TIME REQUESTED FOR ORAL ARGUMENT: *10 MINUTES*

TO BE ARGUED BY:
JAMES P. MAXWELL, ESQ.
Chief Assistant District Attorney

COUNTY COURT
COUNTY OF ONONDAGA
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

MARY ANNE GRADY FLORES,

Defendant-Appellant.

THE PEOPLE'S BRIEF

WILLIAM J. FITZPATRICK, ESQ.
Onondaga County District Attorney
Attorney for Respondent
Criminal Courthouse, 4th Floor
505 South State Street
Syracuse, NY 13202
Tel: (315) 435-2470

JAMES P. MAXWELL, ESQ.
Chief Assistant District Attorney
MELISSA K. SWARTZ
Criminal Law Associate
Of Counsel

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES..... i

QUESTIONS PRESENTED..... 1

PRELIMINARY STATEMENT..... 2

STATEMENT OF FACTS..... 2
- PRETRIAL PROCEEDINGS..... 2
- TRIAL..... 3
- The People's Case..... 3
- Defendant's Case..... 5
- DELIBERATIONS AND VERDICT..... 6
- POST-CONVICTION MOTION AND SENTENCING..... 6

POINT I
- THE ORDER OF PROTECTION WAS NOT INVALID OR OVERBROAD..... 8

POINT II
- THE ORDER OF PROTECTION PROVIDED THE REQUIRED SPECIFICITY OF INFORMATION..... 14

POINT III
- THE EVIDENCE WAS LEGALLY SUFFICIENT AND THE VERDICT WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE..... 20

POINT V
- THE SENTENCE WAS NOT HARSH, REPUGNANT OR VINDICTIVE..... 22

CONCLUSION..... 26

TABLE OF AUTHORITIES

PAGE

CASES

Matter of Jason MM, 245 AD2d 892 (3rd Dept 1997)..... 17

McCullen v Coakley, ___ US ___, 134 S Ct 2518 (2014)..... 13

People ex rel. Finlay v Gideon, 129 aD3d 1632 (4th Dept 2015)..... 19

People v Appleby, 79 AD3d 1533 (3rd Dept 2010)..... 23

People v Bleakley, 69 NY2d 490 (1987)..... 20, 21

People v Bostic, 10 Misc 3d 775 (Supreme Ct, Suffolk County 2005)..... 16, 17

People v Bright, 71 NY2d 376 (1988)..... 16

People v Catlin, 41 AD3d 1199 (4th Dept 2007), lv denied 9 NY3d 873 (2007)..... 21

People v Clark, 6 AD3d 1066 (4th Dept 2004), lv denied 3 NY3d 638 (2004)..... 23

People v Danielson, 9 NY3d 342 (2007)..... 20

People v Discala, 45 NY2d 38 (1978)..... 23

People v Farrar, 52 NY2d 302 (1981)..... 22, 23

People v Garcia-Gual, 67 AD3d 1356 (4th Dept 2009), lv denied 14 NY3d 771 (2010)... 23

People v Goetz, 141 AD2d 446 (1st Dept 1988), affd 73 NY2d 751 (1988)..... 23

People v Gray, 86 NY2d 10 (1995)..... 14

People v Harris, 15 AD3d 966 (4th Dept 2005), lv denied 4 NY3d 831 (2005)..... 20

People v Mateo, 2 NY3d 383 (2004)..... 21

People v McGowan, 85 NY2d 985 (1995)..... 16

People v Nieves, 2 NY3d 310 (2004)..... 8, 9, 15

People v Nucci, 162 AD2d 725 (2nd Dept 1990), lv denied 76 NY2d 862..... 21

People v O'Connor, 242 AD2d 908 (4th Dept 1997), lv denied 91 NY2d 895 (1998)..... 9

People v Padro, 75 NY2d 820 (1990)..... 15

People v Pedraza, 66 NY2d 626 1985..... 23

People v Raduns, 70 AD3d 1355 (4th Dept 2010), lv denied 14 NY3d 891 (2010), reconsideration denied 15 NY3d 808 (2010)..... 11

People v Romero, 7 NY3d 633 (2006)..... 21

People v Shampine, 31 AD3d 1163 (4th Dept 2006)..... 8, 14

People v Smith, 4 Misc 3d 910..... 12

People v Sommerville, 72 AD3d 1285 (3rd Dept 2010)..... 12

People v Taplin, 1 AD3d 1044 (4th Dept 2003), lv denied 1 NY3d 635 (2004)..... 23

People v Valencia, 263 AD2d 874 (3rd Dept 1999), lv denied 94 NY2d 799 (1999)..... 21

People v VanGlahn, 189 Misc 2d 613 (Nassau Dist Ct)..... 13

People v Wells, 13 AD3d 482 (2nd Dept 2005)..... 21

STATUTES

CPL 70.20..... 9

CPL 470.05 (2)..... 14

CPL 470.15 (2) (c)..... 23

CPL 470.15 (6) (b)..... 22

CPL 470.25 (2) (c)..... 22

CPL 530.13 (1) (a)..... 9

OTHER AUTHORITY

Governor's Memo approving L 1998, ch 610, 1998 McKinney's Session Laws of NY at 1485..... 9

COUNTY COURT
COUNTY OF ONONDAGA
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

MARY ANNE GRADY FLORES,

Defendant.

DR # 13-156348

THE PEOPLE'S BRIEF

QUESTIONS PRESENTED

1. WAS THE TEMPORARY ORDER OF PROTECTION INVALID AS A MATTER OF LAW?

   The court below found that the temporary Order of Protection was valid.

2. WAS THE TEMPORARY ORDER OF PROTECTION OVERLY VAGUE?

   The court below found that the temporary Order of Protection was not overly broad.

3. DID THE PEOPLE PRESENT LEGALLY SUFFICIENT EVIDENCE THAT DEFENDANT COMMITTED CRIMINAL CONTEMPT IN THE SECOND DEGREE AND WAS THE VERDICT SUPPORTED BY THE WEIGHT OF THE EVIDENCE?

   At the close of the People's case and the close of the evidence, defendant did not move to dismiss the charge of criminal contempt in the second degree on the grounds he now raises in this appeal. The jury, sitting as the fact-finder, found defendant guilty of criminal contempt in the second degree.

4. DID THE COURT IMPOSE AN UNDULY HARSH, VINDICTIVE AND REPUGNANT SENTENCE?

   The court imposed a legally permissible sentence.

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction for the crime of criminal contempt in the second degree following a jury trial held in DeWitt Town Court (Gideon, J.) on May 15 and 16, 2014. On July 10, 2014, the Honorable David S. Gideon sentenced Mary Anne Grady Flores (defendant) to one year in jail and a $1,000 fine for criminal contempt in the second degree (Sentencing [S.] at 35-36).

The People received a Notice of Appeal on July 10, 2014. The People received two copies of defendant's brief and Appendix (A) on March 20, 2015. On June 8, 2015, the People received a transcription of the recording of the trial from the Town of Dewitt Justice Court, along with minutes from other court appearances and copies of other papers from the court's file. (Note: the transcription of the trial starts each day with page 1, so references to May 15, 2014 are designated at "T1." and references to May 16, 2014 are designated as "T2."). A stay of sentence was granted by the Onondaga County Court (Miller, J.) on July 17, 2014, and was extended on November 20, 2014, and January 20, 2015.

STATEMENT OF FACTS

On February 13, 2013, defendant was charged with disorderly conduct and criminal contempt in the second degree. The charges arose from defendant's presence in the driveway of 6001 East Malloy Road in DeWitt, the 174th Attack Wing, Hancock Field ("the base") on February 13, 2013, in violation of a temporary Order of Protection issued on October 25, 2012 by the Honorable Donald M. Benack, Jr. in the Town of DeWitt Justice Court (A1).

PRETRIAL PROCEEDINGS

During defendant's initial court appearance on this matter on February 13, 2013, defendant claimed that she had gone to the base solely as a "support person" (February 13, 2013

minutes at 4). Town of DeWitt Justice Robert Jokl told defendant, "We went over it very carefully what you were not supposed to do in that court order and you didn't abide by it" (February 13, 2013 minutes at 8).

In a Notice of Motion and Attorney Affirmation dated July 2, 2013, defendant brought an omnibus motion. In that motion, defendant sought dismissal of the charges, alleging that the accusatory instrument did not contain legally sufficient evidence. Defendant contended that the criminal contempt charge was based on insufficient evidence because, according to defendant, the temporary Order of Protection issued on October 25, 2012, was invalid (attorney Affirmation at 5-12). In a Motion Decision dated February 28, 2014, the court denied defendant's motion to dismiss. The court found that the temporary Order of protection was valid, not overly broad, and issue upon a determination of good cause (Motion Decision at 2). The court also found that it was required by the principle of *res judicata* to uphold the temporary Order of Protection because it had been upheld by Supreme Court Justice Hugh A. Gilbert when defendant challenged it in an Article 78 proceeding (Motion Decision at 2-3).

TRIAL

The parties stipulated that the Order of Protection was a legal order (T1. 27), and that it was valid (T1. 32). Defense counsel indicated, however, that this stipulation was not intended to preclude defendant from raising the issue of "the order of protection itself" on appeal (T1. 55).

The People's Case

Colonel Earl Evans of the Air National Guard, in a supporting deposition dated October 25, 2012, asked that the Town of Dewitt Court issue Orders of Protection directing defendant and the others arrested that day to stay away from Hancock Field (A2). Evans stated that the protest that day was the third unannounced protest, that the protest blocked gates to the

primary and secondary entrances to the base, and that the protest had forced the opening of an entrance not normally used (A2). His request was granted; Judge Benack issued a temporary Order of Protection directing defendant to stay away from Colonel Evans, and specifically directing defendant to stay away from Evans's business and place of employment at 6001 East. Molloy Road in the Town of DeWitt (the temporary Order of Protection was received as People's Exhibit 2 at trial and is reproduced at A1).

Colonel Evans was at his office at the base, located at 6001 East Molloy Road in DeWitt on the afternoon of February 13, 2014 when a group of protesters arrived at the main gate of the base, blocking the entrance (T1. 210-211). Colonel Evans was not at the gate when the protesters arrived, but that he did go down to the gate at some point (T1. 211). Evans estimated that the protesters were within 50 meters of the gate (T1. 211). Blocking the entrance to the base disrupts the operation of the base. That entry is normally used by emergency vehicles such as ambulances (T1. 213).

Chief Master Sergeant Michael Ramsey, who was at the gate shack, contacted Colonel Evans and his commanding officer to inform them about the protest going on at the base (T1. 237, A14). The group was approximately 170 feet away from the gate shack and fence of Hancock Field, on base property (T1. 237; A14). Defendant was walking around the entrance area, crossing Malloy Road a few times. She appeared to be filming or taking pictures (T1. 238-239). Defendant was interacting with the group of eight people who were standing in a line and holding signs (T1. 247). Ramsey called 911 because the base uses local law enforcement even though it is base property (T1. 237, A14).

Officer Michael Kurgan was the first Dewitt Police Officer to arrive at the scene (T2. 59). He arrived at around 2:00 p.m., at 6001 East Malloy Road (T2. 57). Kurgan was unable to enter the base because he was being blocked by protestors (T2. 60-62). As Officer Kurgan waited for

backup to arrive, he interacted with defendant (T2. 61). Kurgan had previously met defendant, and believed that she had an Order of Protection issued against her regarding Hancock Air Base (T2. 63). Backup arrived between 10 and 20 minutes later (T2. 66). At some point after other officers arrived, a warning was given to the protestors, including defendant, to leave base property (T2. 64).

The protestors were advised that they had 30 seconds to clear the area or they would be arrested (T2. 64). Officer Kurgan testified that at that point defendant was standing in front of him (T2. 65). Kurgan recalled that at some point, defendant crossed the street. Kurgan directed Officer Chase Bilodeau to arrest defendant while Kurgan was arresting another person (T2. 65-66). Officer Bilodeau arrested defendant upon being informed by Officer Kurgan to do so (T2. 10, 66). Officer Bilodeau arrested defendant as she walked away from the base (T2. 9).

At the end of the People's case defense counsel moved to dismiss for legal insufficiency and lack of evidence (T2. 90). The People opposed the motion and the court denied the motion (T2. 93-94).

Defendant's Case

Defendant testified that she was aware of the Order of Protection (T2. 111). She also testified that when she was given the Order of Protection she was told that "we had to stay away from the base" (T2. 126). During defendant's testimony, she claimed that her understanding of the order was "to stay off the base property, but I was allowed to be in the roadway" (T2. 127). Defendant testified that she did not interact with the police at the protest (T2. 123). One of defendant's sisters, Ellen Grady, who was present in the courtroom during Officer Kurgan's testimony (T2. 100), testified that it was not defendant who was blocking Officer Kurgan but, instead, it was Grady who was preventing the officer from getting onto the base (T2. 100-101). Officer Kurgan was not the one to arrest defendant due to arresting another individual (T2. 66).

In addition to her own testimony, defendant called seven other witnesses. Several of them indicated that defendant did not participate in the demonstration while she was at the base on February 13, 2013 (T2. 102, 167, 177, 190, 201).

After resting, defense counsel renewed the motion to dismiss, which was denied by the court (T2. 252-253).

DELIBERATIONS AND VERDICT

During deliberation the jury sent a note requesting a definition of what "stay away" meant (T2. 341, A32). After the court and counsel agreed that the Criminal Procedure Law did not provide a legal definition for "stay away" the People and defense counsel agreed with the Court's instruction, "Your question relates to a question of fact and you are the sole triers of the fact based upon testimony that you have heard and the evidence that has been received relative to that issue" (T2. 341-349, A31-39). Defendant was found guilty of criminal contempt and not guilty of disorderly conduct (T2. 353-354).

POST-CONVICTION MOTION AND SENTENCING

Defendant claimed in a CPL 330.30 motion that the court had improperly instructed the jury regarding the temporary Order of Protection. Defendant claimed for the first time in this motion that both the trial court (Judge Gideon) and Judge Jokl had explained in open court to counsel and to "other similar parties" that that being on the other side of the road did not violate the order and that mere presence at a protest without participating would not violate the order (Attorney Affirmation in support of CPL 330.30 motion at 2; see also Attorney Affirmation in support of CPL 330.30 motion at 5 [claiming that jurors adopted an interpretation of "stay away" that was different from the definition the court had given to "defendants and other observers in open court"]). On the day of sentencing, July 10, 2014, defense counsel contended that the defense had requested at trial that the court "give the same explanation that had been given to

this defendant to others of what that term meant" and that the court had denied this request (Sentencing [S.] at 8). The court responded that it had listed to the recording and determined that "there was no denial" (S. 8). Counsel also argued that the jury, in concluding that "stay away" meant stay away, came up with a definition that was different than "the explanation that is given to people" (S. 11). The court indicated that it recalled telling everyone that it would not violate the order to be across the street and that the court had told counsel that if defendant had stayed across the street, maybe she would not have been arrested (S. 11). The court found that counsel had consented to the jury instruction given at trial and denied the CPL 330.30 motion (S. 16).

The court found, as it sentenced defendant, that this case, like previous cases, "involved nothing more than the defendant willing to break the law to seek publicity for her cause. Publicity at any cost without any regard for the rules of society" (S. 29). The court pointed out the presentence report (PSR) prepared by the probation department failed to take into account defendant's two previous convictions and defendant's refusal to pay fines and surcharges imposed by the court despite her financial ability to do so (S. 31-32). The court also pointed out that had defendant merely wanted to take pictures of the demonstration, she could have done that from across the street, but she chose not to do that (S. 33). The court found that a sentence of a conditional discharge or probation would not be appropriate because defendant has failed to abide by conditions previously set down for her by the court (S. 34). Incarceration was the only way to show defendant that the court would no longer tolerate willful violations of the court's orders (S. 35). The court sentenced defendant to one year in jail, a $1000 fine, a $205 surcharge and a $50 DNA databank fee (S. 35-36).

Defense counsel immediately handed the court a Notice of Appeal and requested a stay of sentence for one week while defendant applied to County Court for a stay (S. 37). The court denied that request (S. 38).

POINT I

THE ORDER OF PROTECTION WAS NOT INVALID OR OVERBROAD

In Point I of defendant's brief (at 7-18), defendant argues that the temporary Order of Protection was invalid and overbroad. Specifically, defendant alleges that the court had no authority to issue an order of protection in favor of an individual who, according to defendant, was neither a victim of the crime nor a witness to the crime. Defendant's claim is without merit.

As a threshold matter, this Court should find that defendant has failed to preserve for appellate review as a matter of law his claim that the temporary Order of Protection issued on October 25, 2012 in connection with a previous case was invalid. Defendant has not shown that she "object[ed] to the Order of Protection on [her current] ground[s] when it was issued" (People v Shampine, 31 AD3d 1163, 1164 [4th Dept 2006], see also People v Nieves, 2 NY3d 310, 315-317 [2004]).

Rather than protesting to the issuing court at the time the temporary Order of Protection was issued, defendant apparently brought an Article 78 proceeding in Supreme Court, where Supreme Court Justice Gilbert refused to prohibit Town Justices in the Town of DeWitt from issuing orders of protection (see Motion Decision of the trial court, dated February 28, 2014 at 2-3). The trial court rejected defendant's arguments regarding the temporary Order of Protection both because the court concluded they lacked merit and also on *res judicata* grounds based on Supreme Court's Article 78 ruling.

Even if this Court reviews defendant's claim that the Town of DeWitt Justice Court issued an invalid temporary Order of Protection in one of defendant's previous cases, this Court should not grant any relief. This Court should find that the trial court ruled properly and should not grant defendant any relief.

After defendant was charged with violating the temporary Order of Protection, defense counsel brought a pretrial omnibus motion seeking dismissal on the grounds of legal insufficiency of the accusatory instrument. Defendant alleged that the temporary Order of Protection was invalid, and that this invalidity made the accusatory instrument charging criminal contempt in the second degree invalid and the charge legally insufficient (Attorney Affirmation in support of Omnibus Motion at 5-12). Legal sufficiency is normally a trial issue (see CPL 70.20), but rather than claim during trial that the temporary Order of Protection was invalid, defendant stipulated that the Order of Protection was a valid order (T. 32). Defense counsel also indicated – and the trial court and prosecutor agreed – that the stipulation did not preclude defendant from raising the "issue of raising the issue of, of the order of protection itself" on appeal (T1. 55). But that agreement cannot convert a meritless pretrial argument into a valid claim on appeal.

Judge Benack properly issued the Temporary Order of Protection. CPL 530.13 (1) (a) authorizes a court to issue an order of protection directing a defendant to "stay away from the home, school, business or place of employment of the victims of, or designated witnesses to, the alleged offense." The Court of Appeals in People v Nieves (2 NY3d at 316), discussed the legislative history of CPL 530.13 and noted that "the primary intent of the statute is to ensure that victims and witnesses who have the courage and civic responsibility to cooperate with law enforcement officials are afforded the maximum protection possible" (id., citing Governor's Mem approving L 1998, ch 610, 1998 McKinney's Session Laws of NY at 1485; see also People v O'Connor, 242 AD2d 908 [4th Dept 1997], lv denied 91 NY2d 895 [1998]). The Court also wrote that orders of protection are "an ameliorative measure intended to safeguard the rights of victims and witnesses both prior to and after conviction--it is not a part of the sentence imposed" (People v Nieves, 2 NY3d at 316).

In light of this legislative intent behind CPL 530.13, this Court should find that Judge Benack acted properly in issuing a temporary order of protection in favor of Colonel Evans. When defendant appeared before Judge Benack on the Town of DeWitt Justice Court on October 25, 2012, Judge Benack had a supporting deposition from Evans. In that deposition, Evans wrote that he was the mission support Group Commander for the base. He described the protest that had occurred at around 8 a.m. that day. The group of protesters, presumably including defendant, blocked the gates to the base both at the main entrance and exit route on Molloy Road, the secondary entrance and exit on Thompson Road, and also the Townline Road entrance and exit. The protesters were on base property. They remained on the base's property after being advised by law enforcement to leave. Evans indicated in this deposition that as an authorized representative of the base he requested that the court issue an Order of Protection against all of the defendants "such that they are to stay away from Hancock Field" (A2).

Judge Benack properly found good cause to issue the temporary Order of Protection that Evans requested. That temporary Order of Protection ordered defendant to stay away from 6001 East Molloy Road, which is the base's address and the location of the business and place of employment of Colonel Evans. The temporary Order of Protection has defendant's signature acknowledging that it was served on her in court (A1).

Colonel Evans qualified as a person who was cooperating with law enforcement and was deserving of the protection of the law through the issuance of the temporary Order of Protection. He was a victim – the entrances and exits to his work-place had been block at the start of the day. This affected him both personally as an individual who worked at the base, and professionally as the person in command at the base. CPL 530.13 (1) (a) allows a court, for good cause shown, to issue a temporary order of protection directing a defendant to stay away from the business or place of employment of the victims in a pending criminal action. The Criminal Procedure Law

does not have a specific definition of the term "victim" that would somehow limit it to exclude someone in Colonel Evans's situation. Defendant seems to imply in her brief that this Court should create a requirement that the People would have had to prove that Evans was on the base at the time of the October 25, 2012 protest in order to qualify for an order of protection (see e.g. defendant's brief at 8). But that is nonsense. Evans was a victim regardless of whether he was trapped on the base by the protest, unable to get to work at his usual time because of the protest, or had his work world disrupted by the protest.

CPL 530.13 (1) (a) also allows a court to issue a temporary Order of Protection for a witness. With defendant making no objection to the temporary Order of Protection when it was issued it is not known whether Judge Benack considered Evans a witness in the case involving the October 25, 2012 incident. It is likely, however, that he was a witness, just as he was a prosecution witness at the trial of the February 13, 2013 incident. Evans was on the base during the incident, watched the protest on video, and went to the gate after the protest began (T1. 211). He also gave trial testimony about his role on the base and the disruption caused by the protesters (T1. 209-216). Thus, this Court should reject defendant's argument that Evans was neither a victim nor a witness in relation to the October 25, 2012 arrest (compare People v Raduns, 70 AD3d 1355 [4th Dept 2010], lv denied 14 NY3d 891 [2010], reconsideration denied 15 NY3d 808 [2010] [finding that the court below 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 the defendant pleaded guilty]). Temporary orders of protections issued in favor of any victim or witness in a criminal matter constitute a lawful mandate of a court. The statute does not indicate that a witness must be an identifying witness. As stressed by the Court of Appeals, orders of protection are not issued to punish defendants; they are issued to protect those individuals who may be subjected to harassment or harm because of their status as a victim or witness.

Defendant mistakenly relies on People v Sommerville (72 AD3d 1285 [3rd Dept 2010]) to support this claim. In that case an Order of Protection was issued to an individual who testified that he did not witness the defendant's altercation with the police (id. at 1288). Here, since the protest disrupted the operation of the base where Evans worked and was the Commander, he was a victim (T1. 210, 213). With regard to the February 13, 2013 incident, Evans testified that, among other problems, the protest disrupted the entrance where an ambulance would normally enter the base (T1. 213). This victimized Evans along with everyone else on the base by creating a threat to the safety of anyone – including Evans – who might have needed an ambulance during the protest. Based upon the supporting deposition that Evans gave in support of the October 25, 2012 incident, it is logical to conclude that the same factors supported the temporary Order of Protection issued by Judge Benack on October 25, 2012 (A2).

Defendant argues in her brief (at 10-13) that the temporary Order of Protection was not valid because Evans sought to protect the property of the base and not Evans himself. Defendant relies on People v Smith (4 Misc3d 909 [Crim Ct, New York County 2004]), where an Order of Protection was issued for the Black Star Bar; there was no named individual (People v Smith, 4 Misc3d 910). But here, a person was named: Colonel Evans. And as specifically permitted by CPL 530.13 (1) (a), the temporary Order of Protection prohibited defendant from going to his workplace. It simply does not matter whether Evans was in fear of defendant assaulting him. Evans was victimized by defendant's actions and did not want that victimization to continue while the prosecution for defendant for her actions on October 25, 2012 was pending in the Town of DeWitt Justice Court. This Court should reject defendant's attempt to create a "true purpose" test when a court issues a temporary Order of Protection. Colonel Evans, like other crime victims, wanted defendant to stay away from his workplace while the case against her was pending. Judge Benack properly granted Evans's request for a temporary Order of Protection.

Defendant claims in her brief that in order for a court to issue a valid temporary Order of Protection a protected party must first suffer an act of violence or intimidation, or there must be a risk to the safety of a witness (defendant's brief at 14). CPL 530.13 (1) (a) does not have that requirement. And even one of the cases quoted in defendant's brief points out that a purpose of a temporary Order of Protection includes the prevention of "abuse" by a defendant of "those involved in the accusation" (Defendant's brief at 14, quoting People v VanGlahn, 189 Misc 2d 613, 616 [Nassau Dist Ct]). The temporary Order of Protection, had defendant obeyed it, would have prevented Evans suffering abuse while defendant's case was pending.

Additionally, defendant claims that Judge Benack issued an invalid temporary Order of Protection because it was overly broad (defendant's brief at 16-18). But there is no indication that defendant raised this concern with Judge Benack when the order was issued. And as Judge Gideon pointed out when sentencing defendant, she would not have been arrested had she just stayed across the street from the base property (S. 33). The temporary Order of Protection did not silence defendant, improperly imping upon her right to speech or violate any other Constitutional right of defendant. It directed defendant to stay away from a specific location, 6001 East Molloy Road, the location where the incident had occurred in which the entrances and exits of the base had been blocked.

In her brief (at 16), defendant relies on McCullen v Coakley (__ US __, 134 S Ct 2518 [2014]). But that case involved the interpretation of a Massachusetts statue, not a court order, and involved the use of public ways and sidewalks, while here defendant was told to stay away from the base. The Massachusetts statute permanently criminalized any person knowingly standing on a public way or sidewalk within 35 feet of an entrance or driveway of a place where abortions were performed (id. at 2528-2529). Here, in contrast, defendant, not all members of the public, had to temporarily stay away from the base. While the Massachusetts statute took

what the United States Supreme Court viewed as an "extreme step by closing a substantial portion of a traditional public forum to all speakers" (id. at 2541), the temporary Order of Protection in this case served to protect Colonel Evans from the abuse from one person. Judge Gideon properly concluded that the temporary Order of Protection issue in this case was not overly broad (Motion Decision, February 28, 2014, at 2).

This Court should deny defendant's request for relief.

POINT II

THE ORDER OF PROTECTION PROVIDED THE REQUIRED SPECIFICITY OF INFORMATION

In Point II of defendant's brief (at 18-31), defendant claims that the Order of Protection was overly vague and that the jury was not properly instructed on the meaning of "stay away." Defendant's contentions are unpreserved and without merit.

The thrust of defendant's argument is that there was confusion about the precise property line of the base. But the temporary Order of Protection did not direct defendant to stay off the property of the base. It directed defendant to stay away from the base. This direction was not overly vague or improper.

Defendant failed to preserve for appellate review as a matter of law her claims that alleged confusion about the boarder of the base property made the order invalid and that the jury should have been given a more precise definition of the term "stay away" (CPL 470.05 [2]; People v Gray, 86 NY2d 10, 19-21 [1995]). In her omnibus motion, defendant did not cite any confusion about boarder location as she claimed that the order was overly broad (see Attorney Affirmation in support of omnibus motion at 10-11).

And defendant argues for the first time in this appeal that the Order of Protection was vague because the trial court failed to define "stay away" for the jury (see People v Shampine, 31

AD3d 1163, 1164 [4th Dept 2006], see also People v Nieves, 2 NY3d at 315-317). When the jury asked whether there was a legal definition of "stay away" (Court Exhibit 3), the court reviewed the note with counsel. The court and the attorneys agreed that CPL 530.13 did not define stay away (T2. 343; see also T2. 341 [defense counsel: "I don't think there's an . . . exact definition"]). Defense counsel suggested that the jury should be given the same definition that was given to defendant (T2. 345).[1] The court concluded that it should tell the jurors that they would have to determine that question based on the testimony and evidence (T2. 348). Defense counsel, when asked by the court, "Does that work?" responded, "Yeah, I think" (T2. 349). The court then gave the agreed-upon response to the jury's note without any objection from either party (T2. 349).

When arguing the CPL 330.30 motion on the day of sentencing, defense counsel claimed that the court had denied defendant's request that the court give the jury an explanation of the term "stay away" and that the court had denied this request (S.8). The court immediately corrected this misstatement, correctly pointing out that the court did not deny any request (S. 8). Instead, the court correctly pointed out, the jury was instructed as both parties had agreed the court should instruct the jury (S. 9-15). Defendant failed to preserve any objection to the court's response to the jury's note because she did not object to the instruction during trial. Nor can defendant's post-conviction motion under CPL 330.30 serve to retroactively preserve this claim (see People v Padro, 75 NY2d 820, 821 [1990]).

In any event, defendant's claims lacks merit. Defendant was not left to guess about what she could and could not do as a result of Judge Benack's order directing her to stay away from

[1] The trial testimony does not show that defendant was given a specific definition of "stay away." Defendant's trial testimony, however, was that she was told when she received the order that it meant that she had to stay away from the base (T2. 126); when asked whether that term was defined for her, the People's objection was sustained, and defendant then testified that it was her understanding that she had to stay of base property, but she did not testify that Judge Benack or any other person told her that information (T2. 126-127) Defense counsel's attempt to present evidence about what Judge Benack may have said to another defendant was stricken from the record (T2. 136-139).

the base. As defendant testified, she was told when she received the order that it meant that she had to stay away from the base (T2. 126). The events of February 13, 2013 show that both the police and the protesters understood that those people in the driveway were going to get arrested; those across the road were not (see e.g. T2. 168, 170 [Timothy Ryan explaining that he knew that he was arrested because he was blocking the driveway and that the people on the other side of the road were not risking arrest]). Defendant herself acknowledged in her testimony that she had seen people arrested in the driveway at the base (T2. 156). And as the trial court commented at sentencing, had defendant stayed across the street, she would not have been arrested (S. 33).

While this case involves a court order and does not involve the interpretation of a statute, case law involving claims that a statute is too vague may be instructive here. In People v Bright (71 NY2d 376 [1988]), the Court of Appeals delineated a two-prong due process test to analyze statutes. The Court held that "a statute must provide sufficient notice of what conduct is prohibited" and "must not be written in such a manner as to permit or encourage arbitrary or discriminatory enforcement" (id. at 382). In applying the Bright test to orders of protection, a "court must balance the defendant's due process rights with the purpose of the order—to protect the person in whose favor it is written" (People v Bostic, 10 Misc 3d 775, 777 [Supreme Ct, Suffolk County 2005]). "[T]he defendant must be informed, either orally or in writing, of the contents of the order and the conduct that it prohibits" (id.; see also People v McCowan, 85 NY2d 985, 987 [1995]).

The uniform order of protection form used in this case issued by the Office of Court Administration did not need to include a definition of "stay away," but it provided defendant with "notice of what conduct [was] prohibited" and did not "permit or encourage arbitrary or discriminatory enforcement" (People v Bright, 71 NY2d at 382).

The plain language of the uniform form order of protection provided clear notice to defendant of the conduct that was prohibited, satisfying the first prong of the Bright due process test. "The order of protection require[d] [] defendant to stay away from [Colonel Evans], *wherever that person may be*" (People v Bostic, 10 Misc 3d at 776 [emphasis in original]). The order explicitly instructed defendant to stay away from 6001 East Malloy Road, Dewitt, the business address and place of employment for Colonel Evans. The inclusion of a definition of stay away would not have provided defendant with any added due process protections (see Matter of Jason MM, 245 AD2d 892 [3rd Dept 1997] [holding that an order of protection requiring a father to stay away from his children at all times and wherever they may be was sufficiently clear to put father on notice of conduct required of him]). A defendant's due process rights are sufficiently protected and the intent of CPL 530.13 is better served "if it is incumbent upon a defendant, who inadvertently enters a location and recognizes a protected party, to leave that location" (People v Bostic, 10 Misc 3d at 778).

> The order of protection issued in this case was not written in a manner that
>
> " 'permits arbitrary or discriminatory enforcement' because it lacked 'stay away' footage or specific addresses. Similar to giving notice to an accused person, a temporary order of protection issued while a case is pending in a court provides law enforcement with objective standards and guidelines to enforce the temporary order of protection. Based on the language on the form, a law enforcement official 'can ascertain the identity of the parties and/or whether the victim/witness is at his home, school, business, or place of employment[,] . . . determine from the facts and circumstances presented to him whether the defendant was aware of the victim/witness' presence at the location or knew that the protected party was at his home, school, business, or place of employment' " (id. at 779).

Based on those observations, a police officer can determine if a defendant is staying away from the protected party (id. at 779). Additionally, a defendant's requisite knowledge and intent must be established beyond a reasonable doubt at trial (id.).

Defendant in her brief (at 26-27) contends that the he trial court was unable to define "stay away" and points to this as support for her claim that the term "stay away" is vague. But as already pointed out, when the trial court received a note from the jury asking if there was a legal definition of "stay away" as it pertains to the Order of Protection or is just common sense (T2. 341), the trial court, and the parties agreed, that this term had no specific definition in the statute. This supports the conclusion that the term was not vague, that the Legislature viewed it as a term that did not need a specific definition or explanation. That is, the term is so self-explanatory that it poses no danger of being too vague. And as also previously discussed in this brief, the court with the full agreement of the parties told the jurors "your question relates to a question of fact and you are the sole triers of the fact based upon the testimony that you have heard and the evidence that has been received relative to that issues" (T. 349). Before giving that answer, the trial court discussed his response with both the People and defense counsel and all agreed that there was no legal definition of "stay away" under CPL 530.13 (T. 341-349, A32-39).

At trial, defendant claimed that she did not want to participate in the protest because she did not want to violate the Order of Protection, and that she understood the order as prohibiting her from going on base property (T2. 127; 165). She also testified that she was "shocked" when Judge Benack read the order to her and that she understood that the purpose of the order was to keep protesters away from the base (T2. 128). Thus, her testimony belies any reasonable conclusion that the order was too vague. Defendant knew that she had to stay away from base property (T2. 127). Defendant claimed that she did not want to participate in the protest, but she admitted that she went to the protest at the base. While defendant tried to show at trial that there may have been some confusion as to where the base property actually ended (see e.g. T1. 246), defendant was aware of other arrests that occurred in the area where the protesters were standing (T2. 156-157). Defendant testified that she knew she had to respect the Order of Protection (T2.

131). The temporary Order of Protection clearly stated that defendant needed to stay away from Colonel Evans's business and place of employment, and listed the address of the base (A1). Defendant chose to go to Hancock Field despite her knowledge of the terms of the Order of Protection. The temporary Order of Protection did not need to be more specific regarding what defendant could and could not do. Defendant's decision to construe the order a certain way did not render it too vague.

Defendant mentions in her brief (at 25-26) the unpublished decision on a habeas corpus petition in Finlay v Gideon (Index No. 2014-0521, Sup Ct Onondaga County 2014), where Acting Supreme Court Justice John Brunetti found an Order of Protection vague because there was no mention of a distance to stay away on the Order of Protection form. That decision is not binding on this Court and was not adopted by the Appellate Division, which found that Justice Brunetti should not have been reviewing the Temporary Order of Protection in a habeas corpus petition (People ex rel. Finlay v Gideon, 129 AD3d 1632 [4th Dept 2015] [finding that the Temporary Order of Protection did not restrain the petitioner's liberty to a degree that entitled the petitioner to habeas corpus relief]). CPL 530.13 does not mandate that an order of protection include a specified distance for an individual to "stay away." Defendant knew that she had to stay away from the base (T. 127-128) and knew she risked arrest for violating the Order of Protection going to the protest at the base, but chose to go to the base despite this knowledge.

The Order of Protection provided sufficient information for defendant to be able to comprehend it. Defendant chose to disobey the Order of Protection despite her knowledge of what was expected from her. No relief should be granted by this Court.

POINT III

THE EVIDENCE WAS LEGALLY SUFFICIENT AND THE VERDICT WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE

In Point III of defendant's brief (at 32-37), defendant claims that the People's proof was legally insufficient and the verdict was against the weight of the evidence. Defendant's claim lacks merit.

Defendant's only argument regarding legal sufficiency is her unpreserved claim that the proof was insufficient because the temporary Order of Protection was invalid (defendant's brief at 32). As already pointed out in this brief, defendant stipulated at trial that the Order was valid (T1. 32). And as also already argued in this brief, the Order was valid and was not unconstitutionally vague. The People's proof – and even defendant's own testimony – demonstrated that defendant knew that the Order directed her to stay away from the base, and that she intentionally disobeyed that Order. Thus, the proof was legally sufficient.

That proof also supports the jury's verdict, which was not against the weight of the evidence.

An appellate court must take a two-step approach when asked to weigh the evidence. First, the appellate court must determine whether an acquittal would have been reasonable (People v Danielson, 9 NY3d 342, 348 [2007]). Second, if this Court determines that a different finding would not have been unreasonable, "then the appellate court must, like the trier of fact below, 'weigh the relative probative force of conflicting testimony' " (People v Bleakley, 69 NY2d 490, 495 [1987]). Moreover, where witness credibility is "of paramount importance" in determining a defendant's guilt, "the appellate court 'must give great deference to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor' " (People v Harris, 15 AD3d 966, 967 [4th Dept 2005], lv denied 4 NY3d 831 [2005], quoting People v

Bleakley, 69 NY2d at 495); see also People v Catlin, 41 AD3d 1199 [4th Dept 2007], lv denied 9 NY3d 873 [2007]).

Only if it appears that the trier of fact has failed to give the evidence the weight it should be accorded may the appellate court set aside the verdict (People v Bleakley, 69 NY2d at 495). Resolution of issues of credibility, as well as the weight to be accorded to the evidence presented are primarily questions to be determined by the finder of fact at trial (see People v Romero, 7 NY3d 633, 643-644 [2006]; People v Mateo, 2 NY3d 383, 410 [2004]). Those determinations should be given great weight on appeal and should not be disturbed unless clearly unsupported by the record (People v Nucci, 162 AD2d 725, 726 [2nd Dept 1990], lv denied 76 NY2d 862). The finder of fact at trial has a superior vantage point and opportunity to determine the credibility of the witnesses; its determination of credibility should be given "[g]reat deference" (People v Valencia, 263 AD2d 874, 876 [3rd Dept 1999], lv denied 94 NY2d 799 [1999]).

Issues of credibility, and the weight to be given to a witness's testimony, are questions for the jury, which heard and saw the witnesses (People v Wells, 18 AD3d 482 [2nd Dept 2005], lv denied 5 NY3d 811 [2005]). A jury is free to accept or reject a witness's testimony in whole or in part, and a reviewing court should not "speculate on the content of the fact-finder's deliberations" (People v Wells, 18 AD3d at 483 [citation omitted]).

Here, a reasonable jury could and did find defendant guilty of criminal contempt in the second degree. The only issue for the jury to decide was whether defendant intentionally disobeyed the Order of Protection; the other elements of criminal contempt had been stipulated to (T1. 31). Defendant's presence at the base, and thus her failure to stay away from the base, was unquestionably demonstrated. The jury, as finder of fact, was not required to credit defendant's testimony that her understanding of the Order of Protection was that she had to stay off of base property, but was allowed on the road way (T2. 127, A19), or the testimony of

another witness who testified that defendant did not want to participate in the protest because she did not want to violate the Order of Protection (T2. 165, A21). And even if the jury credited that testimony, the jury could have found it irrelevant. The Order told defendant to stay away from the base, not to merely stay off of base property or to refrain from participating in protests. The jury requested whether there was a legal definition of "stay away" as it related to the Order of Protection (T. 341, A31). The court informed the jury that it was a question of fact for them to decide on based upon the testimony heard and evidence presented (T2. 341-349, A39). Based upon the testimony heard and evidence presented the jury found defendant guilty.

The jury in this case was able to observe the witnesses and defendant as they gave testimony. The jury was able to judge the credibility of the witnesses as testimony was given. The court gave instructions to the jury when they had a question about the definition of "stay away." It was not against the weight of the evidence for the jury to find that defendant failed to stay away from the base – and thus violated the Order – when she went to the base on February 13, 2013.

This Court should grant no relief.

POINT IV

THE SENTECE WAS NOT HARSH, REPUGNANT OR VINDICTIVE

In Point IV of defendant's brief (at 37-44), defendant contends that the court imposed an unduly harsh and severe sentence. This Court should not reduce defendant's sentence.

Although this Court possesses the power to reduce any sentence that it considers unduly harsh or severe (see CPL 470.15 [6] [b], 470.25 [2] [c]), absent an affirmative demonstration of extraordinary circumstances or an abuse of discretion by the court imposing a sentence, the intermediate appellate court will not modify a sentence (see People v Farrar, 52 NY2d 302, 305

[1981]; see also People v Garcia-Gual, 67 AD3d 1356 [4th Dept 2009], lv denied 14 NY3d 771 [2010]). Defendant has failed to demonstrate that the court below abused its discretion or that extraordinary circumstances exist that warrant a reduction in sentence (see People v Appleby, 79 AD3d 1533, 1534 [3rd Dept 2010]; see also People v Taplin, 1 AD3d 1044 [4th Dept 2003], lv denied 1 NY3d 635 [2004]; see also People v Clark, 6 AD3d 1066 [4th Dept 2004], lv denied 3 NY3d 638 [2004]).

Sentencing within the statutory limits is a matter within the sound discretion of the sentencing court (see People v Farrar, 52 NY2d at 305; see also People v Goetz, 141 AD2d 446, 447 [1st Dept 1988], aff'd 73 NY2d 751 [1988]). The court must consider, among other facts: the crime charged, the particular circumstances of the individual before the court, and the purpose of penal sanctions (People v Goetz, 141 AD2d 447). While an appellate court has the power to review and reduce a sentence (see CPL 470.15 [2] [c]; see also People v Discala, 45 NY2d 38, 44 [1978]), this Court should not intervene absent an abuse of discretion or the existence of extraordinary circumstances (see People v Pedraza, 66 NY2d 626 [1985]).

Here, defendant has not shown extraordinary circumstances or an abuse of discretion by the sentencing court. Defendant was sentenced to a year imprisonment and a $1000 fine, which was within the legally permissible sentence that could be imposed.

The trial court put much thought into the question of what is the appropriate sentence in this case. The court aptly noted that defendant was "willing to break the law to seek publicity for her cause" (S. 29). The court found defendant an "equable and likeable person," but concluded that those qualities were not the sole criteria for arriving at an appropriate sentence (S. 31). The court recognized that those who participated in demonstrations had a right to protest, but "only in a lawful manner" (S. 30). The court stated, "There are limits to our individual rights and [in] the

opinion of this Court, one person's rights will extend only as far as another's rights begin" (S. 30).

The sentencing court pointed out that the presentence report failed to take into account two prior convictions and an intentional failure to pay fines and surcharges previously imposed (S. 31-32). The court pointed out that defendant chose to disregard the Order of Protection, fully aware of the consequences that could result (S. 33).

The court viewed a sentence of a conditional discharge inappropriate in light of defendant's failure to abide by the conditions imposed upon her under that sentence in a previous case where she did not pay fines and surcharges imposed (S. 34). The court also found a sentence of probation inappropriate because defendant was not in need of supervision or other services, and because defendant would not abide by any conditions of probation that she did not agree with (S. 34). Thus, the court concluded, the only significant sentencing option left to the court was incarceration (S 34-35). Incarceration would serve to send the message to defendant that the court would no longer tolerate defendant's "willful actions and violations of orders of the Court" (S. 35). The court found the continued violation of the orders of the court to be "serious" (T. 36). The court therefore sentenced defendant to a year in jail, as well as a $1000 fine and the mandatory surcharge and DNA fee (S. 35-36).

Given the thoughtful consideration by the trial court in deciding on what sentence to impose in this case, this Court should not find that the trial court abused its discretion in sentencing defendant. Nor should this Court find that defendant has presented extraordinary circumstances that should cause this Court to reduce her sentence. This Court, like the trial court, should regard the violation of a court order to be a serious matter. It should not be up to defendant to decide whether to obey the order of a court.

Defendant should be punished for her actions. This Court should not reduce her sentence based on some evaluation of her social conscious, personality or likeability. While defendant may have acted out of a heartfelt belief in a cause, there are legal means of protesting the decisions of the government. By choosing to violate the law, defendant subjected herself to punishment.

Defendant asks this Court to modify both her jail sentence and her fine. With regard to the fine, defendant contends that the court did not have a proper basis for finding that she had the ability to pay a fine of $1000 (defendant's brief at 40). Throughout the proceedings, however, defendant portrayed herself as the owner of a small business for the past 16 years and a homeowner of a home just four blocks from the heart of downtown Ithaca (see Attorney Affirmation in support of omnibus motion at 14 ["defendant " is a long term contributing member of society"]; T2. 108 [defendant testified that she is a home owner and has a catering business]; presentence report at 4 [defendant has owned LaCocina Latino Catering for over 16 years]; defendant's brief at 43 [defendant is "a stable, contributing member of society, a homeowner who has a long history of self-employment as a small business owner"]). Defendant's unwillingness to include payment of fines imposed by courts among her contributions to society should not cause this Court to reduce her fine.

The court did not abuse its discretion by sentencing defendant to a definite one year in jail and $1,000 fine.

The court should not reduce defendant's sentence.

CONCLUSION

The People respectfully ask this Court to affirm defendant's conviction and sentence.

Respectfully submitted,

WILLIAM J. FITZPATRICK, ESQ.
Onondaga County District Attorney
Attorney for Respondent
Criminal Courthouse, 4th Floor
505 South State Street
Syracuse, NY 13202
Tel: (315) 435-2470

JAMES P. MAXWELL, ESQ.
Chief Assistant District Attorney
MELISSA K. SWARTZ
Criminal Law Associate
Of Counsel

DATED: September 4, 2015