TO BE ARGUED BY:
Kathy Manley

TIME REQUESTED:
10 Minutes

Onondaga County Court

---------- * ----------

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

MARTHA HENNESSEY, CLARE GRADY, MARK SCIBILIA-CARVER, JUDITH BELLO, DANIEL BURGEVIN, MARY ANN GRADY FLORES, MARK COLVILLE, BRIAN HYNES, ELLIOTT ADAMS, PATRICIA WIELAND, EDWARD KINANE, JAMES RICKS,

Appellants,

APPELLANTS' JOINT BRIEF

KINDLON SHANKS and ASSOCIATES
Kathy Manley
Attorneys for Appellants
74 Chapel Street
Albany, New York 12207
(518) 434-1493

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

New York Cases:

Federal Cases:

PRELIMINARY STATEMENT

This unusual case involves an October, 2012 protest at the Hancock drone base. Many people have been arrested in civil disobedience actions there over the past several years because they are extremely upset that their tax dollars are going to support remote killing, often of civilians, in ways to would appear to violate international law. The Statement of Facts contains many of their arguments and their compelling explanations as to why they were at the base that day.

The *legal* issues raised herein deal with the legal insufficiency of the disorderly conduct convictions; the abuse of discretion in granting orders of protection; and the improper duplicitousness of the accusatory instruments.

First, this Court should reverse all the convictions because there was *no proof* as to the *public* element of disorderly conduct. Here, no members of the general public (who are not allowed on the base without permission) were present, nor were they likely to be present. The Court of Appeals has repeatedly made it very clear that there can be no disorderly conduct under these circumstances.

Secondly, it is submitted that the granting of both temporary and permanent orders of protection at the request of the base commander was an abuse of discretion under CPL 530.13 because there was no showing that the commander was either a victim or a witness. In addition, the improper use of orders of protection in this manner chills protected speech under the First Amendment.

Finally, it is submitted that the accusatory instruments were impermissibly duplicitous because they each charged two offenses, rather than one.

QUESTIONS PRESENTED

1. Should the convictions be reversed based on insufficient evidence, or because they were against the weight of the evidence in that there was no proof of the *public* element of disorderly conduct?

2. Should the orders of protection be vacated because there was an inadequate showing under CPL 530.13?

3. Should the convictions be reversed because the charges were duplicitous?

STATEMENT OF FACTS

Introduction

This unusual case involves an October, 2012 protest at the Hancock drone base. Many people have been arrested in civil disobedience actions there over the past several years because they are extremely upset that their tax dollars are going to support remote killing, often of civilians, in ways to would appear to violate international law.

All but one of the appellants represented themselves in this non-jury trial, and they were given a great deal of leeway to express themselves, making for a lengthy trial. The appellants herein were all charged with Trespass and Disorderly Conduct, and were all acquitted of Trespass but convicted of Disorderly Conduct.

In this joint brief, the only legal issues raised are the sufficiency of the evidence as to the public element of disorderly conduct, the lack of validity of the orders of protection, and the improper duplicitousness of the Informations. However, the Statement of Facts also includes a summary of the Appellants' case, which sheds light on an important issue facing this nation.

Orders of Protection

Based on a supporting deposition of then Base Commander Col. Earl Evans, the prosecution requested, and the Court granted, temporary Orders of Protection directing all of the defendants herein to stay away from the home and place of employment of Col. Evans. (A-55, 67-79) The Temporary Orders of Protection were first issued at the arraignments herein on October 25, 2012, and then were re-issued on October 30, 2013 after they had expired. (A-148-160) After the convictions herein, permanent Orders of Protection were issued. (A-1412-1414) (Except for Elliott Adams, I was unable to obtain transcripts of the arraignments herein, but I have the transcripts for the re-issuance of the Orders of Protection in 2013, and the

issuance of the permanent orders after conviction.)

At the arraignment for Elliott Adams on October 25, 2012, the Court said that there was a supporting deposition from Earl Evans requesting an Order of Protection and, without any discussion of the factors to be considered under CPL 530.13, the Court said that Mr. Adams was to stay away from Col. Evans' home and place of employment. (R-63) When asked if he understood this, Mr. Adams said, "Yeah, I wanna say why, but I understand." (R-63) (Upon information and belief the same procedure occurred on the same date at the arraignments for the other twelve defendants, but a lot of the audio of said arraignments is inaudible.)

October 30, 2013

On October 30, 2013, there were proceedings for nine of the defendants to have the orders of protection renewed after they had expired five days earlier. Martha Hennessey was not present and an attorney appeared on her behalf. (R-81) As to the order of protection, the Court said, "...I'm gonna issue the order (inaudible). It'll be up to the district attorney to have her served..." (R-81)

As to Appellant Clare Grady, Ms. Grady stated:

> "...I wanna point out that for Colonel Evans to have, to take out an order of protection against us is, the way it played in my mind was so the Colonel of this airbase of the greatest military in the world is taking out an order of protection against grandmothers who are practicing their first amendment rights armed with a piece of paper indicting for war crimes. That's basically how it gets summed up in my mind.
>
> ***
>
> ...[This] order of protection is an obscenity and a perversion of the law that was hard won and ... to support that is to be in collusion with the killing that is going on right now..." (R-85)

The Court then said that he was directing Ms. Grady to stay away from Earl Evans at his home and place of employment. (R-86) Ms. Grady responded that this was not reasonable. (R-87)

Mark Scibilia-Carver said a defendant in a related case in Dewitt was flying home from Chile and was pulled aside and questioned because of a similar order of protection. (R-92) He

added that it was shameful to grant orders of protection under these circumstances. (R-92) The Court then directed him to stay away from Earl Evans at his home and place of employment. (R-93)

As to Judith Bello, Ms. Bello stated that she believed that since the order of protection had already expired, it was too late to renew it. (R-96) She added that as a survivor of domestic abuse, she found the use of orders of protection under these circumstances to be objectionable and offensive. (R-96-97) The Court then directed her to stay away from Earl Evans at his home and place of employment. (R-97-98) Ms. Bello said, "God knows I've got nothing to do with that man" and "I have never in my life made any attempt to be near Mr. Evans." (R-97, 99) When the Court asked if she understood the order, she responded "As well as anyone can understand it. You know, I mean I feel like Alice in Wonderland down the rabbit hole." (R-100)

As to Rae Kramer, Ms. Kramer stated that she did not understand why Col. Evans would claim to feel threatened by her, and added:

> "I would like included in the record my concern [for] the trivialization of ... a very important ... statute, in terms of the protection of people who are victimized by attackers, and the idea of using this ... to simply prevent us from being present at the workplace of a man most of us have never seen in our lives." (R-108)

Subsequently, the following occurred:

> "MS. KRAMER: In a domestic situation, the complainant needs to show some level of threat, some level of intimidation or fear for oneself, one's pets, one's children, etc. Colonel Evans, to me, is I'm mystified as to what the threat was that we posed other than inconvenience to, in his eyes, to his work. To apply this statute because of inconvenience resulted in a compromise of our first amendment rights...
>
> THE COURT: ...I remember the decision on the article 78[1] and the judge .... said ... the judges were within their discretion to do it. ..." ...
>
> MS. KRAMER: But the litigation [the first Art. 78] was not based on substance...

[1] The Court was referring to the *first* Article 78 petition regarding these orders of protection – a subsequent one, *Finlay v. Gideon*, was granted, holding that these orders of protection were improper. The People appealed and the Fourth Department Decision is likely to occur before this case is decided.

THE COURT: When it comes to orders of protection I think there's a slippery slope.

MS. KRAMER: I agree." (R-109, 112)

As to Daniel Burgevin, the Court directed him to stay away from Earl Evans at his home and place of employment. (R-118) Mr. Burgevin stated, "...I certainly haven't contacted Colonel Evans. I don't know what the man looks like. I wouldn't contact him if I did. ..." (R-120)

As to Mary Ann Grady Flores, she stated:

"I could not identify him [Col. Evans] if I saw him again. I don't know who he is still till this day even though he was in court the other night. ...I'm still in shock that this is happening in a very inappropriate way. It's an improper application of the law." (R-124)

The Court replied that there are remedies available and that this could go through the appellate process. (R-125) He then stated, "...there seems to be some inconsistency across the state [with regard to this issue] and when you got inconsistency, it means there's always gonna, there usually is an appeal. (R-126) The Court then directed Ms. Grady Flores to stay away from Earl Evans at his home and place of employment. (R-126) She responded:

> "I understand it but I don't agree with it and I don't feel like I participate in anything having to do with the man, the person. ... I'm not going there to threaten any human being on the base. ...I go there to prevent people from being threatened. ..." (R-127)

As to Edward Kinane, he said that he didn't understand the reasoning behind the orders of protection, and the Court said that it was based on the affidavit he had received from Col. Evans. (R-130) Mr. Kinane asked if Col. Evans needed to testify about that, and the Court responded, "You'll hear it on December 12th [trial]." (R-130) The Court then directed him to stay away from Earl Evans at his home and place of employment. (R-134) Mr. Kinane stated that he objected to the order, and the Court said, "Well then I suggest you bring an article 78. I think that's already been litigated..." (R-138)

As to James Ricks, Mr. Ricks said:

"... I have not heard Earl Evans come in here and say why he wants an order of protection and I think you and I know that we represent no threat to him as far as holding a sign in front of that base... I heard you make an analogy about somebody holding a sign in front of somebody's house. If they're bringing a sign in front of somebody's house that either killed somebody in there ... they are bringing [it] to attention.

***

...I was in this courtroom [when] Ramsey Clark said that it's our duty ... to call for the attention and bring to [a] halt war crimes being committed at Hancock Airbase. He's a former Attorney General. He said it here in the court in front of you. ...

***

...I know that you know that it's ridiculous, that we represent no threat to him.

***

...[I]t seems like it's just a tool that somebody has figured is a (inaudible) exercising our constitutional rights and I would think that you would find that problematic... (R-140-143)

The Court then directed Mr. Ricks to stay away from Earl Evans at his home and place of employment. (R-146) Mr. Ricks said, "you might as well read it to my grandson. He has as much ability or desire to hurt or, or strangle or touch Earl Evans. My codefendants stated he came in, it was the first time I ever saw him." (R-147)

Discussion of Orders of Protection at Trial

At trial, when Col. Evans was asked, by Appellant Brian Hynes, why he requested orders of protection, the district attorney objected as to relevance, and the objection was sustained. (R-242-243)

James Ricks asked Col. Evans if he found him (Mr. Ricks) threatening, and there was an objection, which was sustained. (R-247-248) The Court then noted that there had been an Article 78 Petition decided on this matter. (I- 113)

Subsequently, Clare Grady asked Col. Evans if he knew who she was, and he replied, "I've heard your name, but no this is the first time we've met." (R-264) She later asked him if he had actually seen her at the gate, and he replied, "I can't confirm I saw you in particular, but I did see protestors at the gate, yes. " (R-270)

Daniel Burgevin also asked Col. Evans if he found him threatening, and an objection was again sustained, with the court noting that there was an article '78 decision on this issue. (R-276-277)

Chief Master Sergeant Michael Ramsey was asked if he thought the base commander had any reason to feel threatened by the protestors and he responded, "No, his main concern was keeping the gates clear." (R-397)

Orders of Protection at Sentencing

At sentencing the Court issued two year permanent orders of protection directing the appellants to stay away from Col. Evans and his home and workplace. (R-1356) He stated:

> "...It's left to the judge's discretion [under CPL 530.13] as to good cause and I'm affirming that I have good cause to issue ... those orders of protection. ... I know you don't agree with this, but I'm asking each of you individually do you understand what I read to you. ..." (R-1356)

Ms. Kramer said that it is not an issue of intimidation, but rather inconvenience to the base. (R-1357) The Court said that the orders were being issued based on good cause and the totality of the circumstances, adding, "That's the issue you can address on appeal. If I'm wrong, they'll reverse me." (R-1357-1358)

The Prosecution's Case

Colonel Evans

Colonel Earl Evans testified that he oversees security for the 174th Attack Wing and has discretion over who is allowed to be present on base property, which he said extends to the center line of Malloy Road. (R-229-230, 232)

Chief Ramsey

Chief Master Sergeant Michael Ramsey testified that he was the security force's manager,

in charge of oversight of security for the base. (R-281) He said that on October 25, 2012 he got a call about a protest at the E. Malloy Road gate, and that he went there. (R-281-283) Chief Ramsey said that there are three gates altogether and that at one point all three gates were blocked. (R-282-283)

The district attorney attempted to introduce People's Exhibit 1 – a map of the boundaries of the installation (base) into evidence. (R-285-286) Appellant Edward Kinane (acting *pro se*) objected unless the defense could obtain a copy of the map. (R-289) The Court stated that the map was too big to fit in the copy machine and Mr. Kinane responded that he could just take a picture of it. (R-289) The Court asked if the prosecutor objected to that, and he (after briefly consulting with an unknown person) withdrew his request to have the map admitted. (R-289-290)

The prosecution started playing video clips (from People's Exhibit 2, which was admitted into evidence) from surveillance video taken at the E. Malloy Road gate during the protest. (R-291, 294, 297). Chief Ramsey testified that "there were several vehicles that were denied access by the gates being blocked." (R-299)

Chief Ramsey said that, with regard to the E. Malloy Road gate, which is the main gate, that the property line of the base goes to the middle of E. Malloy Road. (R-304) He testified that the base provides an easement to the Town of Dewitt which runs 25 feet from the center of E. Malloy Road. (R-305-306). *He said that where the protesters were standing was on base property outside the easement area.* (R-306)

Chief Ramsey testified that there were no signs or markers indicating the boundaries of the base or the easement area. (R-309-310) He later testified that a decision had been made by the base commander not to put up No Trespassing signs and not to mark the property lines in any way. (R-444-445) When asked if he could identify, in the video, the boundaries of the easement, he said

"I would be guessing and estimating." (R-316)

When asked where he got the information about the easement, Chief Ramsey testified that he got it from "staff (inaudible) advocate at the base." (R-347) He had seen a boundary map of the base, but it didn't show the easement. (R-347-348)

Chief Ramsey said that in addition to the E. Malloy Road gate, the other two gates where there were protests that day were the Town Line gate and the Thompson Road gate. (R-360) Another video clip was shown which depicted people walking toward the Thompson Road gate, which is on the east side of the base perimeter. (R-362)

There were movable metal barriers placed at the Thomson Road gate preventing anyone from entering or exiting there. (R-365, 371) Chief Ramsey testified that at the Thompson Road gate the protesters were standing on property the base leases from the Town of Dewitt. (R-367) When asked where the lease boundary was, Chief Ramsey said he'd have to look at a lease map, but then he tried to describe the area, with reference to the video, saying it was like a triangle. (R-367-368) *He said that the protesters there were on [leased] base property.* (R-370) There were no markers indicating that this was base property. (R-372)

Chief Ramsey testified that it was the decision of the base commander to have the protestors arrested by police rather than base personnel. (R-377)

Subsequently a video clip from the third gate, the gate off of Town Line Road, was played, and Chief Ramsey testified that the same type of metal barriers that were at the Thompson Road gate were also here, blocking access to the gate, which was not normally used. (R-402-405) *He said this area where the protesters were was base property.* (R-406, 412) He also testified that this gate had been open, but that it was closed by base personnel when they saw the protestors approaching. (R-413)

Lt. Curtis Dailey

Lt. Curtis Dailey of the Onondaga County Sheriff's Department testified that he arrived at the main gate (the E. Malloy Road gate) at 8:30am on October 25, 2012 and saw about ten protestors blocking both sides of the base driveway. (R-485-488) When asked whether it was possible at that point to enter or exit that gate, Lt. Dailey responded that he wasn't sure. (R-487) He said that ten people were arrested there, after having been given warnings to leave. (R-489)

Subsequently Lt. Dailey went to the Town Line Road gate where he saw three protesters in the entrance way. (R-490) After being given warnings, the three were arrested. (R-491) He said that this gate was blocked with metal star barriers by the Air Force because "they decided to keep it closed." (R-501-502)

Deputy Daniel Ferazzoli

Onondaga Sheriff's Deputy Daniel Ferazzoli testified that he was sent to the main gate at E. Malloy Road on the morning of October 25, 2012, and that he arrested Elliott Adams there. (R-562-564, 566) Mr. Adams acted in a respectful manner. (R-580) Subsequently Deputy Ferazzoli went to the Town Line Road gate entrance way, where he went up to a person he later learned was Mark Colville and asked him if he was refusing to leave. (R-568-569) He claimed that Mr. Colville answered affirmatively and he then arrested Mr. Colville for trespassing. (R-569) Mr. Colville was very cooperative. (R-578)

Finally, Deputy Ferazzoli went to the Thompson Road gate entrance way, where he walked up to a person he later learned was Brian Hynes and asked him if he was refusing to leave. (R-570-571) He said that Mr. Hynes said yes, and Deputy Ferazzoli placed him under arrest for trespass. (R-571) Deputy Ferazzoli could *not* identify Mr. Hynes in the courtroom. (R-572)

Deputy John Fuller

Onondaga County Sheriff's Deputy John Fuller testified that he went to the E. Malloy Road gate on October 25, 2012, and that he placed James Ricks under arrest after telling him he could leave or be arrested. (R-599-602) He then went to the Town Line Road gate and subsequently to the Thompson Road gate, where he arrested Mary Ann Grady Flores. (R-604) He was not able to positively identify her in the courtroom. (R-606-607) He testified that all the protesters were respectful and very friendly, especially the people he arrested. (R-608-609, 611)

Deputy Laura Collins

Onondaga County Sheriff's Deputy Laura Collins testified that she went to the E. Malloy Road gate on the morning of October 25, 2012, and that she approached a woman who refused to leave. (R-615-618) She placed the woman under arrest and later learned that she was Judith Bello. (R-618) Deputy Collins then went to the Town Line Road gate and subsequently the Thompson Road gate, where she approached a woman she later learned was Clare Grady. (R-619) Deputy Collins said that Ms. Grady refused to leave, and she placed her under arrest. (R-619-620)

Deputy Karen Munroe

Onondaga County Sheriff's Deputy Karen Munroe testified that she went to the E. Malloy Road gate on the morning of October 25, 2012, and that she arrested Bonnie Mahoney there. (R-627-628, 630) Subsequently she went to the Town Line Road gate where she arrested Mark Scibilia-Carver. (R-631-632)

The district attorney stated that Deputy Munroe also arrested Martha Hennessy but that Ms. Hennessey had been hospitalized and was not present in court that day. (R-629) On the next day of the trial, January 23, 2014, Ms. Hennessey was present, and the Court spoke to her about how she wanted to proceed. (R-695-697) She said she wanted to represent herself and also wanted

to stay in the trial with all her co-defendants. (R-696-697) In order to do that, without having to recall her arresting officer, Ms. Hennessey stipulated that she was arrested at the Thompson Road gate after refusing to disperse. (R-726)

PO John McNeil

Dewitt Police Patrolman John McNeil testified that he responded to a trespass complaint at the 174th Attack Wing on October 25, 2012. (R-642-643) He proceeded to the E. Malloy Road gate and arrested Edward Kinane there. (R-643-644) He didn't know if he asked Mr. Kinane to leave before placing him under arrest. (R-645) Mr. Kinane was very cooperative. (R-645, 648) PO McNeil testified that based on all of the interactions he had or witnessed with the protesters, they were all friendly, cooperative, peaceful and non-threatening. (R-660-661)

PO Michael Ellis

Dewitt Police Patrolman Michael Ellis testified that he went to the Thompson Road gate on October 25, 2012. (R-729-730) He saw eight to twelve people there in front of the gate and told them to leave or face arrest. (R-731) *PO Ellis testified that they all left.* (R-731)

PO Ellis then returned to the main gate and approached a man he said was Daniel Burgeson (actually Burgevin). (R-731-733) He said that the man refused to leave and he placed him under arrest for trespassing. (R-733) He could *not* identify Mr. Burgevin in the courtroom. (R-735)

PO Ellis testified that when he arrived at the main gate, that gate was closed. (R-736) The Thompson Road gate was also closed and there were metal star barriers in front of it. (R-736-737I)

PO Donald Baumann

Dewitt Police Patrolman Donald Baumann testified that he went to the main gate on E. Malloy Road on October 25, 2012, and that he arrested Patricia Wieland there. (R-748-749, 751) He didn't give a warning first, and he said Ms. Wieland was cooperative. (R-749-750)

Deputy Jennifer Hanslip

Onondaga County Sheriff's Deputy Jennifer Hanslip testified that she went to the E. Malloy Road gate on the morning of October 25, 2012, and then went to the Town Line Road gate. (R-758-761) She approached a woman she later learned was Rae Kramer and placed her under arrest when she refused to move. (R-762-763) Ms. Kramer was cooperative. (R-762-763)

On cross-examination, Ms. Kramer noted that she was a regular at a local restaurant owned by Deputy Hanslip's parents, who speak about her with great pride. (R-769) She then asked Deputy Hanslip if she remembered her, and Deputy Hanslip said she hadn't remembered her from the restaurant until she mentioned it (R-770), and then she stated:

> "...[Y]ou left ... you left an impression on me. ...[I]t's not like you did something bad. ... It's not like you did something bad that left this really negative impression on me. ...[Y]ou were nice about it... And when you came in, into the back, I remember you guys singing... So it was stuff like that that left an impression why I remember you." (R-770-771)

Subsequently, Ms. Kramer said to Deputy Hanslip that it was a pleasure seeing her again, and she responded, "same here." (R-775)

Motions for Trial Order of Dismissal

Attorney Robert Baska moved to dismiss the charges for Paul Frazier because he had not been identified and, as to the trespass charge, because there was insufficient evidence as to the base boundaries. (R-808-810) He moved to dismiss the disorderly conduct because the gates were already closed. (R-811) The Court reserved on the motions. (R-817)

Judith Bello moved to dismiss the disorderly conduct because there was no proof of any impact on the public as the prosecution witnesses testified that the defendants were on base property and didn't mention any impact on the public. (R-819) She also moved to dismiss the trespass charge. (R-820)

The district attorney responded by saying that cars were blocked, but he did not claim that said cars belonged to members of the public as opposed to base employees. (R-820-821) The Court reserved on the two motions. (R-821)

In addition Mary Ann Grady Flores also moved to dismiss the disorderly conduct because the location was not public, and noted, significantly, that base personnel had testified that the public was not allowed on the base without permission. (R-821-823) She also joined in Mr. Baska's motions. (R-821)

Patricia Wieland moved to dismiss because her arresting officer was unable to identify her in court. (R-822) Daniel Burgevin moved to dismiss because he was not positively identified in court, and because he was exercising his constitutional rights. (R-824)

Clare Grady apparently joined in the prior motions, though it was unclear which ones as her statement was inaudible. (R-825) Rae Kramer joined in the prior motions except for the motion regarding lack of identification. (R-826) An unknown defendant – perhaps Mr. Hynes - joined in all the prior motions. (R-826-827)

Edward Kinane joined in the motions by Judith Bello and Daniel Burgevin, and said, significantly, "*I would emphasize that the one charge trespass is private property, the other charge disorderly conduct deals with public property. And I was only in one place, I was either on private property or I was on public property, not both.* You kind of, you kind of can't square that circle." (R-827-828, emphasis supplied.)

James Ricks joined in the motion regarding disorderly conduct, and agreed with Mr. Kinane that he couldn't be on both public and private property at the same time. (R-828-829)

The Court reserved on all of these motions. (R-829)

Defendants' Case

Opening Statements

Edward Kinane stated that he and his co-defendants did not intend to break the law, but rather to uphold international law – particularly the Nuremberg protocols which "mandate that citizens of all nations expose and refuse to participate in their government's war crimes and crimes against humanity." (R-217, 219) He added that he came to Hancock in an attempt to save the lives of children and other noncombatants who are in danger of being killed by drone strikes from this base. (R-220)

Cross-Examination of Prosecution Witnesses

Col. Evans was asked if the MQ9 [Reaper Drone] was the main mission of the base, and he responded "It's the primary assigned aircraft of the 174th Attack Wing, yup." (R-245-246) He said he was not aware whether people suffered from PTSD as a result of their work with the reaper drones. (R-265)

Chief Ramsey was asked if he could identify a person in a photograph and when he said he could not, he was told it was a photograph of a dead Afghan child. (R-349) He was asked if he was aware that the base was responsible for this child's death. (R-349) Chief Ramsey responded that he couldn't say that the base was responsible for that child's death. (R-349) Subsequently he was asked if he was aware of the many civilians killed by MQ9's piloted from this base, and Chief Ramsey said he was not. (R-462) He said, "You said from Hancock Field, killing civilians. ... That part, I'm not aware of any deaths coming from my base. I'm not aware of what everybody else is aware of from what I read, yes." (R-463-464)

Application for Expert Testimony

The defense requested that Professor Francis Boyle be allowed to present expert testimony

via video (as he could not be present due to a medical emergency with his mother) and the Court initially denied the application, claiming collateral estoppel with regard to a previous decision, which he read. (R-830, 832, 835-837, 853)

The defense argued that Prof. Boyle would testify about how international law applies [pursuant to the Supremacy Clause in the US Constitution, and how the Nuremberg Protocols apply within that context] and thus can be raised in this case. (R-835) The Court read from his prior decision (in another Hancock protest case) which stated that the principles contained in the Nuremberg Judgment were not properly codified and thus could not be applied herein. (R-836-837) Ms. Grady Flores argued that collateral estoppel should not apply because this was a different group of defendants. (R-838)

Attorney Robert Baska argued that the defense was raising justification under PL 35.05(1) which allows for an act to be justified because it is "required by law," and that the defendants were arguing that their actions were required by international law, so that the expert testimony would be relevant. (R-840-843) He noted that Prof. Boyle has an extensive background in international law, which he teaches at Harvard. (R-845) The Court then reserved decision on this issue. (R-857)

Subsequently, the Court said he would accept a memorandum from Prof. Boyle, as part of the defense case, but would not allow him to testify via Skype. (R-968)

Defendants' Testimony

Elliott Adams

Elliott Adams testified that he had served as a paratrooper in Vietnam, and later was an EMT, and then spent 15 years in public service, including being president of his local school board. (R-862-863) He testified that he went to Hancock on October 25, 2012 to uphold international law and the United States Constitution, and to peacefully petition his government for

targets. Two percent of over 4,000 people.... You do the math... I wonder if there was a drone force and it indiscriminately bombed Dewitt township, how we would feel about it. If it was our grandchildren, mothers, and families blown to bits. ... How do we look at our conscience as Americans? ..." (R-897-898, emphasis supplied)

Mark Colville

Mark Colville testified that he felt it was very important for people to actually go to the places where war crimes were being committed, and that when he had traveled to countries attacked by the United States or its weapons, it meant a lot to the people there to know that he had been trying to prevent these attacks. (R-912-915) He stated:

"...On September 10, 2001, I arrived in ...the Northwestern part of Colombia, which was inhabited for centuries by communities of indigenous ... Indians. ...[T]he Colombian military ... had been terrorizing them for years... using these Blackhawk helicopters... And we put out a call internationally for folks to come and just live in their villages in order to protect them. ... [T]he weapons that were used in attacking them were part of Bill Clinton's (inaudible) ... [T]he people there were aware that I was [facing charges] for actually resisting the Blackhawk helicopters. Children, children were drawing pictures of these things shooting into their villages... and the people there know, I can't explain how it made them feel to, to know that people in the United States were actually trying to get in between ... these weapons... So, that experience really impressed on me the importance of, of taking action... So that's why I was there that day, on October 25, 2012, out in front of the Hancock Air Force base. ... (R-912-915, 917)

Mr. Colville said that he had taken the nonviolence pledge without any reservations, and that his behavior was consistent with the pledge. (R-920) Later, he stated:

"...[T]hey're [police and base personnel] just doing their job, but what we're trying to call them to is a deeper understanding of what their job is ... the defending of the Constitution. ... [W]e're used to being ignored or ridiculed. And, and yet we, we kind of cling to a hope... those institutions are, are occupied by people... ...[T]hey can respond in a human way. And all of them have families like I do, and they all love people like I do, we're just trying to get them to expand their sense of responsibility... The, *the children and the families in Afghanistan have just as much a right to life and, and safety and sanity as my children and my family do and those of the police*, you know, all of who are obviously good people who also came to testify here. We have no quarrel with anybody on a personal level.

...If I'm walking down the street and there's a building on fire and there's a no trespassing sign on the building and there's kids up in the window, you know, I'm gonna run in there, you know, and try to save the kids." (R-932-934, emphasis supplied)

Judith Bello

Judith Bello started her testimony with a description of a childhood experience which made a huge impression on her. (R-981) She was accustomed to air raid drills at her school when an alarm would sound and all the children would leave their classrooms and crouch in the hallway or the basement. (R-981) One day when she was in the eighth grade there was an air raid drill - the children were all in the basement and some of the teachers were crying. (R-982) Ms. Bello was then convinced that a nuclear bomb was about to land on them, and she decided to get her younger sister and walk home so she could be with her family. (R-982) She found her sister and they walked home, and found their mother sitting in front of the television crying. (R-982) Her mother said that the President was just shot. (R-982) Ms. Bello was relieved that not everyone was going to die, and she stated:

> "...[I]n places like Afghanistan and Pakistan, they have the continuous sounds that make them know that there might be a bomb falling on them. And ...other people in the family have already had a bomb fall on them, and died. ...[T]he threat never goes away for them... ...[A]s an adult looking back [at the air raid drills] I think that there [was] probably no threat whatsoever to me at that time. But as a child, I didn't know that. ..." (R-983)

Ms. Bello also described a recent trip she had taken to Pakistan, where she met with family members of people killed by US drones, stating:

> "So when I came to Hancock Base to stop the drones on the 25th of October, I had just returned from a trip to Pakistan where I met with the families of drone victims... I also understand that Hancock pilots... [fly] reaper drones over Afghanistan and I understand, I have people in the military in my family. So it doesn't surprise me when they say they want to protect the soldiers on the ground. Of course they do. ... There is no possibility ... that a drone pilot thousands of miles away could really specifically identify a person of interest without help from someone on the ground and so, when I heard that they're using other methods [where] they're deciding by patterns of behavior among the people...I really think this is a huge problem... [Also] there are people on the ground who are being paid for information to assist in targeting the drones... ...Among the Afghan Peace Volunteers [who she works with] there's a young man named Raz Mohammad whose brother-in-law was killed in a drone attack in the town of Maidan Shar in Afghanistan. ... [H]e talks about the

effect on his family and community... ...[T]his is for me a very powerful influence on my intentions..." (R-983-985)

Ms. Bello requested that she be allowed to show a video of Raz Mohammad describing the drone attack which killed his brother-in-law, and the Court allowed it to be played, which then occurred. (R-985, 990-991)

Ms. Bello went on to discuss a series of reports which investigated US drone attacks. (R-994-995) These included Amnesty International's [2013] Report entitled "Will I be Next," Human Rights Watch's [2013] Report entitled "Between the Drone and Al Qaeda," and European human rights group [Alkarama's 2013] Report entitled "License to Kill" which all concluded that the United States' drone attacks were being conducted in violation of international law. (R-994-995)

Ms. Bello also said that the US claimed that the drone attacks were only aimed at "militants," but she noted that the government defined "militant" as any man between the age of 16 and 60 found in a particular area. (R-996)

Finally, Ms. Bello described a drone protest she participated in at the NYS Fair where she was holding a list of drone victims, including many children. (R-1002) She said that a man came up to her and was reading the names carefully, and agreed with her that it was terrible. (R-1002) Ms. Bello noted the names of the children, which were starred, and the man said, "I didn't know." (R-1002) She replied that most people don't know, and the man said, "*No, you don't understand, I'm the drone operator.*" (R-1002, emphasis supplied) Then he started to walk away, and when he was about 20 feet away, he turned, looked over his shoulder and said, ""I'm sorry." (R-1002-1003)

Mark Scibilia-Carver

Mark Scibilia-Carver testified that he came to protest at Hancock because its mission has

killed people in the poorest region of the world. (R-1017-1018) He quoted former Supreme Court Justice Robert Jackson, the US prosecutor at Nuremberg, as saying that "if certain acts and violations of treaties are crimes, they're crimes whether the United States does them or whether Germany does them, we are not prepared to lay down a rule of criminal conduct against others that we would not have evoked against us." (R-1018) He went on to say:

> "...Anyone who saw the victims will do all he or she could to prevent the drone attack[s]... Of course I can't bring the victims here. Perhaps the best I can do to give reasons for my actions is to share a few of the victims' stories... On April 6, 2011 a ...missile fired by a drone blew to bits Jeremy D. Smith, a Marine Staff Sergeant, age 26, from Arlington, TX and Benjamin David Rast, a Navy hospital man, age 23, of Niles, Michigan. An unreleased Pentagon report found that Marine officers on the scene and the Air Force crew piloting the drone from halfway around the world were unaware that analysts [in Terre Haute, IN] had changed their assessment [that these were terrorists] writing that they were 'unable to discern who the figures were.'... Jeremy Smith was killed the day before his second wedding anniversary. He always wore his wedding ring on a chain around his neck. A Marine buddy returned to the site of the attack and at great risk hunted for this ring. He found it and was able to return it to the ...widow.
>
> ...By contrast the attack of September 7, 2009 cannot be considered a mistake or an accident. ...It was the month of Ramadan... Sadata, age 15 ... was particularly happy that day because there was an iftar, an opening of the [Ramadan, where Muslims fast from dawn to dusk for a month] fast feast planned at his house that evening. ...[H]is mother was cooking his favorite meal. ...Everyone broke their fast [with snacks] and proceeded to the courtyard [for] ...evening prayer. Sadata was the last one to join the prayer... Everyone finished prayer and again gathered ... to have the main course of the meal. Sadata and his cousin were the last ones to finish their prayer. It was at this time that the (inaudible) missiles were fired... and Sadata, who was entering the room, fell unconscious under the debris of the fallen roof. He woke up in a hospital where he found out that he would never walk again as both his legs had been amputated and one of his eyes had been destroyed by shrapnel. He also lost his uncle... and two of his cousins...
>
> A recent attack killed 17 and wounded 20 people in a wedding procession in Yemen on December 12 [2013) our original trial date. ...On October 30, 2006 a drone attack on (inaudible) which was alleged to be a Taliban training camp killed 82 including 69 children. More than twice as many as were killed in Newtown, Connecticut." (R-1021-1027)

Brian Hynes

Brian Hynes testified that he went to Hancock on October 25, 2012 because he believed the base was violating international law (and the US Constitution) by engaging in offensive war.

(R-1047-1048) He stated:

> "It must not be necessary to quote unquote defend the United States that we must violate our own laws, abandon our legal commitments to international law... We have a commitment to recognize the sovereignty of other nations and the ... ongoing campaign targeting civilians in Afghanistan is a violation of [the law]... [We have] a crisis that puts on the one side the dutiful and honorable service of the military personnel, contractors at Hancock, this court, the DeWitt police, etc on one side versus on the other side, a community of allegiance to ...the principles of our Constitution and the principles of international law. ... ..My actions today and throughout this trial have been to call attention to that crisis. ..." (R-1048-1049)

On cross-examination, Mr. Hynes was asked if he was familiar with the term "double taps." (R-1066) He responded that this was a US government policy to strike a target and then return and fire at people who come to aid the victims of the strike on the assumption that they must be "militants." (R-1066-1067) He added, "[W]e not only target persons, civilians living in other countries whose sovereignty we're violating but we specifically try to target the aid workers who go to assist at the scene of the explosion." (R-1067)

Mr. Hynes testified that he recalled taking the pledge of nonviolence and that it reflected his state of mind, and helped him focus his intention and reaffirm his commitment to the group. (R-1069) He also stated, "The gates were never opened. The military were nowhere to be seen and the police were very respectful. ... *There was no public there at all.* It was, it was us and the police..." (R-1071)

James Ricks

James Ricks testified about why he came to protest at Hancock, stating:

> "Judge, it's good to be here. ...I find you to be very compassionate. You seem to be very... considerate of the fact that we aren't professional lawyers.
>
> ...I'm a black man. ...[T]he elephant in the room for me, sad to say, [is] the concept that black, brown and red and yellow lives are somehow less important ... than white lives. ... I noticed the victims [of drone attacks] are black, or some shade of brown. The funerals are all Muslim funerals. ...
>
> I went to Pakistan. I met some victims' family members and they told me their

stories... [P]arents don't let their children gather in groups anymore. Any kind of gathering that could promote community is pretty much a very dangerous endeavor... when these signature strikes just with a thermal camera pick out some group... ...I was just wondering if those bodies were white children, limbs scattered, white mothers and fathers grief stricken and searching for pieces of their children....would then that oh god what are we doing here moment hit? ... I know these are innocent lives lost. ...

...My intent was to exercise my Constitutional rights when I came to Hancock. ... [A]nd to perform my duty to halt war crimes being committed, I'm sure in a very orderly fashion at that base. ...

...And you're a judge. You know, *when do you kill somebody for being suspected of anything*? ...Killing with absolutely no due process...

...When ...secret interpretations of policy and law ... lead to violence, intimidation and death, the citizens in whose name it is done in have a definite right to know...how else can they ... inform their elected officials about the direction that they feel this country should take. ... A secret interpretation to extinguish somebody's life is not acceptable. ... [If] anybody came before you in this courtroom accused of anything and they told you they had a ... perfectly legal reason to have committed the act which appears to be criminal and you ask them what ... and they say trust me, Judge Gideon. ...[I]t's a secret. ... ...[W]e allow these politicians to tell us that they have a secret policy for killing thousands of people.

...We're not here for exercise or ...publicity... We're here to try and stop an illegal war... (R-1077-1078, 1080-1085, 1089-1090, emphasis supplied)

On cross-examination, Mr. Ricks testified that he took the non-violence pledge, and when asked if it faithfully reflected his frame of mind that day, he said "Definitely. And I might add that the unbelievably congenial manner ...with law enforcement was surreal and actually pretty enjoyable for being arrested." (R-1109)

Patricia Wieland

Patricia Wieland, who was questioned on direct examination by James Ricks, testified that she had just returned from a trip to Pakistan about a week before she came to Hancock on October 25, 2012. (R-1122-1123) She stated:

"...I was so tired by the time I left Pakistan because I had heard so many ...horrible stories of people, innocent civilians ...who were killed by drones that my government was dropping on people. And how many times could ... I say to the people whose stories we heard, whose pain we shared, I'm sorry.

...[T]he highlighting [in the 10/25/12 protest and the indictment the protest brought to the base] of extrajudicial killings, the wars of aggression and the killing of innocent civilians struck me so deeply because those are the exact family members of those people

we had just encountered. ...

What I hoped to accomplish that day was making real the compassion that I felt for the people of Afghanistan and Pakistan, that by coming to this base to speak out to bring this indictment, and ... you and another defendant and I read the indictment at the gate to the people on the base. ...[I]t was a way that we really could say [this] to the ...people who are actively involved... ...I was actually able to speak for the people in those two countries ... whose voices are not heard here...

...It was not simply compassion for the people of [Afghanistan and] Pakistan, but one of my background[s] ...was in social work and what I've become aware of is the post-trauma ... suffered by drone pilots and so ... it was also to have compassion for them...

[She read from Defendant's Exhibit "Q," Stanford and NYU Report "Living Under Drones"] ...I just want to read two lines from that document ... [from a] journalist who has spent years photographing and interviewing victims of drone strikes. ...[H]e relates, 'When people are out there picking up the body parts after a drone strike, it would be very easy to convince these people to fight against America.' And that's [related to] the last group of people [I have compassion for] – everyone here to our children and our children's children that they not be victimized by people who would want to retaliate." (R-1123-1128)

On cross-examination Ms. Wieland was asked if any members of the public were there that day, and she said no. (R-1134-1135) She also said she took the non-violence pledge "and embraced it and was happy to be part of a community taking it together..." (R-1135)

Martha Hennessy

The last defendant to testify was Martha Hennessy, the granddaughter of Catholic Worker founder (and now candidate for sainthood) Dorothy Day, and she discussed what had brought her to Hancock that day, including her personal connection with the family member of a drone victim. (R-1141, 1146-1148, 1153) She stated:

"...I've had an opportunity to travel two times to Afghanistan and the young man who testified on video tonight was (inaudible). I know him personally. I lived with him for one month. I helped to teach him English. ... I learned what his hopes and dreams are ... and I experienced his pain and his trauma...

I was raised in a large family and I was ... made aware of the suffering of others so I would say this [coming to Hancock] is a result of a lifetime of experience ... to acknowledge and understand the suffering of others.

...We do this exercise over and over again and our hopes - and it's an outside hope – [is] in bringing some kind of conversion to the people that we touch... we all have an obligation and responsibility both moral and legal to take a stand... ...I also have the

intention of bringing truth to the Court. ...If we can't operate within the system with a clear sense of truth then what is it for?" (R-1147-1150)

After Ms. Hennessy's testimony, the defense rested. (R-1157-1158) Mr. Baska then renewed his motion to dismiss on behalf of Paul Frazier. (R-1158-1160) The Court granted the motion as to Mr. Frazier, stating that he had not been identified at the scene. (R-1160)

Ms. Grady then renewed her motion (on behalf of all the *pro se* defendants – the prosecutor did not object to them all joining in all the defense motions. [R-1171]) to dismiss the charge of disorderly conduct because the prosecution was claiming they were all on private property. (R-1160) She also moved to dismiss the trespass charge based on lack of proof as to the location of the base boundaries. (R-1161) The Court reserved. (R-1161)

Ms. Grady Flores then moved to dismiss both charges, and stated that as to disorderly conduct, there had been testimony that the base was not open to the public, and that there was thus lack of proof – as to any of the gates where people were arrested - as to the public element. (R-1163, 1165-1168) The Court reserved on this an all the other motions to dismiss. (R-1172)

Closing Statements

Eight of the defendants made closing statements, but not all of them are discussed herein. Daniel Burgevin argued, among other things, that there was no evidence that the any members of the general public were annoyed by the defendant's actions. (R-1204-1205) Mary Ann Grady Flores argued, *inter alia*, that there was only one accusatory instrument charging her with two offenses, rendering them duplicitous in violation of the Criminal Procedure Law. (R-1217, 1231)

The prosecutor listed each defendant and the gate where he or she was arrested, as well as noting the arresting officers for each person. (R-1256-1266) As to disorderly conduct, he did not discuss the *public* element of said charge, stating:

"Now, to the disorderly conduct. Intent to block traffic...well, Judge, each and every one of them stated that they stood in the road... ...[T]hey were on the pavement, in the driveways entering the base. They all saw cars pull in... ...[E]veryone says if I could get between the, the work and the operators, I could maybe prevent something. ..." (R-1276-1277)

The Court said the verdict would be announced on February 7, 2014. (R-1288)

Verdict

The Court acquitted all the defendants of trespass, finding that there was insufficient evidence as to the boundaries of the base. (R-1296-1297) With regard to disorderly conduct, the Court convicted each of the remaining thirteen defendants. (R-1298) He stated that the evidence showed that vehicular and pedestrian traffic had been blocked at each gate. (VI-6) As to the public element, he stated:

"...[A]s set forth by the court of appeals in People versus (inaudible), 680 NY3d (inaudible) 2011 and People versus Baker 20 NY3d 354, a 2013 case, ... the members of the public must be involved (inaudible) incident. In these cases, (inaudible) cases, there's no doubt in this Court's opinion sitting as trier of fact and having reviewed the videos several times ... there was no reasonable doubt that each of the defendants intended to cause public inconvenience (inaudible) or recklessly create a risk thereof by obstructing vehicular and pedestrian traffic at the 174th Air Base gates." (R-1298)

Sentencing Statements

The defendants each made a statement before being sentenced, but, again, not all of them are discussed herein. Mary Ann Grady Flores discussed a drone strike that killed a 13 year old boy and his 16 year old cousin right after they returned from a large public gathering in opposition to drone strikes. (R-1330-1331) She stated:

"He wanted to try to stop the killing by taking (inaudible) photos of the drones that were flying over his village and ... documenting what was going on... And because of this he was targeted and [killed] by the drone... ...[H]is body and the body of his cousin [were] almost unrecognizable. ... According to British Attorney Clyde Stafford Smith, the legal director of the human rights group [Reprieve] ... it was obvious the target was not a terrorist or an extremist. It was somebody who was traumatized by drones. A very intelligent high school boy [with] a great sense of humor, someone who loved playing soccer... I pray that

you do take some time to look at that film. ..." (R-1331-1332)

Sentences

The Court sentenced each of the convicted defendants to fifteen days in jail. (R-1362; 1392) (Elliott Adams was sentenced on February 25, 2014, while the rest of the defendants were sentenced on February 7, 2014.) The judge also issued two year Orders of Protection directing each defendant to stay away from Colonel Evans at his home or place of work. (R-1356) The Court stated (on February 7, 2014):

> "...I understand the position in your beliefs. War on any level is not good. War is evil. ... I applaud Ms. Bello in indicating she's talked to her leaders about this, because they are truly the ones to make the decision. ... In my mind, however, this is not what this case is directly about. ...If you feel that the war or international law violations exist, there is a remedy in my mind. You can address that to an international tribunal.
>
> ... I sort of agree with Mr. Colville and Mr. Hynes that this is a tough decision and I have thought long and hard to (inaudible) to be imposed. I (inaudible) this stops. ...[T]he bottom line is, it has to stop at some point. ... I'm sure that nothing I do here today is gonna make this stop. ... I can only send the message.
>
> .. I'm affirming that I have good cause to issue ... those orders of protection.
>
> ...I have to send (inaudible) message to stop. And I'm going to impose the maximum sentence of 15 days in the Onondaga County Correctional Facility... (R-1351-1356, 1362)

ARGUMENT

POINT I

THE CONVICTIONS SHOULD BE REVERSED BECAUSE THE VERDICT WAS BASED ON INSUFFICIENT EVIDENCE AS TO THE PUBLIC ELEMENT OF DISORDERLY CONDUCT – IN THE ALTERNATIVE, THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE

In this case there was absolutely *no evidence* that any members of the general public were even present, let alone alarmed, annoyed or inconvenienced, by appellants' actions. Nor was there

any evidence that the appellants recklessly created a risk of such an impact on the public.

It is beyond dispute that the disorderly conduct statute is reserved for *public* situations, not for events occurring on property not open to the public, and which do not involve members of the general public. Recently the Court of Appeals reiterated this principle in *People v. Baker*, 20 NY3d 354 (2013), and *People v. Johnson*, 22 NY3d 1162 (2014), reversing the disorderly conduct convictions therein. The *Baker* Court stated:

> "...As is clear from precedent, critical to a charge of disorderly conduct is a finding that defendant's disruptive statements and behavior were of a public rather than an individual dimension. ...
>
> ***
>
> The significance of the public harm element in disorderly conduct cannot be overstated. *In virtually all of our prior decisions, the validity of disorderly conduct charges has turned on the presence or absence of adequate proof of public harm.* ...[W]e have employed a contextual analysis that turns on consideration of many factors, including 'the time and place of the episode under scrutiny; the nature and character of the conduct; the number of other people in the vicinity; whether they are drawn to the disturbance and, if so, the nature and number of those attracted; and any other relevant circumstances' (*People v. Weaver* 16 NY3d 123, 128...)...
>
> ***
>
> ...[W]e concluded that the public harm element was lacking in *People v. Munafo*, 50 NY2d 326 (1980), a case where a landowner engaged in a confrontation with a State Power Authority construction crew that was attempting to erect a transmission line on a right-of-way that cut through his farmland. ... Eight or ten people witnessed the incident but no one was attracted to the scene by defendant's conduct, nor did they get involved in the protest. We determined that the evidence was insufficient to support the disorderly conduct conviction since defendant's actions too place in broad daylight on his own property...
>
> ***
>
> Under the multi-factored analysis we have used in these prior cases, there is no record basis for the finding of probable cause in this case because the proof is insufficient to support the public harm element. ..." *People v. Baker*, supra, at 359-362.

The prosecution witnesses testified that 1) the general public isn't allowed on the base without permission in that Col. Evans determines who is allowed to be on base property; and 2) the protestors were all on base property when they were arrested. (I-66-67; 142, 206, 242, 248)

While there was some evidence that drivers trying to enter or leave the base were blocked

from doing so, there was *no evidence* that this involved any members of the general public – i.e. the drivers were all apparently base employees. Brian Hynes testified that "there was no public there at all. It was, it was us and the police." (R-1071) Patricia Wieland said the same thing. (R-1134-1135) This was uncontested.

In response to a motion for a trial order of dismissal of the disorderly conduct charge based on lack of proof of the public element, the district attorney only stated that cars were blocked but did not claim that members of the public were involved. (R-820-821) The Court reserved. (R-821)

In his closing statement the district attorney made no mention of the public element of disorderly conduct, again referring only to cars being blocked – in fact he appeared to concede that they belonged to base personnel, stating, "...They were on the pavement, in the driveways entering the base. They all saw cars pull in... [E]veryone says if I could get between the, the work and the operators, I could maybe prevent something...." (R-1276-1277)

When the Court convicted the defendants of disorderly conduct, he mentioned the relevant cases, but did not cite any *facts* as to the public element, stating:

> "...[A]s set forth by the court of appeals in People versus (inaudible), 680 NY3d (inaudible) 2011 and People versus Baker 20 NY3d 354, a 2013 case, ... the members of the public must be involved (inaudible) incident. In these cases, (inaudible) cases, there's no doubt in this Court's opinion sitting as trier of fact and having reviewed the videos several times ... there was no reasonable doubt that each of the defendants intended to cause public inconvenience (inaudible) or recklessly create a risk thereof by obstructing vehicular and pedestrian traffic at the 174th Air Base gates." (R-1298)

As shown by *Johnson*, supra, *Baker*, supra, and other cases, there must be evidence that either members of the public at large were alarmed, inconvenienced or annoyed by the acts in question, or that there was a reckless disregard of the risk that this would occur. Because there is no evidence that any members of the general public were present during the protest, which the prosecution claimed occurred on base property, and no evidence that members of the general

public were likely to be there, the verdict as to disorderly conduct was based on legally insufficient evidence.

As noted in *Baker*, in *People v. Munafo*, 50 NY2d 326 (1980), the Court of Appeals reversed the conviction for the same reason, stating, at 332, emphasis supplied:

> "...[S]ince the accusatory instrument pointed to subdivision 5 [the same section charged herein] ...we observe that, *especially on this private way* there hardly could be, and definitely was not, any obstruction of passage, vehicular or pedestrian, *of the public at large...*"

In *People v. Zuckerberg*, 44 Misc.3d 366 (App. Term, 2nd Dep't 2014), the court dismissed a disorderly conduct charge for the same reason where the acts were alleged to have occurred inside a police station. This is analogous to the protest in the instant case, which occurred on a military base, in that both are government entities where the public is not allowed without permission.

Very recently, in *People v. Moreno*, 2015 N.Y. Misc. LEXIS 1329 (App. Term, 2nd Dep't 2015), the court reversed the disorderly conduct conviction for the same reason, even though the incident had occurred in a public place, stating:

> "In this case, other than the allegation that the incident occurred in the St. George Staten Island Ferry Terminal, nothing in the factual part of the accusatory instrument alleged that defendant's acts had a public dimension, as is required for a charge of disorderly conduct (see *People v Baker*, 20 NY3d 354, 359, 984 N.E.2d 902, 960 N.Y.S.2d 704 [2013]; *People v Weaver*, 16 NY3d 123, 128, 944 N.E.2d 634, 919 N.Y.S.2d 99 [2011]; *People v Munafo*, 50 NY2d 326, 331, 406 N.E.2d 780, 428 N.Y.S.2d 924 [1980]; *People v Badue*, 22 Misc 3d 137[A], 881 N.Y.S.2d 365, 2009 NY Slip Op 50339[U] [App Term, 9th & 10th Jud. Dists 2009]). Instead, the accusatory instrument alleged that the officer experienced annoyance and alarm. There are no factual allegations as to whether there were bystanders or spectators who noticed defendant yelling obscenities and crude comments at a police officer, and/or whether there was a risk of any public inconvenience, annoyance or alarm as a result of defendant's conduct (see Penal Law § 240.20 [1])." *Moreno*, supra, at 3.

Therefore, as in *Johnson, Baker*, *Munafo*, *Zuckerberg*, and *Moreno*, because there was *no*

evidence that any members of the public were alarmed, inconvenienced, or annoyed by Appellant's actions, and *no evidence* of a reckless disregard of any such risk, the convictions for Disorderly Conduct must be reversed and the accusatory instruments dismissed.

POINT II

THE ORDERS OF PROTECTION SHOULD BE VACATED BECAUSE THERE WERE INADEQUATE FINDINGS UNDER CPL 530.13 AND BECAUSE THE USE OF ORDERS OF PROTECTION UNDER THESE CIRCUMSTANCES IMPROPERLY CHILLS THE APPELLANTS' FIRST AMENDMENT RIGHTS

CPL 530.13 allows for the imposition of orders of protection to protect victims and witnesses to crimes from intimidation and violence from perpetrators of said crimes. In this case, the appellants are purely nonviolent protestors and there was absolutely no basis to believe that they might engage in any such intimidation or violence. Moreover, significantly, there was not even any evidence that the protected party herein, Col. Evans, was an actual witness to any of these appellants' actions. Finally, it is submitted that, by inappropriately increasing the potential penalties for engaging in nonviolent protest at the base, these orders of protection impermissibly chill the appellants' First Amendment rights to free speech and assembly.

A. The Court Abused its Discretion in Finding "Good Cause" for Issuance of the Orders of Protection Pursuant to CPL 530.13

CPL 530.13 provides that temporary (pre-trial) and "permanent" (post-conviction) orders of protection may be issued directing defendants to stay away from a *victim* or *designated witness to the alleged offense*. The statute provides that such an order of protection may be granted "for good cause shown" but is silent regarding what would constitute good cause in these circumstances.

In this case, it is submitted that the court abused its discretion in issuing orders of

protection, both pre-trial and post-conviction. The Orders herein were based on the Affidavit of Col. Evans, who stated:

> "[A]s an authorized representative of Hancock Field, I request that the Court issue an Order of Protection against each and every defendant arrested such that they are to stay away from Hancock Field..." (R-55)

Significantly, Col. Evans did *not* claim that he was a witness to the alleged offenses (and the trial record does *not* establish that). Nor can he in any way be said to be a "victim" of the offense of conviction – Disorderly Conduct – as discussed above, the only possible "victims" under that statute are members of the general public.

Hancock Field has several options in dealing with protestors – for instance, they could issue "ban and bar letters" directing that particular people cannot return to the base. Using a statute designed to protect actual crime victims or witnesses who are afraid to testify is *not* proper under these circumstances.

There are several cases in which courts have vacated orders of protection because the purported protected party was not a victim or witness, or otherwise held that this statute cannot be stretched beyond its proper bounds. *People v. Konieczny*, 2 NY3d 569 (2004); *People v. Raduns*, 70 AD3d 1355 (4th Dep't 2010); *People v. Petrusch*, 306 AD2d 889 (4th Dep't 2003); *Finlay v. Gideon*, Index No. 2014-521 (Onondaga County Supreme Court 2014); *People v. Somerville*, 72 AD3d 1285 (3rd Dep't 2010); *People v. Muchuca*, 43 Misc.3d 1220(A) (NY Co. 2014); *People v. Panetta*, 41 Misc.3d 614 (Middletown City Court 2013); *People v Vanglahn*, 189 Misc. 2d 613 (Nassau Co. 2001).

In *Raduns*, supra, the Fourth Department stated:

> "As defendant correctly contends... *the court had no authority to issue an order of protection in favor of an individual who was neither a victim of the crime nor a witness* to the crime to which defendant pleaded guilty. (*see* CPL 530.13[4][a]). Although defendant

failed to preserve that contention for our review ... we nevertheless exercise our power to review it as a matter of discretion in the interest of justice. ... The order of protection issued in favor of that individual thus is invalid. ... We modify the judgment by vacating that order of protection." *Raduns*, supra, at 1355, emphasis supplied.

Similarly, in *Somerville*, supra, the Third Department likewise vacated the order of protection for the same reason, stating:

"The court had the authority, based on defendant's convictions, to enter an order of protection in favor of "the victim or victims, or of any witness designated by the court, of such offense" (CPL 530.13 [4] [a]). ... [T]he witnesses referred to in the statute must be those who actually witnessed the offense for which defendant was convicted... As such, the order of protection with respect to William Baldwin must be vacated." *Somerville*, supra, at 1288.

In *Finlay v. Gideon*[2], in an Article 78 proceeding (a subsequent one to the one Judge Gideon referred to herein) Supreme Court held that a temporary order of protection *in a Hancock protest case in this same court* was inappropriate because, *inter alia*, there was an insufficient basis for the claim that the protected party was a victim or a witness. The *Finlay* court stated:

"Based on the record of proceedings in the Town Justice Court as support for the issuance of the temporary order of protection, there is no basis for classifying the protected party as either a 'victim' or a 'designated witness to the offense' so as to be an eligible protected party under CPL 530.13(1)(a). Because the party is not the 'victim' herein, the People's analogy to a sex offense victim who is unable to identify his attacker contained in their post-argument memorandum is misplaced.

The protected party is not the victim of Obstructing Governmental Administration or Disorderly Conduct, nor is he a witness to those offenses. There was never a proffer before the Town Justice as to what testimony the protected party would offer beyond that contained in his description. *The deposition simply describes a group of 'protestors who failed to remain in a designated area of the Base and entered an un-designated area of the Base.'* The deponent does not identify the Petitioner, and the People have never advanced to the Town Justice Court that the witness could identify the Petitioner. ... *Therefore, the protected party is neither a 'witness' nor a 'victim' of the offenses as contemplated by the statute.*

CPL 530.13(1) permits a court to issue a temporary order of protection 'for good

[2] It is noted that the People appealed the *Finlay* decision and, upon information and belief, oral argument was held at the Fourth Department in May, 2015 – thus it is expected that there will be a decision in that appeal soon. However, even if, *arguendo*, the decision is reversed, it may be on Article 78 procedural grounds and not reach the merits, in which case the lower court holding on the merits would not be affected.

cause shown,' thereby setting up a dual pronged requirement: [1] 'good cause' [2] that must be 'shown.' The statute does not define good cause. Moreover, the statute does not establish who must show 'good cause' or how or when good cause is to be shown.

...[T]he judge [herein] made express reference to the commander's deposition. However, 'good cause' is neither established by, nor may it be inferred from, the accusatory instruments and supporting deposition. ...

...[I]t is *important to note that temporary orders of protection were extended to non-family offenses to prevent witness intimidation and 'to protect individuals from bodily harm or annoyance from another.'* [*People v. Smith*, 4 Misc.3d 909, 911-912...] Since that is the case, *every victim or witness does not automatically qualify as a protected party, which is why this court is rarely asked to issue a temporary order of protection for police officer witnesses.*

***

For the foregoing reasons, the Petition [requesting vacatur of the order of protection] is granted. ... Therefore, the Court need not reach the Petitioner's First Amendment claim..." *Finlay v. Gideon*, supra, at 10-14, 26, emphasis supplied.)

In *Panetta*, supra, the court also vacated an order of protection – and dismissed a contempt charged flowing from said order of protection – because the protected parties were not proper parties under CPL 530.13, stating:

"...[T]he defendant argued that the order of protection issued in favor of members of the Mountain Rotty Rescue group exceeded the scope permitted by CPL 530.13(1) and that the People therefore failed to allege facts establishing that the defendant violated a *lawful* mandate of the court as required by the criminal contempt statute. ...

***

Decisions concerning final orders of protection issued pursuant to CPL 530.13(4) offer guidance. Upon conviction of an offense, CPL 530.13(4) permits a criminal court to issue a final order of protection to the victims.... and to designated witnesses. The language used in CPL 530.13(4)(a) and (b) is virtually identical to the language [in 530.13(1)].

A series of appellate-level cases has vacated orders of protection issued in favor of parties not designated in 530.13(4). ...

***

I find that an order of protection issued in favor of a party not designated in CPL 530.13(1) is not a lawful court mandate and cannot support a prosecution for criminal contempt..." *Panetta*, supra, at 617-619, citations deleted.

In some ways the instant case is similar to *Panetta* in that it is really a *group* (the Base) which wants the protestors to stay away, and, as in *Panetta*, this is an improper use of the statute.

Finally, in *Vanglahn*, supra, the court also vacated an order of protection, reasoning, like

the *Finlay* court, that, based on the intent of the Legislature, and the requirement of 'good cause,' utilizing orders of protection for the benefit of people who were *not* victims, and who were *not* threatened or intimidated by the defendant, was improper, stating:

> "...What constitutes "good cause," and how thorough the hearing for demonstrating that "good cause" need be are not spelled out in the statute, but the Legislature's intent in authorizing the issuance of orders of protection under article 530, originally limited to the protection of victims of domestic violence but now expanded to include victims of, and witnesses to, any offense, is to prevent intimidation, abuse and threats by a defendant against those involved in the accusation against him or her...
> ***
> ... Since there is absolutely no indication that defendant has threatened, intimidated or physically or mentally abused anyone involved in this case, I deny the People's application." *Vanglahn*, supra, at 616.

Therefore, because the instant Orders of Protection were issued improperly because the protected party was not shown to be a victim or a witness, and because use of CPL 530.13 in this manner is contrary to the intentions of the Legislature, the Court should vacate said Orders of Protection.

B. The Orders of Protection Herein were Issued in Violation of the First Amendment

It is also submitted that, because the appellants herein were exercising their First Amendment rights to speech and assembly, the improper use of orders of protection in this manner has a chilling effect on them and others similarly situated and as such, violates the First Amendment. See *People v. Golb,* 23 NY3d 455 (2014) (New York's harassment statute struck down on First Amendment grounds); *Ashcroft v. Free Speech Coalition*, 535 US 234 (anti-pornography statute struck down by Supreme Court as impermissibly overbroad in violation of First Amendment); *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997) (floating protest buffer zones struck down by Supreme Court because they burdened more speech than necessary).

If CPL 530.13 is applied to allow orders of protection in the instant circumstances, said statute would be overbroad as applied, and would violate the First Amendment. ... "The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coalition*, 535 US 234... "The concern that an overbroad statute deters protected speech is especially strong where, as here, the statute imposes criminal sanctions [as this one does, because violations can be charged as criminal contempt.]" *Id.*

Therefore, this Court should find that application of CPL 530.13 to allow the instant orders of protection is in violation of the First Amendment, and vacate said orders of protection.

POINT III

THE CHARGES WERE DUPLICITOUS

The Informations herein charged two different offenses - Disorderly Conduct and Trespass. Said Informations are impermissibly duplicitous because only one offense may be charged in a single accusatory instrument. *People v. Beauchamp,* 74 NY2d 639 (1989); *People v. Elliott*, 41 Misc.3d 1228(A) (NY Co. 2013); *People v. Reid*, 28 Misc.3d 1231(A) (Albany City Court 2010); *People v. Evanglista*, 1 Misc.3d 873 (Bronx Co. 2003). This contention was preserved herein. (R-1231)

In *People v. Beauchamp,* supra, the Court of Appeals reversed the defendant's convictions for sodomy, sexual abuse and rape because the charges were duplicitous. The court stated:

> "[W]e agree with defendant that his pretrial motion to dismiss all counts for duplicitousness should have been granted. In *People v. Keindl,* 68 NY2d 410, 417-418, we stated that 'each count of an indictment [may] charge only one offense' and that 'where one count alleges the commission of a particular offense occurring repeatedly during a designated period of time, that count encompasses more than one offense and is duplicitous.' *Beauchamp,* at 640-641, some citations deleted.

In *Reid*, supra, the court noted that the prohibition on duplicitous counts of an indictment applies to accusatory instruments charging lesser offenses as well, and dismissed an Information charging the violation of Harassment for this reason, stating:

> "The defendant has moved to dismiss the information charging her with harassment in the second degree as duplicitous. Criminal Procedure Law 200.30 provides, '[e]ach count of an indictment may charge one offense only.' *The proscription against duplicitous counts applies to misdemeanor complaints and informations* (see *People v. Evangelista*, 1 Misc.3d 873, 878...; *People v. Minton*, 170 Misc.3d 272, 273...; *People v. Mitchell S.*, 151 Misc.2d 208, 211...; *People v. Rios*, 142 Misc.2d 357, 358-359...; *People v. Todd*, 119 Misc.2d 488, 489-90..
>
> ***
>
> '...If two or more offenses are alleged in one count, individual jurors might vote to convict a defendant of that count on the basis of different offenses; the defendant would thus stand convicted under that count even though the jury may never have reached a unanimous verdict as to any one of the offenses.' *People v. Evangelista*, supra, citing *People v. Keindl*, 68 NY2d 410...
>
> ***
>
> Here, the information states that defendant attempted to strike the complainant and threatened to do so. *Defendant could have been arrested under this statute for either of these alleged acts as they are separate and distinct acts. However, the information alleges both acts in just one information. ... Therefore, this Court finds that the information is duplicitous*. Accordingly, defendant's motion to dismiss the information charging harassment in the second degree is granted." *Reid*, at 1-3, emphasis supplied

Therefore, based on *Beauchamp*, *Reid*, and the other cases cited above, because the Informations herein charged two different offenses, this Court should vacate the convictions on this ground as well.

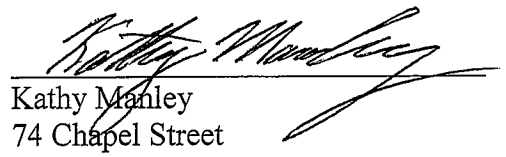
CONCLUSION

As a result of the foregoing errors, the Court should reverse all the convictions herein and dismiss the accusatory instruments.

Dated: June 16, 2015

Respectfully submitted,

KINDLON SHANKS & ASSOCIATES

By: 

Kathy Manley
74 Chapel Street
Albany, New York 12207
(518) 434-1493