STATE OF NEW YORK:
ONONDATA COUNTY: COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

vs.

MARY ANNE GRADY FLORES,

Appellant

APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF FACTS

On February 13, 2013, Ash Wednesday, a small peaceful civil protest was held by eight individuals at the entrance to the Hancock airbase located in DeWitt, New York. The purpose of the demonstration was to object to, and protest the United States government policies involving the use of drones overseas. The protesters conducting the demonstration were standing at the intersection of the entrance driveway to Hancock Field and East Malloy Drive in the Town of DeWitt.

The defendant Mary Anne Grady Flores was not one of the eight protestors but was present taking photographs of the protest. The protest involved the eight individuals standing and holding signs and standing in the entranceway of the drive to the entrance gate of the base. This location was at the intersection of the entrance drive and the shoulder of East Malloy Road.

After the arrival of police on the scene the protest continued peacefully until an order to disperse was given the police at the scene. Following this order the eight protesters were arrested without any issue and taken into custody.

Prior to the order to disperse being given by the police Mary Anne Grady Flores had left the scene of the protest and was walking along Malloy Road towards a local diner located some distance away. Mary Anne Grady Flores was then arrested and taken into custody without incident as she was walking along the road some distance from the entrance gate location.

1. The prior protest and the issuance of the temporary order of protection.

On October 25, 2012, a prior non violent peaceful protest was held at Hancock Field outside the gates to the airbase protesting the use of "drones" which are operated by the 174th Attack Air Wing of the Air National Guard, which is based at Hancock Field. At that protest, Mary Anne Grady Flores, the defendant here, was arrested along with a number of other individuals. The protesters in this case were arrested at a number of the entrance gates to the base and were charged with trespass and disorderly conduct. At the her arraignment on these charges, on October 25, 2012, the defendant was issued a temporary stay away order of protection by the Hon Donald Benack, jr.. (While Judge Benack was the justice for the Village of East Syracuse Court, he was sitting for arraignment and processing matters for the Town of DeWitt Town Court) the order of protection was issued upon the request of Colonel Earl A Evans, the commanding officer of the 174th Air Attack Wing, which is based at Hancock Field. The basis for the request was a sworn statement given by Colonel Evans in which he requested a stay away order of protection in order to keep protesters away from the base gates. This temporary order of protection remained in effect until the disposition of these original charges and is the order or protection at issue in the present case.

Subsequently, in February of 2014, the trial of the defendant and her co-defendants was held on this original matter. Mary Anne Grady Flores was acquitted of the trespass charge and convicted of the disorderly conduct charge in the 2012 matter.

2. The case at bar.

Following her arrest in case at bar, Mary Anne Grady Flores was charged with Disorderly Conduct and with Criminal Contempt in the Second Degree. Following her initial arraignment without counsel on February 13, 2103, she subsequently appeared with counsel April 2, 2013. Omnibus motions were filed by the defendant on June 14, 2013. The prosecution filed a reply and motion arguments were heard by the trial court on July 11, 2013, and the court denied the defendant's motions.

A trial date was subsequently set for May 15, 2014. Following jury selection on May 15th, trial was held that day and the subsequent date of May 16, 2014.

At trial there was testimony that a demonstration was held on February 13, 2013, Ash Wednesday, at the intersection of the driveway entrance to the Hancock Field gate entrance and East Malloy Road. This location was approximately 170 feet from the base entrance gate. Eight demonstrators were standing in the entrance to the driveway holding signs and blocking traffic. In addition, there were a number of other observers on both sides of East Malloy Road observing the protest. One of these individuals was Mary Anne Grady Flores who was taking photographs of the protest. During this protest she walked back and forth across East Malloy Road and was standing on the shoulder on both sides of the roadway. During the demonstration traffic was flowing in both directions on East Malloy Road.

Subsequently, upon a request from base personnel, police arrived at the scene. After some period of time an order to disperse was given and the eight protesters were arrested without incident or struggle and taken into custody. Following this process, Mary Anne Grady Flores was arrested as she was walking along East Malloy Road. She

had departed the scene of the protest prior to the arrest process and was walking on the shoulder of the road towards a local diner. She was charged with disorderly conduct and criminal contempt in the second degree, for violating the order of protection.

The testimony at trial from both prosecution and defense witnesses was that on the date of the protest, February 13, 2013, there was confusion among people present over the exact location of the base boundary. Multiple witnesses testified that either they were confused or they were aware of confusion over the location of the base property line. Prosecution witnesses testified that in fact the base property extended to the midline of East Malloy Road and that there was a public easement for the roadway that allowed pedestrian and vehicle traffic. Witnesses testified that there were no signs along the roadway indicating that this was base property. The testimony from witnesses was that the only signs were located on the base fence line which was located about 170 feet from the demonstration site and the roadway.

The testimony from many of these same witnesses, both from the prosecution and defense was that Mary Anne Grady Flores did not participate in the protest and was merely taking photographs while standing in the roadway and on the shoulder of the road.

The key issue at trial was the stay away order of protection and the meaning of the term stay away. During jury deliberations, a jury question was presented to the court seeking a legal definition of the term. The prosecution and the court felt that they could not find a legal definition of the term in the statute and through other resources. The defense requested that the court provide the same definition or explanation of the term that had been given to the defendant and other co-defendants. The court declined to do

so and instructed the jury they should develop their own definition based upon the testimony at trial and their own common sense.

Following jury deliberations the evening of May 16, 2014, the defendant was acquitted of the charge of disorderly conduct and was convicted of the charge of criminal contempt in the second degree. Sentencing was set for July 10, 2014 and a pre-sentence investigation was ordered by the court to be completed by the Onondaga County Department of Probation. This PSI report recommended a sentence of a conditional discharge for the defendant.

Subsequent to the verdict and prior to sentencing the defendant filed a CPL § 330 motion was filed with the court. On July 10, 2014 oral arguments were heard on the defendant's CPL 330 motion and the court denied these motions. The court then proceeded to sentencing and sentenced the defendant to the maximum sentence of one year of local incarceration and a fine of one thousand dollars.

The defendant filed a Notice of Appeal with the court and served the District Attorney's Office with a copy of the notice immediately following sentencing by the court on July 10, 2014.

Subsequently a stay of sentence motion pursuant to CPL was filed in Onondaga County Court on or about July 14, 2014. A stay of sentence was granted by Onondaga County Court on July 17, 2104 (Hon. Thomas Miller, presiding) A subsequent extension of the stay was further issued by the county court on November 20, 2014 and on January 20, 2015.

ARGUMENT

POINT I: THE ORDER OF PROTECTION IN THIS CASE WAS INVALID AND OVERBROAD

1. The Prior Protest and the Issuance of the Temporary Order of Protest

The temporary order of protection that is at issue in the case at bar was the result of an earlier peaceful non-violent protest that occurred on October 25, 2012 at the Hancock air base. At this protest a number of protestors were arrested for non-criminal violations for protesting at several of the entrance gates to the air base. Mary Anne Grady Flores was arrested at one of these locations. Following her arrest and arraignment Ms. Flores was issued a stay away order of protection in the name of Colonel Earl A. Evans, the commander of the 174th Attack Air Wing of the Air National Guard. The basis for the order of protection was a request by Colonel Evans in a sworn statement for an order of protection. In the sworn statement requesting the order of protection, the Colonel stated that he wanted the order to keep people away from the base entrance to stop protests from occurring there. There was no indication that the officer had actually witnessed the events that led to the arrest of Mary Anne Grady Flores on that date. Nor was there any basis cited for the request other than a desire to keep protesters away from the base gate.

2. The temporary order of protection was invalid as the named party in the order did not meet the requirements of CPL 530.00

The temporary order of protection that Mary Anne Grady Flores is accused of violating has Colonel Earl A. Evans named as the protected party. Col. Evans did not meet the requirements of CPL § 530.13 to be a named protected party and as such the order of protection is invalid.

The order of protection was issued by the Hon. Donald Benack on October 25, 2012 following the arrest of Mary Anne Grady Flores. The basis of the order of protection was the accompanying accusatory instrument and sworn statement of the colonel in which he requested the order of protection. (A.2)

There is nothing in the sworn statement of Colonel Evans that indicates he was even at the base campus on the time of the protest of October 25, 2012. There is a complete lack of any evidence that the Colonel was an actual witness to the protest that produced the temporary order of protection. Nor has the Colonel ever claimed to be an actual witness to the protest of October 25, 2012. There has never been a proffer of evidence made to suggest that Colonel Evans was present and was an actual witness to the demonstrations at issue. In addition, there is no evidence that Colonel Evans was a victim of a crime that would make him eligible to an order of protection, as this has been defined under the law. The Colonel cannot qualify as a victim simply because of his status as commander of the 174th Attack Wing. There is simply no support in the law for such a broad interpretation of victim, nor is there any support in the legislative history to

suggest he could qualify as a victim. Indeed the court rulings and the legislative history in this area is the exact opposite.

The trial court had "no authority to issue an order of protection to a party who was neither a victim of a crime or a witness to a crime ... ." (*People v. Raduns,* 70 AD3d 1355, 896 NYS2d 541 (4th Dept 2010) *lv.* denied14 NY3d 891, 929 NE2d 1014, 903 NYS2d 736 (2010), *reconsideration denied,* 15 NY3d 808, 934 NE2d 902, 908 NYS2d 168 (2010); *People v. Shultis*, 61 AD3d 1116, 1118, 876 NYS2d 748 (3d Dept 2009), *lv denied* 12 NY3d 929, 912 NE2d 1091, 884 NYS2d 710 (2009) (order of protection is overly broad if it extends to individuals unrelated to criminal action)

The prosecution cannot seek to claim that Earl A. Evans is a properly covered party simply because he was a potential or designated witness at trial in this matter and thus covered under CPL § 530.13. The court in *People v. Somerville* directly addressed this issue when it stated that "[t]he witnesses referred to in the statute must be those who actually witnessed the offence for which the defendant was convicted, rather than simply all witnesses who testified at trial." (*People v. Somerville*, 72 AD3d 1285, 1288, 900 NYS2d 468 (3d Dept 2010), *citing People v. Creighton*, 298 AD2d 774, 776; 749 NYS2d 309 (3d Dept 2002)) This finding directly excludes a witness such as Colonel Evans from consideration for protection with an order of protection as issued in this case.

Given that Colonel Evans does not qualify for an order of protection under CPL § 530.13 (1) the order of protection cannot be viewed as valid. "An order of protection issued in a favor of a person not designated in CPL § 530.13 (1) is not a lawful court mandate and cannot support a prosecution for criminal contempt." (*People v. Panetta*, 41 Misc3d 614, 972 NYS2d 446 (City Ct., City of Middletown, 2013), *citing People v.*

Smith, 4 Misc3d 909, 782 NYS2d 596 (NYC Crim. Ct., NY Co. 2004) (in absence of specific valid order that has been disobeyed there can be no contempt)

The sworn statement and request of the Colonel for the order of protection simply seems to be in his capacity as commanding officer of the 174th Attack Air Wing of the Air National Guard.

The prosecution has sought to argue in this case that the Colonel was a material witness at trial and thus should be entitled to the protection of an order of protection. The law is clear however, and the legislative intent of this statute, supports the requirement that the protected party must be a witness of the actual crime and not merely a witness at trial. (*See People v. Smith, supra*, at 911) In this regard the prosecution cannot rely upon *People v. Purpura* to suggest that all types of witnesses are covered by CPL § 530.13. *Purpura* dealt with victims only and did not address the issue of different categories of witnesses. (*People v. Purpura*, 12 Misc.3d 933 (Crim Ct, Kings County 2006))

As the trial record and transcripts indicate, the actual purpose of Colonel Evan's testimony was to merely discuss the boundaries of the base and the impact of the non-violent protests upon the activities of the base.

3. The temporary order of protection is invalid as it was improperly issued to protect property and not a person.

The temporary order of protection that the defendant was found to have violated was an invalid order in that it sought to protect property and not a person. While Colonel Earl A. Evans is the named and protected party in this order, the purpose of the order, as

sought by Colonel Evans, was to keep protesters away from the base main entrance and property and to keep the base gates open for traffic. The Criminal Procedure Law of the State of New York does not authorize a temporary order of protection to be issued to protect property or a place. (*See* CPL § 530.13 (1)(a); *People v. Smith*, 4 Misc3d 909, 911, 782 NYS2d 596 (NYC Crim. Ct., NY Co. 2004) (no provision in the statute which authorizes the issuance of an order of protection in favor of a place); *People v. Bostic,* 10 Misc3d 775, 807 NYS2d 280 (Dist. Ct. Suffolk Co. 2005)

In his sworn deposition dated October 25, 2012 which accompanied the complaint, and which was the basis for the issuance of the temporary order of protection, Col. Evans stated that he requested that an order of protection be issued so that the defendant and all others so situated would be kept away from Hancock Field, the airbase at issue in this matter. (A.2) The sworn statement solely complained about he blockage of the gates and the need to keep protesters away from the gate property. There was no concern expressed for any base personnel or individual. (A.2)

Colonel Evans also acknowledged that this was the purpose of the temporary order of protection at the trial of the defendant on May 15, 2014. Upon questioning by defense counsel, Colonel Evans stated that the purpose of the temporary order of protection issued on October 25, 2012 was to keep protestors from blocking the entry of the air base. (A.3-A.4) Colonel Evans also testified that he was not afraid of the defendant and was not concerned about her harassing or stalking or committing any of the listed violations contained in the order of protection form. (A.4-A.5) Colonel Evans when asked repeated that his sole concern in asking for the order of protection was to keep protestors away from the entrance to the gate of the base. (A.5)

In so testifying, and ratifying his original sworn statement, it is clear that the requested purpose of the temporary order of protection was for one purpose only – to try to protect the base property by keeping protesters away from the entrance gate road. While the temporary order of protection lists a person it is clear from the testimony and sworn statement of Colonel Evans that he was not seeking protection for himself, but that rather this was an attempt to secure an order to keep people away from the base gate and protect the base property and its operations from demonstrators.

Under CPL § 530.13 a temporary order of protection may only be issued to protect a person, not property or a place. (*See* CPL § 530.13 (1) (a); *People v. Bostic*, 10 Misc3d 775, 807 NYS2d 280 (Dist. Ct. Suffolk Co. 2005); *People v. Smith,* 4 Misc3d 909, 911, 782 NYDS2d 569 (NYC Crim. Ct., NY Co. 2004)

While having an order of protection listed in the name of a person may appear to comply with the statute, it is clear that this order was issued for one purpose and one purpose only – to protect the base entrance and the base property from protestors who may seek to block the gate in a non violent civil protest. As such, the purpose of the temporary order of protection was to keep base property clear a purpose which is not valid under CPL § 530.

Indeed, that true purpose of the order is reflected in the testimony of Colonel Evans in that he had no fear of the defendant or any of the other protestors he simply wanted to keep them from the base entrance, and that he had never met the defendant Mary Anne Grady Flores or spoken to her at the time he requested the order of protection. (While the statute does not require that a protected party know the person he or she is seeking to have the order issued against, this fact that the Colonel had never met

or spoken to the defendant does underline that the true purpose of the order was to protect the property of the base and not Colonel Evans himself.)

Chief Master Sergeant Michael Ramsey testified that at the time of the incident on February 13, 2013, the Colonel worked inside one of the buildings located on the base inside the fence perimeter. (A.12) The sergeant testified that it was a set of buildings on a campus similar to a college campus in terms of the physical setting. (A.12-A.13)

While the use of a named person may be a clever legal strategy to try and sidestep the prohibition on the use of such orders to protect property, the use in this case clearly is contrary to the intent the legislature had in creating this statute and the use of orders of protection and as such is repugnant to the rule of law in this state. (*See People v. Smith, supra, at* 911-912)

4. The order of protection is invalid as no good cause was shown for its issuance by a court.

Under CPL § 530.13 a court may upon its discretion issue an order of protection for good cause shown. In this case there was no good cause shown and the issuance of the order of protection was an abuse of discretion on the part of the trial court.

As discussed, *supra*, the request of the order of protection came from Colonel Evans and was based upon his desire to keep protesters from the base gate entrance. There is no evidence that any inquiry was made or conducted into the basis for the order of protection beyond the sworn statement of Colonel Evans.

The legislative findings that led to the enactment of CPL § 530.13 indicated that the purpose of the statute was to prevent intimidation of crime victims and witnesses to crime by defendants who had been released from jail on bail. (*People v. Meggie*, 184 Misc2d 883, 712 NYS2d 316, 318 (Dist. Ct. Nassau Co. 2000), *citing People v. Koertge*, 182 Misc 2d 183, 701 NYS2d 588 (Dist. Ct. Nassau Co. 1998); *People v. Purpura,* 12 Misc. 3d 933, 944 (Crim Court, N.Y. 2006)(orders of protection designed to protect persons subjected to harassment or violence)) As the court in *People v. Van Glahn* put it, the purpose of expanding orders of protection to those victims and actual witnesses of crimes in criminal cases is to "prevent intimidation, abuse and threats by a defendant against those involved in the accusation against him or her." (*People v, Van Glahn*, 189 Misc2d 613, 616, 734 NYS2d 820 (Dist. Ct. Nassau Co. 2001)

As such there is a requirement that there be an act of violence or intimidation against the protected party or at a minimum an articulable risk of safety involving the witness. There is no such risk here. Nor can the prosecution claim that the defendant was abusive or threatening to Colonel Evans in any manner.

The Defendant was a participant on February 13, 2013, in a non violent sit in demonstration protesting certain policies of the United States government. Indeed the Defendant and other named protestors are members of the Catholic Church who oppose certain government policies related to war and the conduct of war on religious grounds. They are the classic definition of pacifists. Indeed, the testimony of the Colonel was that he had never met the defendant. He stated that he had no fear or concerns about his safety from either the defendant or other protestors. This fact illustrates the lack of

eligibility of the Colonel as a protected party and recipient of an order of protection as defined by CPL § 530.00.

While good cause may be inferred from the accusatory documents and supporting depositions accompanying said instruments, such good cause is lacking in this case.

The sworn statement of Colonel Earl A. Evans does not list any act or threat of violence or intimidation towards himself or any personnel of Hancock Field. The statement of the colonel states nothing other than a group of protesters blocked the gates of the base and that he wanted an order of protection to keep them away from the base gates during their protests.

The court in *People v. Vangham* noted that a requirement of good cause in CPL § 530.13 must include an act of intimidation, threat or physical or mental abuse towards a victim or witness. In the lack of such an order of protection is not justified and is invalid. (*People v. Vangham*, 189 Misc 2d 613, 616, 734 NYS2d 820, (Dist. Ct. Nassau Co. 2001)

Given the lack of any good cause showing any threats, intimidation or violence towards Earl A. Evans the order of protection is not justified and cannot be seen as valid.

Nor can the prosecution argue that there has been any finding beyond the decision of the trial court regarding good cause in this matter. The prosecution has argued elsewhere that in the case of *Scibilia-Carver v. Benack*, Index No. 2013-1102 (Sup. Ct. Onondaga Co. 2013) the court there found the order of protection in this matter to be an appropriate exercise of the court's power and discretion. However, in fact, the court in that case did not make a finding on the merits of the order of protection. Rather the court

there issued a decision stating that it had no jurisdiction to address the order of protection issue through the Article 78 process.

5. The order of protection was overly broad and invalid as it impinges and improperly restricts the First Amendment rights of the Defendant

The order of protection here is vague and hence overly broad in nature. As such it unnecessarily burdens the constitutional free speech rights of the defendant. The order is overly broad and the result is it bars protests in traditional areas of public for a for protests near the base entrance. This is clearly seen in the case of Mary Anne Grady Flores who was in the roadway or on the shoulder of the roadway during the entire incident at issue in this case.

This type of broad restriction on demonstrators near a targeted location was rejected by the Supreme Court in the last year in *McCullen v. Coakley*, 134 S.Ct. 2518, 2539 (2014). The Supreme Court in *McCullen* noted that while the type of demonstrations that have occurred near the air base may offend many and may seem undesirable, "this aspect of traditional public for a is a virtue, not a vice." (*McCullen,* 134 S.Ct. at 2529)

The breadth of the order of protection in this case silences the defendant and overly burdens her constitutional right to speech. The order of protection by its vague and undefined stay away requirement without more enacts a more substantial burden on Grady Flores' speech than is required. As such it violates the First Amendment. (*McCullen,* 134 S.Ct. at 2538); *Schenck v. Pro-Choice Network of Western New York,*

519 US 357, 374, 117 SCt 885 (1997); *Parkmed Co. v. Pro-Life Counseling Inc.*, 91 AD2d 551 (1st Dep't 1982)

The order of protection also violates Grady Flores' rights freedom of speech, freedom of assembly, and freedom to petition for redress of grievances under the First and Fourteenth Amendments of the U.S. Constitution and Article 1, Sections 8 and 9.1 of the N.Y. State Constitution.

The courts have long held that in evaluating and injunction or temporary restraining order (which is effectively what we are dealing with here) where issues of rights under the First Amendment are at issue, the key is to determine whether the injunction burdens more speech than is necessary to secure a significant government interest. (*Schenck v. Pro-Choice Network of Western New York*, 519 US 357, 374, 117 SCt 885 (1997); *Madsen v. Women's health Center, Inc.*, 512 US 753, 114 SCt 2516, 129 L Ed2d 593 (1994), *see also*, *New York ex rel. Spitzer v. Operation Rescue National*, 273 F.3d 184 (2d Cir 2001))

Where the order as here does overly burden the defendant's speech as compared to what is required it is unconstitutional. The courts have been clear. Any order would have to be constructed to prevent obstruction while preserving the rights of the defendant under the First and Fourteenth Amendments and Article 1, §§ 8, 9.1 of the State Constitution.

The courts have specifically held that these requirements do apply to orders of protections in criminal cases. (*See Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976); *U.S. v. Chatelain,* 360 F.3d 114 (2d Cir 2004)(Second Circuit applying New York law recognized the applicability of the First Amendment to order of protection)

This concern applies even in the case of military establishments. Court of Appeals has recognized this and applied this constitutional concern to the military and noted that, exclusions from a non-public forum "must be reasonable in light of the purpose for which the particular property and forum serve." (*Rogers v. New York City Transit Authority*, 89 N.Y.2d 692, 699 (1997))

POINT II: THE ORDER OF PROTECTION WAS OVERLY BROAD AND VAGUE AND FAILED TO PROVIDE THE REQURIED SPECIFICTY OF INFORMATION TO THE DEFENDANT

The temporary order of protection issued to the defendant was overly vague and improper, and the jury was not properly informed as to the definition of stay away as defined to the defendant, and the trial court improperly denied the defendant's omnibus motion and post trial CPL § 330 motion on this point.

The Appellate Division was clear in addressing this issue. Where an order of protection is vague or ambiguous any ambiguity must be resolved in favor of the defendant. (*People v. Roblee*, 70 AD3d 225, 890 NYS2d 166 (3d Dep't 2009))

This is a long standing rule of the courts that ambiguity in an order of protection must be resolved in the favor of the person charged with contempt. (*Matter of Holtzman v. Beatty*, 97 AD2d 79, 82-83 468 NYS2d 905 (2d Dep't 1983), *citing Ford v. Kammerer*, 450 F2d 279,280 (3d Cir. 1971))

The temporary order of protection issued to the defendant contained no specificity as to what conduct was required of her other than to stay away from the property of the airbase. As such the order was overly vague and did not meet the requirements under the law.

1. The vagueness and confusion as to the base boundary or property line on February 13, 2103

At trial the testimony of multiple prosecution and defense witnesses was that at the time of the protest on there was a great deal of confusion over exactly where the boundary line of the base property was located.

The testimony of Chief Master Sergeant Michael Ramsey was that the protestors were standing approximately 170 feet from the fence line and entrance guard shack on February 13, 2013. (A.14) Sgt. Ramsey also testified that there was confusion among police officers, and others as to where the actual base boundary was located. (A.13, A.15)

The sergeant testified that this confusion as to the location of the base boundary was a reason why after the February 13, 2013 demonstration, additional signs were placed along the edge of the easement that exists on the property boundary along East Malloy Road in order to provide delineation of the base boundary. (A.15)

Sgt. Ramsey testified that there was a public right away on Malloy Road. (A.13) and that members of the public could walk and jog on the shoulders of the road.

Colonel Evans also acknowledged on cross-examination that any member of the public could drive or walk on the easement granted for the roadway. (A.9)

And in fact in people's exhibit number one, the video tape of the demonstration, at 13:20 a jogger is seen running along the side of the road through the area where the arrest of the protestors occurred on February 13, 2013, along with the ongoing vehicular traffic.

Colonel Evans testified that the only signage that delineated the property line and base entrance on the date of the arrest of the defendant were the no trespassing signs located on the boundary fence which sites some distance back from the road, and the sign indicating the entrance drive to the entrance gate for the base on Malloy Road. (A.9-A.10)

Colonel Earl Evans also testified that on February 13, 2013 there were no boundary signs along the edge of the easement and the property, but that such signs were there as of the trial. (A.9-A.10) Colonel Evans testified during cross examination that on February 13, 2013 the date of the arrest of Mary Anne Grady Flores, the only signs indicating the base property were located on the fence line of the air base. (A .10) This is the fence line that Sgt. Ramsey testified was approximately 170 feet from where the protest occurred. (A .14)

While both Sergeant Ramsey and Colonel Evans testified that the boundary of the base extended to the middle of Malloy Road, there was no actual documentation or other evidence submitted by the prosecution to support this claim as to the boundary location of the base. Colonel Evans testified that at some point following the protests the base had a survey by a surveyor completed to delineate the property lines of the base. (A.8) The Colonel acknowledged that at least in part this was done due to questions being raised as to the location of the boundary line. (A.6-A.10) However, no evidence of the actual land

survey was ever presented at trial. At the same time the witnesses testified that the boundary of the base was actually located in the middle of Malloy Road. No documentation of the claimed property line was ever presented at trial. The same witnesses who testified about the base boundary line also testified that there was a public easement allowing public access along the roadway.

The public nature of the roadway, which according to prosecution witnesses has a public easement or right of way attached to it, and its appearance as public property is evident in People's Exhibit One, the video of the demonstration and subsequent arrests of the protesters that was introduced at trial. This video is from a police dashboard cam which recorded much of the events of the demonstration on the date in question and the subsequent arrest of the eight protesters. Viewing the exhibit it is clear from the vehicle traffic and the pedestrians and jogger who appears at approximately 13:20 in the video that the roadway and shoulder area appear to be public property utilized by the public on a regular basis and that there is no indication that this is actually part of the air base. As such it is clear that the belief of the defendant and others that this was public space was a reasonable belief.

Numerous other witnesses also testified at trial to the confusion over the location of the base boundary line.

Mary Anne Grady Flores testified at the trial that there were no signs along the road February 13, 2013 delineating a boundary line or indicating where the base boundary was located. (A.16) Ms. Grady Flores also testified that there were no identifying features about any boundary line on that day (A.16) She also testified that she had never been told or was aware prior to February 13, 2013 where the base boundary

line was located. (A.16-A.17) Mary Anne Grady Flores testified that she thought the roadway was a public road.

Mary Anne Grady Flores testified that her belief on February 13, 2013 was that the boundary line of the base was the chain link fence and the guard shack of the entrance to the base. (A.18) She stated that her belief on that date was that where she was standing was public roadway. Mary Anne also testified that after February 13, 2013, she learned that the base boundary line may be in a different spot than what she had believed previously. She testified that she had been told that she had to be off the base property but could be in the roadway. (A.19)

Matthew Ryan testified that he was unaware of where the base property line was during the demonstration on February 13, 2013. (A.20) Linda LeTendre, one of the eight protesters that day, also testified that she was aware that there was confusion over where the base property line was located on the day of the demonstration. (A.21) She testified that she thought that, they, the protesters were standing in the road to the base property. (A.22)

William Streip testified that he was also one of the eight protesters that day. He stated that there was confusion on that date about the exact location of the base boundary. (A.23) He also testified that there were no markings to identify where the actual base boundary line was located. (A.23)

2. The order of protection lacked specificity as to the banned behavior and left it to the defendant to guess as to the limits of the order.

The courts have consistently found that where an order is vague and indefinite a defendant cannot be found to be in criminal contempt for willful failure to take a particular action. (*See e.g. Matter of Sheridan v. Kennedy,* 12 AD2d 332, 212 NYS2d 296 (1st Dep't 1961); *Matter of Holtzman v. Beatty*, 97 AD2d 79, 468 NYS2d 905 (2d Dep't 1983))

The order of protection issued by the DeWitt Town Court merely stated that Mary Anne Grady Flores, the defendant, was to "stay away" from 6001 East Malloy Road. The term stay away was left undefined by the court and provided no specificity as to what conduct was allowed or disallowed under the order. The order did not state if Mary Anne Grady Flores was to simply stay off the base property or if she was to stay a certain distance away from the base. Mary Anne Grady Flores testified that she was told to stay off the base property but that was never explained to her in terms of a specific location or distance, but was merely a general explanation. (A.25)

The existing temporary order of protection is overly vague and fails to properly define exactly what conduct would constitute a violation of the order as to staying away from the workplace of Earl A. Evans. The order of protection lists as the workplace of Earl A. Evans 6001 East Molloy Road, T/Dewitt. This address is the location of the campus of Hancock Field, a military entrance to the joint civil military Syracuse Hancock International Airport. The campus of Hancock Field, the military component of the airport consists of over twenty buildings and other facilities on a large campus which is

enclosed by security fencing and security gates, as is shown in the defense exhibits introduced at trial.

The order of protection does not list or indicate which building inside the campus is the workplace of Earl A. Evans, or to what the address of 6001 East Malloy Road refers to.

Nor does the order of protection specifically indicate how and where the Defendant's presence on a public roadway outside the campus of Hancock Field would constitute a violation of the order.

The order here did not specify anything other than stay away from 6001 East Malloy Road. It provided no specificity as to whether this referred to a particular building inside the air base, whether this referred to the entire airport or simply portions thereof. (Indeed, in theory, given that the airbase, which is the protected location here, shares runway space or access with the commercial portions of the airport one could argue that the defendant merely by being present in the commercial terminal at Hancock Field or in a plane on the runway would be in violation of this order of protection.)

There is nothing in the order that indicates or specifies how far away the defendant must stay from the airbase or if the order applies to the entire airbase, and if so what constitutes the base property.

The court in *People v. Furman*, stated that where the terms of an order are vague a party cannot be in criminal contempt for taking the prohibited action. (*People v. Furman,* 145 Misc2d 115, 546 NYS2d 755 (NY City Crim. Ct., NY Co. 1989) This is the same view taken by other courts that have found that if the terms of an order are vague in

proscribing behavior, then a defendant cannot be found to be in criminal contempt for violating the order. (*See Matter of Holtzman v. Beatty*, 97 AD2d 79, 468 NYS2d 905 (2d Dep't 1983); *Matter of Sheridan, supra* (where terms of order are vague and indefinite a defendant may not be adjudged in criminal contempt for willful failure to take such action); *People v. Balt*, 34 AD2d 932,933, 312 NYS2d 587 (1st Dep't 1970) (where the mandate in the order is vague cannot be in criminal contempt)

In *Finlay v. Gideon,* Index No. 2014-521 (Sup. Ct. Onondaga Co. 2014) J. Brunetti dealt with this issue involving an almost identical order of protection emanating from the same town court. J. Brunetti found that order of protection to be vague in that it failure to provide specificity to the term stay away exactly as the order at issue in this case fails to do. Judge Brunetti noted that the failure to specify a distance to stay away was evidence of the vagueness in these orders and that the order was not valid due to this lack of specificity. The judge specifically noted that the lack of specificity in the order left it vague and for the defendant and police to both guess at its meaning and application and hence must be held to be invalid.

This issue of the vagueness in the order is particularly applicable in this case where as discussed above there was great uncertainty among people present at the scene over exactly where the base boundary was located. Given the vagueness in the order and the confusion over the location of the base boundaries the actions of Mary Anne Grady Flores in this situation were exactly that envisioned in the court decisions cited above.

The prosecution has argued previously that the vagueness argument fails as the defendant must have had notice as she had been present at prior demonstrations where

there were arrests. However, there was no evidence presented in any fashion about any of the prior demonstrations or arrests that could conceivably go to show there was prior notice on the part of Mary Anne Grady Flores. There was nothing presented to show that there were any arrests or even demonstrations at the same location along the roadway that would have provided notice or even if the prior arrest of the defendant had occurred at this gate or a different gate.

3. The vagueness of the temporary order of protection is underlined by the inability of the trial court to provide a definition of the term "stay away" to the jury in this matter.

During jury deliberations, the trial court received a question from the jury requesting a definition and meaning of the term "stay away" as contained in the temporary order of protection. (A.31) (Upon review of the trial transcript it is clear that at least a portion of the discussion regarding this request from the jury occurred without it being recorded. The fact that there were telephone calls made by the court is captured in the trial transcript at and in the transcript of the CPL 330 oral arguments. Despite the omission, the core of the arguments and issues were captured and preserved in the transcripts)

The court ultimately declined to give a definition to the jury. During this process, the court made a number of attempts to seek a definition of the term stay away. The court made phone calls to resource centers in Albany seeking help with an answer to this question, but was unable to obtain an answer to this question. (A.33, A.42) The court noted that in his reading of CPL § 530.13 there was no standard definition in the statute of the term "stay away." The prosecution also argued that there was no legal definition

of the term stay away. (A.35) The judge also indicated that he did not want to tell the jury that the term did not seem to be defined in law. (A.36)

The defendant argued that the term had been defined and given a meaning by the court when it explained to defendants what conduct was permissible with the order of protection. The defendant's position on the meaning of the term as defined by the court was not accepted by the court and this definition was not provided to the jury. This would seem to indicate that the trial court was uncertain as to the definition he had provided to the defendants in his court and again underlines the vagueness of the order of protection and the vagueness with which the court would define its meaning for defendants.

The fact that the trial court felt it was unable to provide a definition of what stay away meant in the order of protection provided to the defendant and that the prosecution similarly argued that there was not a legal definition of this term illustrates the overly vague nature of the order of protection.

The fact that the court and prosecutor both felt that there was no way to define the meaning of stay away for the jury is an exact demonstration of the vague and indefinite nature of this stay order as it applied in this circumstance and the invalidity of said order of protection. (*See Matter of Holtzman,supra,* at 82)

a. The trial court improperly abdicated its role in defining and settling issues of law and gave that power to the finder of fact

The trial court added to the harm caused by the vagueness in the order of protection by declining to share with the jury the same explanation or definition the court

had created for the defendant and her co-defendants. Although the jury sought to have the court explain the meaning of the term stay away in the order of protection as outlined above the court declined. The trial court decided not to provide such a definition and instead instructed the jury to come up with their own definition. The trial court gave the following instruction to the jury:

> "Question is, is there a legal definition of stay away as pertains to the order of protection or has it just left the common sense. Your question relates to a question of fact and your are the sole triers of the fact based upon the testimony you have heard and the evidence that has been received relative to that issue." (A.39)

This instruction came after the defendant had made multiple requests for a different instruction. Defense counsel requested several times that because a definition had been given to the defendant as to what the meaning of "stay away" was that the same definition should be provided to the jury to define the term as it was defined for the defendant. (A.31, A.33, A.36) This was a critical issue as the defendant had testified that she had been told that she had to be off the base property but that she was allowed in the roadway. (A.19) Defense counsel requested that because the defendant had been given a definition of the term stay away the same definition should be provided to the jury to provide the legal meaning the court had given that term, and then the jury as the trier of fact should determine if a violation had occurred. (A.33, A.31-39, A.40) It was unchallenged both at trial and at the CPL § 330 hearing by either the prosecution or the trial court that the court had provided several definitions or explanations of acceptable conduct under the term stay away in the order of protection. During the trial discussion

of the issue and in response to defendant's CPL 330 motion papers and at oral argument on the papers neither the prosecution nor the trial court contest the fact or disagreed with defense counsel that definitions or explanations of the term "stay away" and what conduct was permitted had been provided by the trial court.

The trial court did not agree with counsel and determined that defining this term would be an issue of fact for the jury to determine. This was error by the trial court. The court in providing a definition of the term "stay away" had given a legal definition and meaning to the term or phrase to the defendant and other co-defendants. This legal definition should have been provided by the court to the jury. The jury could have then as the finder of fact decided whether based upon the facts at trial the defendant had violated the legal meaning of the term. The trial court however, mistakenly determined that defining the term was an issue of fact for the jury to determine by creating their own understanding and definition of what that term "stay away" meant. This error was amplified by the fact that the prosecution argued during its closing summation that by simply being at the East Malloy Road location Mary Anne Grady Flores had violated the order of protection. (A.45)

The effect of the jury instruction as raised by the defense in its CPL 330 argument is that the trial court instructed the jury to use their life experience and the testimony of witnesses on this point as they saw fit.

By providing the answer as quoted above, the trial court not only failed to provide the previously determined legal definition of the term stay away, but it also created an

implicit inference that the testimony of the defendant that she had been given a definition by the court was not correct.

The Defendant had testified that she had been given a definition of what stay away meant by the trial court and that she was trying to comply with the definition given to her (A.19, A.25, A.30) The trial court, when then asked if there was a legal definition of the term stay away and by subsequently telling the jury that there had been testimony on that issue and they would have to determine the definition of the term stay away themselves, implicitly informed the jury that he would not confirm that a definition had been provided to the defendant or what that definition was. The effect was to call into question the testimony of the defendant by suggesting there was no definition given by the court.

This was a failure to provide a legal definition that related to the key issue at trial. Indeed, the prosecution theory of the case was just that – that Mary Anne Grady Flores intentionally violated an order of protection to stay away form 6001 East Malloy Road. (A.44-A.45) The testimony of much of the trial dealt with this issue. The defense at trial focused on illustrating that there was great confusion over the boundary or property lines of the base at the time of the protest that led to the arrest in this matter, and that there was no intent on the part of the defendant to violate the order of protection.

The failure to provide the jury with the same definition or instruction given to the defendant invited the jury to create their own definition of this term. And in fact the jury did create their own understanding and definition of what this term meant. (A.40-A.42) As noted in the defendant's 330 motion both counsel had met with members of the jury immediately after the trial. Jurors indicated that they felt the mere presence of the

defendant at the scene constituted a violation of the term stay away. (A.40-A.42) This is a much broader definition and meaning of the term stay away than had been provided to the defendant and other co-defendants by the trial court. As noted in the CPL 330 oral arguments there were different definitions given to the defendant about being able to be present as long as they were not on the property of the air base. These included not being on the property of the base and staying on the other side of the road. Allowing the jury to come up with a different separate definition was improper and underlines the vague nature of the order of protection and how this vagueness allowed different parties to interpret its meaning in different ways.

The failure of the trial court to provide the prior definition is underlined by the fact that the trial court noted in its sentencing remarks. There the court noted that if the defendant had followed one of the definitions of stay away provided by the court she would not have been arrested. (A.69) The court was clearly acknowledging here that definitions of the term stay away had been given. The explanation of being on the other side of the street was one of several raised by the defendant during the trial and jury question. (*See discussion infra*) This statement by the trial court illustrates its error in not providing the jury the same definition or meaning of the term stay away that had been provided to the defendant when it was asked to do so.

POINT III: THIS COURT SHOULD REVERSE, AS THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE AND THE EVIDENCE WAS LEGALLY INSUFFICIENT

The evidence in this case was legally insufficient and the guilty verdict was against the weight of the evidence in this matter.

1. The Legal insufficiency of the Evidence

The evidence at trial was legally insufficient to convict the defendant of criminal contempt in the second degree. Even viewed in a light most favorable to the people, a rationale trier of facts could not find that the charge had been proven beyond a reasonable doubt. (*People v. Cabey*, 85 NY2d 417 (1995); *People v. Pierce*, 266 AD2d 271, 273 (3rd Dep't 1999)).The Appellate Division directly addressed this issue in *People v. Roblee* where it stated that if vagueness exists in an order of protection, and where there is no unequivocal mandate then the evidence is legally insufficient. (*Roblee,* 70 AD3d 225, 228, 890 NYS2d 166 (3d Dep't 2009); *Matter of DEP v. City of New York*, 70 NY2d 233, 240 (1987), (*See People v. Bleakley*, 69 NY2d 490, 495; *People v. White*, 261 AD2d 653, 656, *lv. denied* 93 NY2d 1029 [1999]).

The evidence as discussed *supra* is that the order of protection was invalid and that it was overly broad and vague with the lack of specificity making it an invalid order.

2. The Verdict was against the Weight of the Evidence

This Court has "exclusive statutory authority to review the weight of the evidence in criminal cases." *People v Bleakley*, 69 NY2d 490, 492 (1987). This "unique factual review power is the linchpin of our constitutional and statutory design intended to afford each litigant at least one appellate review of the facts" and whether a verdict is against the weight of the evidence. *People v Bleakley*, 69 NY2d at 494-95. *See* CPL 470.15(5). Ms. Grady Flores was acquitted of the charge of Disorderly Conduct. Ms. Grady Flores was convicted, however, of Criminal Contempt in the Second Degree. Mary Anne Grady Flores submits that this conviction was against the weight of the evidence, and this Court therefore should reverse.

In determining whether a verdict is against the weight of the evidence, this Court should engage in a two-step analysis. *People v Romero*, 7 NY3d 633, 643 (2006). In so doing, this Court must perform its own independent review of the credible evidence. *People v Bleakley*, 69 NY2d at 495; *People v. Taylor*, 276 AD2d 933, 936 (3d Dep't 2000), *lv. denied*, 96 NY2d 788 (2001), *citing People v. White*, 261 AD2d 653, 657 (1999), *lv. denied* 93 NY2d 1029 (1999).

First, this Court must determine whether, "based on all the credible evidence," *People v Romero*, 7 NY 3d at 643; *People v Bleakley*, 69 NY2d at 495, "an acquittal would not have been unreasonable." *People v Danielson*, 9 NY3d 342, 348 (2007). Second, if it would have been reasonable for the jury to acquit, then this Court must "weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strengths of such conclusions," (*People v Danielson*, 9 NY3d

at 348, citing *People v Romero*, 7 NY3d at 643. *Accord*, *People v Bleakley*, 69 NY2d at 495, quoting *People ex rel. MacCracken v Miller*, 291 NY 55, 62 (1943); *People v Mitchell*, 55 AD3d 1048, 1051 (3d Dept 2008), *lv denied* 12 NY3d 856 (2009)).

Further, this Court views and assesses the evidence in a neutral light and makes an independent determination. (*People v King*, 265 AD 2d 678, 679 (3d Dept 1999), *lv denied* 94 NY2d 904 (2000)). If this Court determines that, "a different finding would not have been unreasonable, [the appellate court must] make its own independent determination of the relative probative value of the inferences that may be drawn from the testimony." (*People v. Valencia,* 263 AD2s 874, 876 (1999), *citing People v. Jefferson,* 248 AD2d 815, 817 (1999), *lv denied* 92 NY2d 926 (1998))

Essentially, this Court sits as a thirteenth juror in determining which facts were proven. (*People v Danielson*, 9 NY3d at 348-49). If the jury failed to give the evidence the weight it should have been accorded, then this Court should set aside the verdict. (*People v Romero*, 7 NY3d at 643-44; *People v Bleakley*, 69 NY2d at 495. *See* CPL 470.20). While deference is accorded the jury's opportunity to view witnesses and observe demeanor, *People v Mitchell*, 55 AD3d at 1051, nevertheless appellate courts have exclusive factual review authority and, like the trier of fact below, must determine the weight that evidence should be accorded. (*People v Bleakley*, 69 NY2d at 495-96 (1987); *People v. Bruno,* 63 AD3d 1297, 1299-1300 (3d Dept 2009), *lv denied* 13 NY3d 858 (2009) (invoking interest of justice jurisdiction to reverse convictions, even viewing evidence in light most favorable to prosecution)).

In the case at bar, the jury would have been reasonable to acquit.

Considering the conflicting testimony and rational inferences that naturally could have been drawn from the evidence presented at trial below, the jury was not justified in finding Mary Anne Grady Flores guilty of criminal contempt in the second degree beyond a reasonable doubt. (*See People v. Alford*, 65 AD3d 1392, 1393 (3d Dept 2009), *aff'd as mod'd og* 14 NY 3d 1392 (2010); *People v Danielson*, 9 NY3d at 349).

a. The intent of the Defendant on February 13, 2013

The defendant testified at trial that she had no intent to violate the order of protection. As discussed, *supra*, Mary Anne Grady Flores testified that she did not know where the boundary line was located and that she believed she was on a public road at the time she was taking photographs of the event. This was also the testimony of a number of other witnesses – that there was confusion over the boundary line.

Mary Anne testified that she was not involved in the planning of the event that day (A.46) Multiple witnesses also testified that the defendant was not involved in the planning of the protest that occurred on February 13th. Ellen Grady (A.49) stated that she was present for the planning meeting and Mary Anne was not involved. Matthew Ryan testified that he believed the defendant was not involved in the planning meeting. (A.47)

The testimony of multiple witnesses also was that Mary Anne Grady Flores had no intent to violate the temporary order of protection during the protest that occurred on February 13, 2013.

Ellen Grady testified that she was one of the protesters and that the defendant was not standing with them. (A.49) Matthew Ryan also testified that he was one of the eight

protesters and that Mary Anne was not involved in the protest. (A.48) Father William Pickard testified that he was one of the eight protesters that day and that Mary Anne Grady Flores was not a demonstrator. (A.50) William Streip, testified that he was also one of the eight protesters that day and that Mary Anne Grady Flores did not participate in the protest. (A .52)

Linda LeTendre also testified that the defendant was not involved in the protest and that Mary Anne had told Ms. LeTendre that she wanted to make sure she did not violate the order of protection. (A.54) Father Pickard also testified that Mary Anne told him that she would not be involved in the planning of the protest and that she did not want to violate the order of protection. (A.50-A.51)

Sgt. Ramsey testified on direct that he saw Mary Anne Grady Flores walking around filming or taking pictures and walking back and forth between the two sides of Malloy Road during the protest. (A.55-A.56) The sergeant also testified that there were eight demonstrators that day holding signs and that Mary Anne Grady Flores was not one of those eight. (A.58) He also testified that she was one of a number of people walking around observing the protest. (A.59) The Sergeant testified that he went to the scene of the protest and talked to the officers parked there and that this was on the edge of the entrance way to the base gate. (A.55)

It is also significant to this issue of intent and the knowledge and vagueness of the actual property line that Mary Anne was acquitted by the jury of the charge of disorderly conduct, which was directly related to the actions of the protest itself. Indeed in its opening statement, the theory of the prosecution was that the defendant violated the order

of protection by participating in the protest and blocking vehicle traffic at the entrance of the base driveway. (A.60) Based on the trial testimony it subsequently backed off this claim and focused their argument on the mere presence of the defendant at the scene.

With this acquittal the jury dismissed the argument that Mary Anne had participated in the protest or engaged in the behavior of blocking traffic, etc. that was carried on by the protestors themselves. This is a clear indication that the jury did not believe that Mary Anne had engaged in the protest or sought to block the entrance gate of the base.

What is left is the issue of where Mary Anne was standing and walking and if this constituted an intentional breach of the mandate in the order of protection. As discussed, *supra,* given the acknowledged confusion and lack of information regarding the exact base boundary line and what exact behavior was required to avoid a willful and intentional violation of the order of protection. (*See People v. Martin*, 81 AD3d 1178 (3d Dep't 2011); *People v. McCoy*, 59 AD3d 856 (3d Dep't 2009))

Thus, the verdict was against the weight of the evidence, and this Court should reverse.

POINT IV: THE SENTENCE IN THIS CASE WAS OVERLY HARSH AND VINDICTIVE AND REPUGNANT AS A MATTER OF LAW

At trial, Mary Anne Grady Flores received the maximum sentence allowed under the law, receiving a sentence of one year of local incarceration, and a fine of one

thousand dollars. The maximum sentence on a conviction is normally reserved for the most egregious of violations in a criminal case. The evidence in this matter does not support the imposition of such a sanction.

1. The sentence was overly harsh and inappropriate for the facts of the case.

The sentence in this matter was overly harsh and an abuse of power by the sentencing court. In determining this issue it is significant that a pre trial investigation was ordered by the trial court. This report, compiled by the Onondaga County Department of Probation, recommended a conditional discharge as the appropriate sanction in this matter. This report was compiled and prepared as are most PSI reports provided to courts in the state of New York. The report involved a review of the accusatory documents, an interview with the defendant, and a review and examination of the history of the defendant. This process it appears utilized the program tools to evaluate the information and generate an indication regarding the defendant and the appropriate sanction. The Department of Probation found that the appropriate sanction based upon the defendant and her history as well as the evidence in the case was a conditional discharge. The sentence imposed by the trial court is so disproportionate to this recommendation that it calls for careful review and scrutiny by the appellate court.

2. The evidence in the case did not support the maximum sentence

As discussed *supra*, the evidence shows that Mary Anne Grady Flores was not an active participant in the demonstration. The evidence in this matter is clear that Mary Anne Grady Flores was not one of the eight protestors on February 13, 2013. The testimony of multiple witnesses was that the defendant did not plan on participating and that she sought to avoid creating a violation of the order of protection. Indeed, at the time of the order to disperse had been given to the protestors, Mary Anne Grady Flores had already left the scene and was walking down Malloy Road, where she was arrested.

If the court does find that the defendant is guilty of this charge, it is equally clear that the violation was not one of a deliberate or flagrant thumbing of the nose at the order of protection by the defendant, but rather that the defendant created a violation by straying into forbidden ground while photographing the event and talking to the protestors. The nature of such a violation speaks to a difference sanction, a fact recognized by the Onondaga Department of Probation.

Here there were no threats or intimidation or harassment directed at the protected party. None of the type of behavior in criminal contempt cases that creates alarm and concern for the safety of the protected party. Indeed, Colonel Evans spoke to the fact that he had no fear of the defendant. It is that type of deliberate willful violation that entails violence or the threat of violence that would mandate a maximum sentence of this nature.

The imposition of the maximum period of incarceration is at odds with the evidence in this matter and the actions and behavior of the defendant. There is no evidence of a need to impose this type of sanction to protect the community and the costs

such a sentence imposes upon the community are disproportionate to the actions of the defendant and the evidence in this case.

The maximum fine was also excessive in this case. (*See People v. Jennette*, 128 AD2d 955, 513 NYS2d 269 (3d Dep't 1998); *People v. Halm,* 260 AD2d 803, 687 NYS2d 827 (3d Dep't 1999) The defendant did not profit from being present at the protest on February 13th and the fine is extremely disproportionate to her conduct on that date. Further, the defendant's economic circumstance is not of a wealthy individual and the maximum fine is an egregious amount compared to her conduct on the day in question.

The fine in question as with the sentence of incarceration is disproportionate to the evidence and behavior of the defendant. The costs it imposes are disproportionate to the sanction that would be required with a violation in this matter.

3. The trial court relied upon a number of improper factors in setting the sentence in this case.

In setting the fine amount, the trial court improperly referenced issues and claims which are no where in the record of the case and for which there is no support. The court claimed that the defendant must be financially able to pay the maximum fine as she had provided bail for other defendants. (A.68) There is simply no evidence in the record of this case to support such a statement. And if indeed the defendant had delivered bail to the court to provide bail for other individuals or defendants, there is no evidence that this was her money or resources or if she was merely the messenger or delivery person. Nor is there any clear rationale why this would be a pertinent factor to discuss at sentencing.

There was no evidence or inquiry by the court as to the defendant's financial situation. To rely upon such argument is improper in establishing a basis for a fine in a criminal case. And it suggests that the court was considering the process or other cases involving other protestors in determining how it wanted to sentence this defendant.

Given that judges do not normally process bail monies themselves and given a lack of record on this claim, it would seem that the court received information second or third hand that was not shared with either trial counsel. The gathering and use of such information by a court is improper and undermines the due process rights of the defendant and her right to a fair trial process, including sentencing.

The sentence is overly harsh given the conduct referenced by the court. the court stated that if the defendant had remained on the other side of the road she would not have been in violation of the order of protection (A.69) However, the court in so stating ignored his instructions to the defendant and others that was referenced during the testimony of witnesses at trial, where the definition of stay away was presented differently to individuals.

The trial court also referenced a planning meeting regarding the protest of February 13, 2013 as evidence of conduct supporting a more severe sentence. (A.65) In so doing the court ignored the fact that the same witnesses he relied upon for this information who also testified that Mary Anne Grady Flores did not participate in this meeting and was not part of the planning of the protest.

In addition, the trial court also went on to discuss a number of demonstrations that had occurred and what the court felt was the intent of all of the protestors involved in these protests and the need to sanction this behavior in order to change these actions. In

so doing the court was clearing punishing the defendant for the actions of others and was seeking to use her sentence and case as a message to other individuals. (A.65-A.66) The court was clearly improperly punishing the defendant for the actions of other individuals at other events and for potential future activities of those individuals.

4. The sentencing process at trial and the good character of the Defendant.

The trial court at sentencing upon the closure of the sentencing arguments by the two parties immediately handed out a pre-prepared sentencing statement of the court. (this statement comprises part of the record on appeal.) The court then read his sentencing remarks from this statement which comprise the sentencing statement found in the trial transcripts. The court had pre determined the sentence for the defendant and ignored the sentencing arguments of both the prosecution and defense, as well as the sentencing statement of the defendant and ignored the comments of both parties at sentencing. Such a sentencing process is improper and failed to follow both the procedure and intent of the criminal procedure law in this state.

In so doing, the court, in addition to rejecting the PSI report, seemingly ignored as well it appears the sentencing memorandum of the defendant which is part of the record on appeal. This document contained multiple letters from third parties, which spoke to the good character, peaceful nature and integrity of the defendant. These letters were similar to the testimony of multiple character witnesses at trial who spoke regarding the general good character and integrity of Mary Anne Grady Flores.

Father Timothy Taughar testified that he had known Mary Anne Grady Flores for over two decades. The Father testified that he knew Mary Anne to be a person of integrity and honesty, and a person who consistently lives a life of conscience and lives the values of the Catholic Church in her life as a moral and ethical person. (A.61-A.62) 16

Father William Pickard testified that he had known the defendant for about five years. The Father testified that he knew Mary Anne Grady Flores to be a person of integrity and faith who lives her life motivated by the teachings of the Catholic Church. (A.50-A.51) Both priests testified to Mary Anne's long involvement in the faith and activities of the church and how she lived her life as a committed follower of the faith.

William DeSalvo also testified at trial as to the character of Mary Anne Grady Flores. He stated that he knew her to be a person of truthfulness, and honesty and a person of integrity. (A.63-A.64)

This testimony, as well as the documentation contained in the sentencing memorandum of the Defendant, was supported by the evidence in this case about the defendant. That she is a stable, contributing member of society, a homeowner who has a long history of self-employment as a small business owner. A person of high moral character and integrity who is no threat to the community.

Given the history of the defendant, combined with the clear evidence at trial that there was great lack of certainty over the boundaries of the base property, the lack of any violence or threat of violence in this matter, and the actual nature of Mary Anne Grady Flores' actions on February 13, 2013, it is hard not to come to the following conclusion regarding the sentence of the defendant.

Given the above regarding the defendant, and in reviewing the sentencing comments of the trial court, however, it is clear that the sole basis for the maximum sentence being imposed is that the trial court was attempting to send a message to the protest group. That is that the trial court was using the sentence to send a message to other supporters and protestors that their conduct had to change and that he wanted them to stop protesting. This is an improper use of the sentencing power of the court. As such the sentence of the court should be reversed.

CONCLUSION

For the foregoing reasons, and in the interests of justice pursuant to CPL §§ 470.15 (3)(c), (6)(b), the judgment of conviction and sentence for Appellant Mary Anne Grady Flores should be reversed and dismissed, and the Appellant should be granted such other and further relief as the Court deems just, equitable and proper

Dated: March 19, 2015

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