time served.

Because Torres had already spent twelve days in jail following his December arrest, Torres did not serve any additional time.

[6] Later in the day on March 29, 2006, Garrido reported a second instance of Torres's violation of the protective order. Garrido reported that she had been driving along Ypao Road when she noticed that both of her rear tires were flat, pulled over to the side of the road, and called a relative for help. While she was still on the phone with her relative, Torres appeared and offered his help. Garrido initially refused his assistance and reminded him of the protective order, but Torres insisted that he help her. Afterwards, Garrido reported the incident to an officer at the Hagåtña Precinct. Torres again turned himself in to the Guam Police soon thereafter. ER, tab ER5 at 9 (Order Re: Contempt, Apr. 24, 2006).

[7] The next day, Torres was brought before a judge in a magistrate hearing under Criminal Case II. ER, tab ER4 at 7 (Magis. Compl., Mar. 30, 2006). He was again charged with violation of the protective order under section 30.40. This time, Torres spent a total of eight days in jail before being released on his own recognizance. Nearly a month after this second incident, the lower court held Torres in contempt in the domestic proceeding for again violating the protective order. ER, tab ER5 at 9-10 (Order Re: Contempt). The judge ordered that Torres should serve a period of eight days of incarceration. Like the previous contempt sanction, Torres was given credit for his eight days already served immediately following the incident. Unlike the last contempt sanction, Torres was also fined one hundred dollars ($100) for the violation, payable to the court. *Id.*

[8] Torres moved to dismiss both criminal cases, arguing that a second prosecution for the same actions already punished by contempt sanctions in the domestic proceeding would place him in double jeopardy. In its Decision and Order, the Superior Court held that the contempt

sanctions in the domestic proceeding did not trigger double jeopardy protections. RA II, tab 18 (Dec. and Order on Def.'s Mot. to Dismiss, Criminal Case II, Nov. 14, 2006); RA I at 36 (Order on Def.'s Mot. to Dismiss, Criminal Case I, Jan. 3, 2007) (incorporating Dec. and Order of Nov. 14, 2006). The court reasoned that because the sanctions occurred in a civil proceeding and were made pursuant to a statute in the Civil Procedure Code, they were merely civil sanctions and thus did not rise to the level of "jeopardy" that would bar prosecution for the criminal charges. RA II, tab 18 at 4 (Dec. and Order on Def.'s Mot. Dismiss). The court summarily characterized the contempt orders as civil, stating that Torres was not "punished" in the jeopardy sense because civil sanctions are meant to coerce, not punish. *Id.* at 2. Citing the rule that only criminal, and not civil, contempt sanctions qualify as punishment in a double jeopardy analysis, the court denied Torres's motions to dismiss. *Id.* at 3.

[9] Torres subsequently filed timely appeals to this court. We granted a motion to consolidate the appeals under Case No. CRA06-004.

II. JURISDICTION

[10] The threshold issue concerns this court's exercise of appellate jurisdiction following the Superior Court's denial of a motion to dismiss on double jeopardy grounds. The Government argues that this court lacks jurisdiction under 7 GCA § 3108 because "this is not an appeal from a final judgment" and "Defendant Torres has not made the necessary showing of a colorable claim to invoke this court's discretionary jurisdiction." Appellee's Br. at 1 (Apr. 11, 2007).

[11] Section 3108(b)(2) of Title 7 of the Guam Code Annotated allows this court to exercise its discretionary jurisdiction over interlocutory appeals in certain instances, including when resolution of the matter will "protect a party from substantial and irreparable injury." 7 GCA § 3108(b)(2) (2005). We have reasoned that the harm caused in forcing a defendant to undergo a

trial that should be barred by the Double Jeopardy Clause would be "irreparable." *Guam v. Angoco*, 2004 Guam 11 ¶ 6 (citing *Abney v. United States*, 431 U.S. 651, 662 (1977)); *see also Mitchell v. Forsyth*, 472 U.S. 511, 537 (1985) (O'Connor, J., concurring in part) ("The very purpose of such immunities [as the Double Jeopardy Clause] is to protect the defendant from the burdens of trial, and the right will be irretrievably lost if its denial is not immediately appealable."). In the interest of protecting a defendant from the rigors of a trial that may be barred by the Double Jeopardy Clause, this court may exercise its discretionary jurisdiction under section 3108(b)(2).

[12] The Government also argues that judicial economy militates against allowing *every* appeal claiming a double jeopardy violation. The Ninth Circuit allows appeals for all "colorable" double jeopardy challenges, meaning claims that have "some possible validity." *United States v. Zone*, 403 F.3d 1101, 1104 (9th Cir. 2005) (quoting *United States v. Price,* 314 F.3d 417, 420 (9th Cir. 2002) (internal quotation marks omitted)). The Government argues that Torres has not met this burden of making a "colorable" claim. Appellee's Br. at 1-2 (Apr. 11, 2007).

[13] We find, however, that Torres has made a facial showing of the punitive nature of the domestic court's contempt sanction—Torres was sentenced to two definite and unconditional periods of incarceration in the domestic case. ER, tab ER3 at 5-6 (Order Re: Contempt, Mar. 29, 2006); ER, tab ER5 at 9-10 (Order Re: Contempt, Apr. 26, 2006); *see also* RA I at 12-13 (Mem. P. & A. in Support of Mot. Dismiss Indictment, Criminal Case I, May 26, 2006) and RA II at 9-10 (Mem. of P. & A. in Support of Mot. Dismiss Indictment, Criminal Case II, May 26, 2006). Punitive contempt sanctions qualify as criminal punishment, warranting the protection of the Double Jeopardy Clause. *United States v. Dixon*, 509 U.S. 688, 696 (1993) (citing *Bloom v.*

Illinois, 391 U.S. 194, 201 (1968)). We therefore find that Torres's claim has some possible validity, and Torres has met his burden of making a "colorable" claim. We elect to exercise our discretionary jurisdiction over the matter, the resolution of which may protect Torres from "substantial and irreparable injury," and to clarify the law with regard to contempt sanctions.

III. STANDARD OF REVIEW

[14] The denial of a pretrial motion to dismiss an indictment on double jeopardy or collateral estoppel grounds is reviewed *de novo*. *Guam v. Angoco*, 2004 Guam 11 ¶ 7 (citing *United States v. James*, 109 F.3d 597, 599 (9th Cir. 1997)); *People v. Palisoc*, 2002 Guam 9 ¶ 35.

IV. DOUBLE JEOPARDY ANALYSIS

[15] Torres challenges the trial court's finding that the contempt sanctions of the domestic case do not qualify as jeopardy triggering double jeopardy protections. Specifically, Torres argues that the contempt sanctions ordered in the domestic case were punitive and therefore criminal punishments, Appellant's Reply Br. at 3 (Apr. 25, 2007), and that application of the *Blockburger* same-elements test reveals that the misdemeanor charges are barred by double jeopardy. Appellant's Br. at 6. In response, the government contends that the contempt sanctions in this case were civil sanctions; relevant Guam law treats contempt of court as a civil matter; the appellate record is insufficient to support a finding of double jeopardy; and if double jeopardy may result from a contempt sanction issued in a civil proceeding, the government should be given notice and opportunity to be heard. Each of these arguments is addressed below.

A. Torres's Contempt Sanctions were Criminal Contempt Sanctions that Constituted Torres's Initial Jeopardy

[16] The Bill of Rights of the Organic Act of Guam provides that "[n]o person shall be subject for the same offense to be twice put in jeopardy of punishment . . . ." 48 U.S.C. § 1421b(d)

(West 2008). Section 1421b(u) of the Organic Act of Guam similarly extends the Fifth Amendment's Double Jeopardy Clause to Guam. 48 U.S.C. § 1421b(u) (West 2008). The Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple criminal punishments for the same offense. *United States v. Halper,* 490 U.S. 435, 440 (1989), *as modified by Hudson v. United States,* 522 U.S. 93, 99 (1997). At issue in this case is the protection from multiple punishments for the same offense.

[17] The parties do not contest that the double jeopardy protections only apply to "multiple *criminal* punishments for the same offense." *Hudson*, 522 U.S. at 99 (citing *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938)). The Double Jeopardy Clause does not bar the state from imposing both a civil and a criminal penalty upon a defendant for the same offense. *See Helvering v. Mitchell*, 303 U.S. 391, 399 (1938). With regard to contempt, only criminal contempt sanctions, not civil contempt sanctions, qualify as the initial jeopardy that prevents future criminal proceedings against the accused. *Yates v. United States*, 355 U.S. 66, 74 (1957); *see also In re Farr*, 134 Cal. Rptr. 595, 599 (Cal. Ct. App. 1976) ("[T]he preclusion of multiple prosecution . . . applies to the criminal contempt process.").

[18] In determining whether a double jeopardy violation exists, the court must first determine whether jeopardy has previously attached. *People v. Manila*, 2005 Guam 6 ¶ 23. This is because "an accused must suffer jeopardy before he can suffer double jeopardy." *Id.* (quoting *Serfass v. United States*, 420 U.S. 377, 393 (1975)). Accordingly, we must decide whether the contempt orders of March 29, 2006 and April 24, 2006 imposed criminal sanctions that constituted Torres's initial jeopardy, or were civil sanctions that do not trigger the protections of the Double Jeopardy Clause.

1. The Contempt Sanctions Were Punitive and Therefore Criminal in Nature

[19] In identifying whether a contempt proceeding was civil or criminal, we consider the entire disposition of the proceeding. Both the substance of the proceeding and the character of the relief that the proceeding will afford are critical factors. If the relief provided is a sentence of imprisonment, it is remedial and civil if "the defendant stands committed unless and until he performs the affirmative act required by the court's order," *Hicks ex. rel. Feiock v. Feiock,* 485 U.S. 624, 632 (1988) (quoting *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911)). As the Supreme Court has stated, any sentence "must be viewed as remedial," and hence civil in nature, "if the court conditions release upon the contemnor's willingness to [comply with the order]." *Feiock,* 485 U.S. at 631, 634-36 (quoting *Shillitani v. United States*, 384 U.S. 364, 370 (1966)). *See also Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828 (1994) ("The paradigmatic coercive, civil contempt sanction . . . involves confining a contemnor indefinitely until he complies with an affirmative command such as an order [to pay child support].").

[20] A sanction is likely to be civil if the defendant stands committed unless and until (and only until) he performs the affirmative act required by the court's order. However, where the sanction is to punish past misconduct, to vindicate the authority of the court, it is criminal. *Gompers,* 221 U.S. at 442. It is punitive if the sentence "is imposed retrospectively for a completed act of disobedience, such that the contemnor cannot avoid or abbreviate the confinement through later compliance," or if the sentence is limited to imprisonment for a definite period. *Bagwell*, 512 U.S. at 829. *See also United States v. Haggerty,* 528 F. Supp. 1286, 1296 (D. Colo. 1981) ("[I]f the sentence imposed is conditional and grants the defendant the ability to end the penalty by complying with the order, the contempt is civil; where the

penalty is fixed and there is no possibility of complying with the court order, the contempt is criminal."). *Criminal* contempt, as distinct from civil contempt, is used to punish disobedience with a judicial order, and thus vindicate the authority of the court. *G. & C. Merriam Co. v. Webster Dictionary Co., Inc.*, 639 F.2d 29, 40 (1st Cir. 1980).

[21] The Government urges the court to apply the test outlined in *Hudson v. United States*, 522 U.S. 93 (1997) to determine that the contempt sanctions in the domestic proceedings were civil. Appellee's Br. at 9. We decline to do so. In *Hudson*, the court developed a multi-factor balancing tool to determine whether an administrative sanction should be characterized as criminal or civil regulatory. The purpose of the test was to determine when a statute which purports to provide a civil remedy (either on its face, or via legislative intent) is so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty. *Hudson*, 522 U.S. at 99.

[22] Guam's general contempt statute, found in section 34101 *et seq.* of Title 7 of the Guam Code Annotated, does not on its face or in its legislative history purport to create a uniquely civil remedy, so *Hudson* is inapplicable. Instead of applying *Hudson*, we will rely on well-established tests for determining whether a court-imposed contempt sanction is criminal or civil. Thus we adopt the approach of other courts who, in the decade since *Hudson* was decided, have not applied the *Hudson* factors when classifying a contempt sanction as criminal or civil. *See United States v. Lippitt*, 180 F.3d 873, 877 & n.5 (7th Cir. 1999); *FTC v. Kuykendall*, 371 F.3d 745, 751 (10th Cir. 2004) (determining whether contempt proceeding was civil or criminal in nature by applying *Bagwell* analysis, with no reference to *Hudson*); *In re Ivey*, 102 Cal. Rptr. 2d 447 (Cal. Ct. App. 2000) (applying traditional tests for determining whether a court-imposed contempt sanction is criminal or civil, without reference to *Hudson*). *But see United States v. Jackson*, 363

B.R. 859, 864 (N.D. Ill. 2007) (applying *Hudson* first to examine statute used to inflict the punishment to determine whether the legislature intended a civil penalty, before applying *Bagwell* to determine whether statutory scheme was punitive).

[23] Distilling the above rules, one of the most salient characteristics of criminal contempt is an inability to cure the contempt by compliance. *Feiock*, 485 U.S. at 632-33 & n.6. Several features of Torres's contempt sanctions convince us that both sanctions were criminal in nature and served to place Torres in jeopardy. Here, the sentence imposed by each contempt sanction was fixed and imposed retrospectively for a completed act of disobedience. These distinctions support Torres's contention that the sanctions were criminal in nature.

[24] Torres argues that the contempt sanctions cannot be classified as a coercive civil sanction to force him to comply with the protective order because the contempt proceeding occurred much later than the violation. Appellant's Reply Br. at 3.[2] The Government argues that the contempt was civil because its purpose was to assure Garrido that there were consequences to violation of the protective order, regardless of whether Torres committed a criminal act. Appellee's Br. at 14. The Government further asserts that the fact Torres was confined for several days and then was released by the trial court shows the trial court was exercising its coercive powers, and released Torres when he showed himself willing to obey the protective order. Appellee's Br. at 15. The Government cites to *United States v. United Mine Workers of Am.*, in which the United States Supreme Court stated that where the court exercises coercive power:

[2] Torres also cites to section 34103 of the Guam Civil Procedure Code which seems to describe what a coercive sanction would look like. Appellant's Reply Br. at 3. This provision established that if the contempt is omission to perform any act, the person may be imprisoned until performance.

> for the purpose of compelling future obedience, those imprisoned 'carry the keys of their prison in their own pockets,' [citation omitted]; by obedience to the court's valid order, they can end their confinement; and the court's coercive power in such a 'civil contempt' proceeding ends when its order has been obeyed.

330 U.S. 258, 331-32 (1947). Thus, the Government attempts to characterize the situation as one where Torres was an imprisoned contemnor who carried the keys of the prison in his own pocket, ending his confinement by obedience to the court's valid order. Appellee's Br. at 15.

[25] This characterization is misplaced given the factual circumstances of this case. In each case, Torres was initially jailed, not by Judge Unpingco for contempt of court, but rather upon turning himself in to the police for the violation of a protective order. ER, tabs ER3 and ER5 (Orders Re: Contempt, DM1510-05). In each case, the day after Torres turned himself in, a Magistrate's Complaint charging him with a misdemeanor crime was filed. ER, tab ER2 at 3 (Magis. Comp., Criminal Case I, Dec. 2, 2005); ER, tab ER4 at 7 (Magis. Comp., Criminal Case II, Mar. 30, 2006). Torres then served a number of days in jail (twelve days in Criminal Case I, and eight days in Criminal Case II), after which Torres was released from custody. ER, tabs ER3 and ER5 (Orders Re: Contempt, DM1510-05). He was later brought before Judge Unpingco on an Order to Show Cause Re: Contempt for his violation of the court's protective order.

[26] In the first case, the hearing before Judge Unpingco occurred several months after Torres' release; in the second case, he appeared before the judge several days after his release from custody. Thus Torres's cases are unlike those in which an individual imprisoned for civil contempt "holds the keys" to his jail cell and is released upon his compliance with a court order. To the contrary, Torres's release on the criminal charges preceded his hearings before Judge Unpingco by several days or several months.

[27] In each of the subsequent contempt proceedings, the court sentenced Torres to the number of days he had already served, with credit for time served. The character of the relief

afforded by such a sanction is not clearly punitive or coercive. Looking to the substance of the proceedings, however, we conclude that in each case, its primary objective was to punish the defendant, not to coerce action for the benefit of the aggrieved party.

[28] Here, the trial court's sanctions of Torres for his violation of the protective order were issued after Torres had already turned himself in to the police for the violation, had already been criminally charged pursuant to section 30.40, and had already been released from custody. On these facts and in the absence of evidence to the contrary, we presume that the purpose of the trial court's show cause orders was primarily to vindicate the court's authority, not the purpose of coercing compliance. Therefore, we find that the contempt sanctions were criminal in nature and caused jeopardy to attach.

[29] In the case of the second contempt sanction, the $100 fine imposed retrospectively for a completed act of disobedience further supports our finding that the purpose of the sanction was criminal, not civil, in nature. As the United States Supreme Court summarized in *Feiock*, if the relief provided is a fine, it is remedial when it is paid to the complainant, and generally punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order. 485 U.S. at 632. A conditional fine is considered civil because its goal is to coerce the defendant into complying with an order. *Bagwell*, 512 U.S at 822. The key point is that where a fine is not compensatory (payable to the complainant), it is "civil only if the contemnor is afforded an opportunity to purge." *Id.* at 829 (citation omitted).

[30] Here, Torres had no opportunity to purge the fine by compliance with the court's order. The fine was payable to the court, and was retrospective, levied in response to a discrete, fixed action in the past. This retrospective, incurable sanction bears the hallmarks of a criminal

contempt, not a civil one. In summary, we find that the unconditional nature of the fine in Torres's second contempt sanction underscores our finding that it was a criminal contempt sanction sufficient to have caused jeopardy to attach for that charge.

2. Guam Courts May Impose Civil or Criminal Contempt Sanctions

[31] In arguing that Torres's contempt sanctions were merely civil remedies in a civil proceeding, the Government emphasizes that the contempt powers articulated in Guam statute in section 34101 *et seq.* fall under the Civil Procedure Code. Appellee's Br. at 12. The Government argues that section 34101 must contemplate a uniquely civil sanction, because a separate provision of the code, section 30.40, allows criminal prosecution of contempt. Appellee's Br. at 9. We find this argument to be without merit.

[32] It is the substance of the proceeding and the character of the relief that the proceeding affords that determine whether a sanction is criminal or civil, not the legislative label. Second, the government's argument, that the legislature intended only to establish the power of civil contempt sanctions in 7 GCA § 34101, must fail.

[33] The power of contempt exercised by the Superior Court is a power inherent in all courts to enforce obedience, something they must possess in order to properly perform their functions. Historically, a court's contempt powers have been described as *sui generis*—neither civil actions nor prosecutions for offenses, within the ordinary meanings of those terms. *See Myers v. United States,* 264 U.S. 95, 103 (1924). The Guam Legislature has established certain procedures to govern the court's exercise of its inherent contempt powers via section 34101 *et seq.* of the Guam Civil Procedure Code. Section 34102 provides that contempt which occurs in the actual presence of the court (sometimes called direct contempt) may be punished summarily, but other contempt (sometimes called indirect contempt) shall be prosecuted on notice. 7 GCA §

34102(a)-(b) (2005). Further, section 34101 establishes a penalty that may be imposed on a person found guilty of indirect contempt of court. It provides in pertinent part:

> Any person found guilty of [indirect contempt of court] is subject to the same penalties as a person found guilty of a petty misdemeanor.[3]

7 GCA § 34101 (2005).[4]

[34] The fact that section 34101 is located in Title 7, which pertains to civil procedure *and* the judiciary, does not suggest that the legislature intended only to authorize civil contempt sanctions. Section 34101 derives from California statute, section 1209 of the California Code of Civil Procedure. 7 GCA § 34101. Therefore, we find California case law interpreting section 1209 persuasive, absent compelling reason to deviate. *See People v. Hall,* 2004 Guam 12 ¶ 18.

[36] California courts have found that the placement of section 1209 *et seq.* within its civil procedure code did not indicate that sanctions imposed pursuant to this provision were always civil contempt sanctions. *See, e.g.*, *In re Farr*, 134 Cal. Rptr. 595 (Ct. App. 1976); *In re Ricardo A.*, 38 Cal. Rptr. 2d 586 (Ct. App. 1995). In 1974, the Ninth Circuit found that, notwithstanding the placement of the provision in the civil code, a sanction imposed under section 1209 was criminal in nature when the purpose of the contempt sanction was punitive rather than compensatory or coercive. *Bell v. Hongisto*, 501 F.2d 346, 353 (9th Cir. 1974); *see also In re Ricardo A.,* 38 Cal. Rptr. 2d at 592 ("[T]he law is clear that a civil contempt proceeding is

[3] A petty misdemeanor is punishable by a definite term of imprisonment not to exceed 60 days, and a fine or restitution not to exceed $500. 9 GCA §§80.34(b) and 80.50(c) (2005).

[4] Section 40109 of the Protection from Abuse Act also allows the court to hold a defendant in contempt "upon violation of a protection order." 7 GCA § 40109 (2005). This statute was a more specific source of applicable authority than the general contempt statute discussed herein. However, no specific source of authority was cited for the contempt orders in this case. Nonetheless, Section 40109 also does not purport to establish a uniquely civil sanction, so the same analysis would apply as the one we apply involving section 34101 *et seq.*

criminal in nature because of the penalties that may be imposed." (citation and internal quotation marks omitted)).

[37] California has determined that section 1209 contempt proceedings may give rise to criminal contempt sanctions, despite the fact that a separate statutory provision, California Penal Code section 166, specifically establishes the misdemeanor crime of contempt of court. Cal. Penal Code § 166 (West 2008). Similarly, in Guam statutory law, section 30.40 establishes the misdemeanor crime of knowingly violating a court order. 9 GCA § 30.40 (2005). Section 30.40 of the Guam Criminal Code additionally provides that certain knowing violations of court orders are offenses against the law and subject to punishment as misdemeanors:

> Any knowing violation of [a protective order] shall be a misdemeanor punishable by a fine of not more than One Thousand Dollars ($1,000), or by imprisonment for not more than one (1) year, or by both such fine and imprisonment.

9 GCA § 30.40. Section 30.40 therefore authorizes the attorney general to criminally prosecute an individual who has knowingly violated a court order.[5]

[38] If contempt proceedings initiated pursuant to sections 1209 *et seq.* of the California Code of Civil Procedure can be characterized as criminal contempt despite the existence of a separate statute establishing the crime of contempt, then Guam's contempt statute in the Civil Procedure Code may likewise encompass criminal contempt, despite the existence of section 30.40.

[39] The Government further argues that the lawmakers who enacted section 34101 must only have contemplated a civil sanction because lawmakers act rationally when enacting legislation,

[5] This is distinct from criminal contempt proceedings, which have been regarded since the foundation of our government as *sui generis,* inherent to the court's authority. *See Myers*, 264 U.S. at 103. Over time, the distinction between criminal contempt proceedings and prosecutions for the statutorily-created crime of contempt of court has blurred, as the guarantees afforded by the Bill of Rights have been interpreted to extend procedural protections once limited to criminal prosecutions to criminal contempt proceedings.

and enactment of two competing criminal contempt statutes would be irrational.[6] Appellee's Br. at 12. We do not see how a statute acknowledging the judiciary's authority to sanction contempt competes irrationally with a statute authorizing the state to prosecute as a crime the knowing violation of a protective order (and one which further affords heightened sanctions for violations that are enforced via a criminal prosecution). The statutes recognize the distinct interests of the judiciary and the executive branch in ensuring that court orders are obeyed and victims are protected.

B. Under *Blockburger,* the Criminal Contempt Sanctions Bar Subsequent Criminal Punishment of the Same Offense

[40] Having found that both contempt sanctions for Torres's violation of a protective order were criminal contempt sanctions that placed Torres in jeopardy, we must still determine whether that initial criminal punishment bars a subsequent criminal punishment under section 30.40(a)(1) for the same acts. Determining whether a court can punish a defendant under two distinct statutory provisions for offenses arising out of a single act or transaction is a two-step analysis.

[41] First, the court must determine whether the legislature has expressly authorized multiple punishments. *People v. Palisoc,* 2002 Guam 9 ¶ 36; *Whalen v. United States*, 445 U.S. 684, 688 (1980). When multiple punishments are involved, the Double Jeopardy Clause is a restraint on the prosecution and the courts, not on the Legislature, which may choose to authorize multiple punishments if it wishes. *See Missouri v. Hunter,* 459 U.S. 359 (1983) (where legislature specifically authorized cumulative punishment under two statutes, it is unnecessary to inquire

[6] Section 34101(b) provides that "[a]ny person found guilty of a [contempt that occurs outside the judge's presence] is subject to the same penalties as a person found guilty of a petty misdemeanor." 7 GCA § 34101(b). The Government argues that the Legislature, by not using direct language to provide that any person found guilty of contempt of court *"shall be guilty of"* a petty misdemeanor, must have intended the penalty to be civil in nature. We find instead that this provision was drafted in such a way as to permit both civil and criminal penalties.

whether those two statutes proscribed the same conduct under *Blockburger* test). Absent express authorization by the legislature, however, a presumption arises that the same offense cannot be punished under two separate statutory provisions. *Whalen,* 445 U.S. at 691-92 ("The assumption underlying the rule is that Congress *ordinarily* does not intend to punish the same offense under two different statutes.") (emphasis in original). Once this presumption is invoked, the court must then take the second step in its analysis, employing *Blockburger* to determine whether the two statutes in effect punish the same offense. *People v. San Nicolas*, 2001 Guam 4 ¶ 11.

[42] Here, the legislature has not expressly authorized multiple punishments, and there is also no clear indication of legislative intent to do so. This invokes the presumption that if the two statutes proscribe the same conduct, punishment under the two separate statutory provisions is barred. We go directly to the second step to determine whether the two statutes punish the same offense.

[43] Under the second step, double jeopardy protections will attach if the separate statutes under which the defendant is punished fail the *Blockburger* same-elements test. This test asks whether "each provision requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Unless each provision requires proof of an additional fact not required by the other, the two crimes are deemed the same offense and double jeopardy bars additional punishment and successive prosecution. *People v. Manila*, 2005 Guam 6 ¶ 20 (citing *United States v. Dixon*, 509 U.S. 688, 696 (1993)).[7] Applying this test, courts have deemed offenses identical for purposes of the Double Jeopardy Clause where the evidence required to support conviction on one prosecution is sufficient to support conviction on

[7] At oral argument, the Government conceded that if this court were to find that the contempt was a criminal punishment, the subsequent criminal charges under section 30.40 of the Crimes and Corrections Code would fail the *Blockburger* test. Still, for the sake of completeness, we proceed with the *Blockburger* analysis.

a second prosecution. *See United States v. Puckett,* 692 F.2d 663 (10th Cir. 1982). *See also Rutledge v. United States,* 517 U.S. 292, 297 (1996) (acknowledging that the court has often concluded that two statutes define the 'same offense' where one is a lesser included offense of the other).

[44] To illustrate, consider the hypothetical of two distinct statutory crimes: (1) knowingly entering a dwelling with a firearm and (2) knowingly entering a dwelling with intent to sell narcotics. Because the first provision contains the element of possession of a firearm, and the second provision contains the element of intent to sell narcotics, the two provisions each contain an element not contained in the other. Prosecution of each crime would be permitted under *Blockburger.* If a third provision established the crime of "knowingly entering a dwelling and assaulting another while in possession of a firearm," this third provision encompasses all the elements of the first provision, plus the additional element of assault. Absent express authorization by the legislature, successive prosecutions or punishments for the third crime and the first would be prohibited under *Blockburger* because the first crime is a lesser included offense of the third; successive prosecutions or punishments for the third crime and the second would be permitted because each crime requires proof of an additional fact which the other does not.

[45] The *Blockburger* test was reaffirmed by *United States v. Dixon* as the primary test in deciding whether two separate offenses constitute the "same offense" under the Double Jeopardy Clause. *United States v. Dixon*, 509 U.S. 688 (1993). *Dixon* is particularly important to our analysis because it specifically considered the issue of whether the Double Jeopardy Clause's protection attaches in an indirect criminal contempt prosecution. *Id.* at 696.

[46] *Dixon* involved two companion cases, that of Alvin J. Dixon and that of Michael Foster. The facts of the case of Michael Foster are more analogous to the facts before us than the facts in Alvin Dixon's case, so we will consider Foster's case below. Ana Foster obtained a civil protection order ("CPO") against her estranged husband, Michael Foster, in response to several alleged incidents of abuse. *Id.* at 692. The CPO required Foster not to "assault . . . or in any manner threaten . . ." his wife. *Id.* After several alleged violations of the CPO by her husband, including an incident where he kicked Ana and threw her down some stairs, Ana Foster filed motions to have Foster held in contempt. *Id.* Foster was found guilty of criminal contempt and sentenced to imprisonment. *Id.*

[47] Foster was later criminally charged with simple assault, assault with intent to kill, and three counts of threatening to injure another. *Id* at 693.[8] The first two charges arose out of the same events for which Foster had been held in contempt, and Foster filed a motion to dismiss the criminal charges on grounds of double jeopardy, which the trial court denied. *Id.* On appeal, the District of Columbia Court of Appeals reversed, holding that the Double Jeopardy Clause barred the government's prosecution of Foster. *Id.* at 694.

[48] The United States Supreme Court granted review and issued a plurality opinion in which a majority of the justices agreed that *Blockburger* was the test to apply when reviewing Foster's double jeopardy claim. Justice Scalia, joined by four others, issued the judgment that one count of Foster's criminal indictment, the prosecution for assault, should be dismissed on double jeopardy grounds. *Id.* at 712 (opinion of Scalia, J., joined by Kennedy, J.); *id.* at 740 (White, J., concurring in part and dissenting in part, joined by Stevens, J.); *id.* at 763 (Souter, J., concurring

[8] In the case at bench, Torres was charged with the misdemeanor crime of violating a court order *before* Judge Unpingco issued the contempt sanction.

in part and dissenting in part, joined by Stevens, J.). However, no majority of justices agreed on how the *Blockburger* test should be applied to Foster's case. *Id.* at 696-97.

[49] In Part III of his opinion (joined only by Justice Kennedy), Justice Scalia wrote that he would apply *Blockburger* by comparing the terms of the CPO underlying the contempt charge with the elements of the substantive criminal statute underlying the subsequent criminal prosecution. *Id.* at 697-703. Because the CPO ordered the defendant not to "assault . . . or in any manner threaten . . . " his wife, the CPO encompassed all the elements of the substantive crime of assault.[9] Justice Scalia would have found that the underlying substantive criminal offense of assault is a species of the lesser-included offense of the contempt order prohibiting the assault, and therefore subsequent prosecution of the criminal offense is barred by the Double Jeopardy Clause. *Id.* at 689.

[50] On the other hand, Justice Scalia found that the charge for assault with intent to kill would have survived the *Blockburger* test's requirement that "each provision requires proof of an additional fact which the other does not." *Id.* Assault with intent to kill required proof of an additional element—a specific intent to kill—that the contempt for assault in violation of the CPO did not. *Id.* at 701. The contempt offenses required proof of an additional element—knowledge of the CPO—that was not required to be proven in the criminal charge of assault with intent to kill. *Id.* at 701-02. Therefore, under Scalia's analysis, the "assault with intent to kill" charge passed the *Blockburger* same-elements test.

[51] Chief Justice Rehnquist, in an opinion joined by Justices O'Connor and Thomas, rejected the reasoning of part III of Scalia's opinion. Rehnquist stated that because the generic crime of

[9] Justice Scalia based this finding on the trial court's finding that the word "assault" in the CPO had the same definition as the substantive crime of assault. *Id.* at 701.

contempt of court has different elements than the substantive criminal charges, he would have found the assault charge and violation of the protection order to be separate offenses under *Blockburger.* Per Rehnquist, contempt of court is comprised of two elements: (1) a court order made known to the defendant, and (2) a willful violation of that order. *Id.* at 716 (Rehnquist, C.J., concurring in part and dissenting in part). A substantive criminal offense, such as assault, did not necessarily satisfy either of the two elements of contempt. *Id.* Thus he reasoned that "[b]ecause the generic crime of contempt of court has different elements than the substantive criminal charges in this case, I believe that they are separate offenses under *Blockburger.*" *Id.* at 714.

[52] At heart, Rehnquist's application of *Blockburger* focuses on the statutory elements of the offenses charged, while Scalia's application focuses on the facts that must be proven under the particular indictment at issue. *Id.* at 716-17.[10] Unlike Foster's case in *Dixon,* in the present case the substantive crime being charged is itself the crime of knowing violation of a protective order. Therefore, although we do not follow Scalia's approach, which would focus on the facts that must be proven for each offense in the particular indictment at issue, in the instant case, following Scalia's approach would yield the same outcome.

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[10] Chief Justice Rehnquist relates the following analogy, raised by the Government at oral argument, to illustrate the "absurd" results that such an analysis could in theory produce:

> Suppose that the offense in question is failure to comply with a lawful order of a police officer, see, *e.g.,* Ind. Code § 9-21-8-1 (Supp. 1992), and that the police officer's order was, "Don't shoot that man." Under Justice SCALIA's flawed reading of *Harris,* the elements of the offense of failure to obey a police officer's lawful order would include, for purposes of *Blockburger*'s same-elements test, the elements of, perhaps, murder or manslaughter, in effect converting those felonies into a lesser included offense of the crime of failure to comply with a lawful order of a police officer.

Dixon, 509 U.S. at 719 (Rehnquist, C.J., concurring in part and dissenting in part).

[53] Applying the *Blockburger* test following Rehnquist's analysis, we focus on the statutory elements of the offenses charged. The elements of the two provisions are very similar but not identical. Section 30.40 establishes that a *knowing* violation of a court order is a misdemeanor crime.[11] It thus comprises two elements: (1) *mens rea* of knowledge and (2) *actus reus* of violation of a court order. The criminal contempt authority delimited by section 34101 *et seq.*, on the other hand, states only that "violation of a court order" is contempt, punishable as a petty misdemeanor.

[54] We hold that willfulness is an essential element of a criminal contempt under section 34101. Willfulness is traditionally considered an "essential element of the offense" of criminal contempt. *In re D.I. Operating Co.,* 240 F. Supp. 672 (D. Nev. 1965). *See also United States v. KS & W Offshore Eng'g, Inc.*, 932 F.2d 906 (11th Cir. 1991); 17 Am. Jur. 2d Contempt § 5 (West 2008).[12] Even where a contempt statute does not expressly require a finding of willfulness, courts have imposed this requirement. Thus, in *Dixon*, Chief Justice Rehnquist

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[11] Title 9 of the Guam Code Annotated § 30.40 (2005) states, in pertinent part:

> (a) Any knowing violation of any of the following court orders shall be a misdemeanor punishable by a fine of not more than One Thousand Dollars ($1,000), or by imprisonment of not more than one (1) year, or by both such fine and imprisonment:
>
> > 1. An order enjoining a person from threatening to commit or committing acts of family violence against, or from harassing, annoying, or molesting, a family or household member, or any person named in the order; . . . .
> >
> > 3. An order requiring a person to stay away from the residence, dwelling, school, day care center, place of employment, or any specified place or from a specified person, within five hundred feet (500') of the specified place or specified person; . . . .

Id.

[12] Black's Law Dictionary provides another example, defining and discussing "contempt of court" as an act to embarrass, hinder, or obstruct the court:

> Committed by a person who does any act in *willful* contravention of its authority or dignity, or tending to impede or frustrate the administration of justice, or by one who, being under the court's authority as a party to a proceeding therein, *willfully* disobeys its lawful orders or fails to comply with an undertaking which he has given.

Black's Law Dictionary 333 (6th ed. 1990) (emphasis added).

found that the D.C. Code provision authorizing punishment of criminal contempt included a requirement of willfulness. *Dixon,* 509 U.S. at 716 (Rehnquist, C.J., concurring in part and dissenting in part).[13] Federal courts have also interpolated this requirement of willfulness when construing 18 U.S.C. § 401 (1982), which grants them discretionary power to punish contempt of their authority. *In re McDonald,* 819 F.2d 1020, 1024 (11th Cir. 1987).

[55] We do not have before us a transcript of the domestic proceedings. However, the contempt order itself states, in relevant part, that "[t]he court finds that Defendant Torres's behavior was *contumacious* and as being in direct violation of the previous court order and the court therefore finds Defendant Torres in contempt of court." Appellee's Br. at 9-10 (emphasis added). The trial court's finding that Torres's behavior was contumacious is equivalent to a finding that he *willfully* disregarded the protective order. *See* Black's Law Dictionary 315 (8th ed. 2004) (definition of "contumacious conduct"). Willfulness in this context "means a deliberate or intended violation, as distinguished from an accidental, inadvertent, or negligent violation of an order." *United States v. Baldwin,* 770 F.2d 1550, 1558 (11th Cir. 1985).

[56] Having established that the statutory elements of a criminal contempt sanction issued pursuant to section 34101 are (1) an *actus reus* of violation of a lawful order and (2) a *mens rea* of willfulness, we now apply *Blockburger* to compare the elements of the criminal contempt sanction with the elements of the substantive criminal charge. We find that the two provisions

[13] As in the instant case, the provision authorizing the contempt in *Dixon*, D.C. Code § 16-1005(f) (2008), is silent as to the elements required to show contempt. D.C. Code § 16-1005(f) states:

> Violation of any temporary or final order issued under this subchapter, or violation in the District of Columbia of any valid foreign protection order, as that term is defined in subchapter IV of this chapter, and respondent's failure to appear as required by § 16-1004(b), shall be punishable as contempt. Upon conviction, criminal contempt shall be punished by a fine not exceeding $1,000 or imprisonment for not more than 180 days, or both.

Id.

fail the *Blockburger* test requirement that *both* offenses contain an element not contained in the other. Proof of the generic criminal contempt would require proof of all the elements necessary to prove the substantive crime of contempt, because proof of a "willful" violation necessarily encompasses proof of the element of a "knowing" violation. It follows that the offense punished under section 30.40 is, if not the same offense, a lesser included offense of that punished by the criminal contempt order.

[57] Therefore, applying *Blockburger*, we find that Torres may not be punished under both the general contempt statute and the substantive crime statute for the same offenses, which are his violations of the protective order on December 1, 2005 and March 29, 2006. The subsequent criminal prosecution of Torres under section 30.40 is barred by the Double Jeopardy Clause, and we reverse the trial court's denial of Torres's motion to dismiss each criminal case.[14]

C. The Sufficiency of the Record

[58] As an alternative to the argument that Torres has not shown double jeopardy, the Government argues that Torres has not provided a sufficient record of the contempt proceedings in the domestic case for this court to determine whether the proceedings were criminal or civil. Appellee's Br. at 16. The Government insists that the inclusion of the transcripts from the contempt proceedings is crucial to determining whether the court specified the contempt as civil or criminal.

[59[However, we find that this transcript information is not crucial in this case, where we have evidence of the sanction actually imposed on the defendant. It is this sanction, not the

[14] Because of this court's reliance on interpretations of California statutes, we find it useful here to note why there is a lack of similar cases dealing with the parallel contempt and protective order statutes in California. The reason is the existence of a California statute, section 654 of the Penal Code, which bars multiple punishment of a single act or omission, even when that act or omission "is punishable in different ways by different provisions of law." Cal. Penal Code § 654 (2008). Section 654, in effect, results in the same preclusion of a second punishment as the *Blockburger* test, although this statute arguably grants even stronger double jeopardy protections to defendants.

judge's characterization of the indirect contempt proceeding that is most relevant to our determination of the civil or criminal nature of the proceeding.[15] *See Feiock,* 485 U.S. at 636; *Mahoney v. Commonwealth*, 612 N.E.2d 1175 (Mass. 1993) (although the trial court specifically declined to characterize the contempt action as a civil proceeding, the sentence and cash amount that had to be posted were designed to compel compliance with the orders and thus were civil contempt sanctions).

D. Notice to the Prosecution

[60] Our finding of a double jeopardy violation in Criminal Case II will result in the dismissal of Torres's criminal prosecution with prejudice. The government raises an important issue when they argue that they were not given notice or an opportunity to be heard in the domestic proceeding that resulted in the criminal contempt sanction which now bars their prosecution, "impinging upon the People's prosecutorial rights." Appellee's Br. at 18. The government therefore asks us to exercise our supervisory powers over the lower courts, described in the Organic Act, 48 U.S.C. § 1424-1(a)(4) (2008), to order the Superior Court to provide the government with notice and an opportunity to be heard in criminal contempt proceedings to which the government is not a party but which could adversely affect the government's prosecution authority.

[61] In *People v. Angoco*, we expressed a "strong commitment to prudential rules shaping the exercise of our jurisdiction which should result in a sparing use of this extraordinary supervisory power." 2006 Guam 18 ¶ 29. More importantly, we found that the language providing the court

[15] The validity of the non-summary contempt proceeding has not been contested by either of the parties and therefore is not at issue here. If Torres had appealed the contempt sanctions by claiming, for instance, violation of procedural due process, the insufficiency of the record may have barred our consideration of the claim, depriving us of the ability to determine whether relevant procedural safeguards were adhered to. However, this has no bearing on the double jeopardy issue.

with supervisory authority was intended to allow us to address "extreme cases, such as when the Superior Court is acting in excess of its powers." *Id.* We do not find the trial court's issuance of the criminal contempt sanction in this case to be an example of the Superior Court acting in excess of its powers.

[62] We decline to exercise our supervisory powers over the Superior Court beyond underscoring that fines providing restitution to civil parties and coercive imprisonment which can be avoided by a contemnor upon compliance with a court order will rarely be construed as criminal contempt sanctions, and therefore a trial court in a domestic proceeding may impose such sanctions without risking prejudice of any ongoing or future criminal prosecution based on the same offense. We acknowledge the possibility that a requirement of notice to the prosecution could be a salutary policy. The Colorado legislature, for example, has adopted a statutory provision requiring that notice of a criminal contempt proceeding be provided to the district attorney. *See* Colo. Rev. Stat. Ann. § 18-1-1002 (West 2008).[16] Such a statute may be enacted to protect the state's interest, rather than the interest of the contemnor. *In re Marriage of Helmich,* 937 P.2d 897 (Colo. Ct. App. 1997). Our task in the context of this litigation, however, is to determine whether a double jeopardy violation has occurred.

[63] The protections afforded by the Double Jeopardy Clause of the United States Constitution and the equivalent clause of Guam's Organic Act serve to protect the rights of criminal defendants. The desirability of a requirement to provide notice to the prosecution, vindicating

[16] Colo. Rev. Stat. Ann. § 18-1-1002 (West 2008) provides:

> Before a criminal contempt proceeding is heard before the court, notice of the proceedings shall be provided to the district attorney for the district of the court where the proceedings are to be heard and the district attorney for the district of the court where the alleged act of criminal contempt occurred. The district attorney for either district shall be allowed to appear and argue for the imposition of contempt sanctions.

Id.

the interests of the state in criminal prosecution, is an issue better suited for the legislature and one that can have no bearing on our determination.

V. CONCLUSION

[64] We reverse the denial of Torres's motion to dismiss in both criminal cases. Reviewing the factual circumstances of the two contempt proceedings, we find Torres could not avoid the contempt sanctions by any subsequent change in his behavior. The proceedings in both cases were initiated after Torres had already been criminally charged for his violation, jailed, and then released. We conclude in this case that the purpose of the sanctions was to vindicate the court's authority, a purpose that is punitive and therefore criminal in nature.

[65] Under *Blockburger*, the two criminal contempt sanctions punished the same "offenses" as that for which defendant had already been criminally charged pursuant to section 30.40 of the Crimes and Corrections Code. Therefore, a second criminal prosecution of the same offense is barred by the Double Jeopardy Clause. In denying Torres's motion to dismiss the charges in the criminal cases underlying this appeal, the trial court violated Torres's right to be free from double jeopardy. We **REVERSE** the trial court's denial of the Defendant's motions to dismiss the criminal cases and **REMAND** for` dismissal by the trial court.

ROBERT J. TORRES
ROBERT J. TORRES
Associate Justice

RICHARD H. BENSON
RICHARD H. BENSON
Justice, *Pro Tempore*

F. PHILIP CARBULLIDO
F. PHILIP CARBULLIDO
Chief Justice