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RE: Finlay v. Hon. David Gideon
Index#2014-0521

Dear Counsel:

Enclosed herewith please find a copy of the Decision/Order/Judgment in the above-referenced matter.

Very truly yours,

John Brunetti

JJB:klh
enc.

SUPREME COURT *PART IV*
ONONDAGA COUNTY *STATE OF NEW YORK*

People of the State of New York ex rel
DANIEL FINLAY
Petitioner,

-against-

Habeas Corpus
Index # 2014-521
RJI: 33-14-0725

HON. DAVID S. GIDEON,
TOWN JUSTICE, TOWN OF DEWITT
Respondent.
For a Judgment Pursuant to Article 70
of the Civil Practice Law and Rules

DECISION/ORDER/JUDGMENT

By Petition filed February 26, 2014, Petitioner seeks habeas corpus relief pursuant to CPLR §7002(a), on the ground that he is "restrained in his liberty within the state" as a result of an allegedly unlawful order issued by the Respondent.[1] For the reasons that follow, the Petition is granted.

PROCEEDINGS IN THE TOWN OF DEWITT JUSTICE COURT

A. The Charges

Petitioner was arrested on April 28, 2013, and issued appearance tickets

[1]This court has a standing arrangement with the District Attorney's Office that said office, rather than the sheriff, be served with an Order to Show Cause in Habeas Corpus proceedings since the District Attorney is the real party in interest. The same is true here, and while, as in the context of Article 78 proceedings [CPLR 7804(I)], Respondent, as the nominal party need not appear or answer, he has done so.

returnable May 7, 2013, at which time informations charging one count of Obstructing Governmental Administration, in violation of Penal Law §195.05, and two counts of Disorderly Conduct, in violation of Penal Law §240.20(5)(6) were filed and upon which the Petitioner was arraigned.

The Informations allege, in identical language, unlawful conduct by a single individual as follows. "On April 28, 2013, in the Town of Dewitt, at "174th Attack Wing, NY International Guard, 6001 E. Malloy Rd" the Petitioner *"after being advised by Onondaga County Sheriff's Deputy Sergeant Dykes to disperse and get out of the roadway, they (sic) refused and they (sic) continued to intentionally obstruct and impair administration of law and governmental function by standing in the roadway obstructing/preventing vehicular and pedestrian traffic from entering and exiting the NY Air National Guard base entrance at E Molloy Rd T/o Dewitt. This action prevented the Onondaga County Sheriff's Office from performing an official governmental function of keeping the roadway clear for vehicular traffic and to prevent injuries to protestors/pedestrians."*

A voluntary affidavit referred to in the Informations as providing a source of the complainant deputy's information is that of Greg A. Semmel, with an address of "DBA 6001 East Malloy Rd. Syracuse, NY 13211." Said affidavit was given on April 28, 2103 at 6:11 p.m., and reads as follows: *"I am the installation commander for the 174th Attack Wing, Hancock Field, New York Air National Guard, located in the Town of*

Dewitt, State of New York. On 28 April 2013, I was present at the installation during a large protest. As the installation commander, I had allowed and granted permission for the protesters to come onto a portion of the front lawn area of the installation to use for their protest. That area was clearly delineated by barriers and/or yellow police tape. I did not give anyone permission to go outside that area. I would like to have anyone who went outside of the specific area that I allowed them to be in, to be arrested for any and all violations of the Penal Law or any other law of the State of New York. I would also like the court to issue a full, stay away order of protection on my behalf, as I am concerned for the safety and welfare of base personnel and base property."

B. The Temporary Order of Protection

Upon Petitioner's arraignment, Respondent issued a Non-Family Offense, Temporary Order of Protection, citing CPL §530.13,[2] which recites, "Temporary Order of Protection - Whereas good cause has been shown for the issuance of a temporary order of protection [as a condition of: recognizance] And the Court having made a determination in accordance with section 530.13 of the Criminal Procedure Law, It is Hereby Ordered that the above-named defendant

Daniel Finley (DOB: 07/30/1940) observe the following conditions of behavior:

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[2]CPL 530.13(1), as it relates to this case, provides in relevant part as follows: "When any criminal action is pending..... the court.....may for good cause shown issue a temporary order of protection .....as a condition of a pre-trial release.....In addition to any other conditions, such an order may require that the defendant: (a) stay away from the home, school, business or place of employment of the victims of, or designated witnesses to, the alleged offense."

❑ Stay away from
Greg A. Semmel (DOB: 04/04/1963);
the home of Greg A. Semmel (DOB: 04/04/1963);
the school of Greg A. Semmel (DOB: 04/04/1963);
the business of Greg A. Semmel (DOB: 04/04/1963);
the place of employment of Greg A. Semmel (DOB: 04/04/1963);"

❑ Refrain from communication or any other contact by mail, telephone, e-mail, voice-mail or other electronic or any other means with Greg A. Semmel (DOB: 04/04/1963);

❑ Refrain from assault, stalking, harassment, aggravated harassment, menacing, reckless endangerment, strangulation, criminal obstruction of breathing or circulation, disorderly conduct, criminal mischief, sexual abuse, sexual misconduct, forcible touching, intimidation, threats or any criminal offense or interference with the victim or victims of ,[3] or designated witnesses to, the alleged offense and such members of the family or household of such victim(s) or witnesses(es) as shall be specifically named[4] Greg A. Semmel (DOB: 04/04/1963);"

C. Proceedings in the Town Justice Court Relative to the Order of Protection

The proceedings of the Town of Dewitt Justice Court were reconstructed on the return date of this Habeas Corpus Petition[5] with respect to certain salient factors. At that time, the court reminded the parties that, should the court reach the merits, it is bound by the record of proceedings before the *nisi prius* (Bail setting) court and that additional facts developed subsequent to the issuance (or re-affirmation) of the order could not be presented

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[3]This blank on the template was not filled in.

[4]Petitioner reads this clause as including the word "by" before "Greg" so as to delegate to "Greg" judicial authority.

[5]March 5, 2014 - Court Reporter - Judy Tracy.

on the return date to support its issuance.[6] For the same reason, information about proceedings in another matter arising at the base contained in the People's post-argument memorandum may not be considered.

What became clear on the return date, is that:

- ❑ The alleged criminal misconduct occurred in a public place. In fact, the very gravamen of each count is dependent upon the roadway being classified as a public place.

- ❑ The protected party has never made an identification of the Petitioner as having been present at the location of the alleged crime. While the court appreciates the People's post-argument assertion that the commander has relevant testimony to give at the trial, that information was never been presented to the bail-setting court as support for the issuance of the order of protection----only the Informations and the commander's statement were.

- ❑ A summary of what the protected party would testify to beyond those facts contained in his deposition has never been advanced to the Town Justice Court.

- ❑ "Good cause" for the issuance of the order was not expressly articulated by the Town Justice Court.

As a result of the foregoing record, in entertaining the merits here, this court is left with the deposition of the protected party that has so little to do with the charged offenses and reads much like a deposition in support of a Trespass Complaint------so much so that it raised a misunderstanding on the return date about whether Petitioner may have actually been charged with Trespass, but that was verified not to be the case.

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[6]*See People ex rel. Rosenthal v. Wolfson*, 48 NY2d 230, *People ex rel. Klein v. Krueger*, 25 NY2d 497.

CONCLUSIONS OF LAW

The merits of the Petitioner's claim will be addressed first because, should the court find the Petitioner's claims without merit, there is no need to discuss available remedies to address them.

A. The Validity of the Temporary Order of Protection

1. Vagueness as to "Stay Away From" Clause

Perhaps the best way for this court to introduce the issue of vagueness is to confess that it has issued hundreds of "stay away" Final Orders of Protection over the years that did not specify how far a distance away the defendant was mandated to "stay away." Fortunately, it has only been by studying the issue here (rather than by finding the order vague in a criminal contempt case) that the court has determined to henceforth include the following language in every order of protection: "Warning: 'Stay Away' means Stay 500 feet Away."[7] The court will also be recommending to the Office of Court Administration that the uniform order of protection form be revised to add a blank line followed by the word "feet" in between the words "stay" and "away" so that each order will be clear, unambiguous and unequivocal.

Here, the order directs the Petitioner to "stay away from" various locations

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[7]The court has already procured (at its own expense) a red rubber stamp to use until such time as the OCA form is revised:

WARNING:
"Stay Away" means
Stay 500 feet Away

without specifying how far away in terms of distance he must stay. "To sustain a finding of ... criminal contempt based on an alleged violation of a court order it is necessary to establish that a lawful order of the court clearly expressing an unequivocal mandate was in effect."[8] Where the terms of an order are vague as to what is prohibited by it, a party may not be properly adjudged in criminal contempt for violating such an order.[9] Here, the terms of the "stay away" order are vague because a distance is not specified.

To avoid vagueness defects in orders of protection, courts in New York have specified distances that the ordered person must "stay away" such as five feet,[10] fifty feet,[11] one hundred feet,[12] two hundred fifty feet,[13] five hundred feet,[14] one thousand feet,[15] fifteen

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[8]*People v. Roblee*, 70 A.D.3d 225 (3d Dep't 2009), citing *Matter of Department of Envtl. Protection of City of N.Y. v. Department of Envtl. Conservation of State of N.Y.*, 70 N.Y.2d 233, 240 (1987); *see also Matter of McCormick v. Axelrod,* 59 N.Y.2d 574, 583 (1983).

[9]*See, Matter of Holtzman v. Beatty,* 97 A.D.2d 79 (2d Dept.1983); *People v. Balt,* 34 A.D.2d 932 (1st Dept.1970); *Matter of Sheridan v. Kennedy,* 12 A.D.2d 332 (1st Dept.1961); *People v. Forman,* 145 Misc.2d 115 (Crim.Ct.N.Y.Co.1989).

[10]*See Elliot v. Marble,* 49 A.D.3d 923 (3d Dep't 2008)["Petitioner (hereinafter the mother) and respondent (hereinafter the father) are the parents of one daughter (born in 2000). Orders of protection required the parties to remain at least *five feet* away from each other except as necessary to effectuate court-ordered visitation."].

[11]*People v. Panetta*, 41 Misc.3d 614, 617 (N.Y.City Ct.,2013)["The temporary order of protection, issued on May 29, 2012 pursuant to CPL § 530.13, directed the defendant to refrain from committing a variety of threatening, offensive or illegal acts toward and to *stay at least fifty feet away* from the protected parties."].

[12]*See Eisele v. Eisele*, 307 A.D.2d 412 (3d Dep't 2003)["On that date, Family Court issued an ex parte temporary order of protection which, among other things, forbade respondent from coming within *100 feet* of petitioner's home or workplace."].

[13]*See In re Christine G.,* 36 A.D.3d 615, 616 (2d Dep't 2007) ["The petitioner established by a fair preponderance of the evidence that the father violated the order of protection, as the record showed that, after having been apprised repeatedly by the Family Court that the order of

hundred feet,[16] and twenty-five hundred feet.[17] Absent a specified distance, the "stay away"

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protection required that he stay at least *250 feet* away from the mother and two daughters, the father approached the mother and children three times, on one occasion coming as close as four or five feet to the mother."]; *Guernsey v. Guernsey*, 37 A.D.3d 989, 990 (3d Dep't. 2007)["At the conclusion of a fact-finding hearing on both petitions, Family Court found sufficient aggravating circumstances to extend the order of protection, but did allow respondent to attend the children's sporting events so long as he was at least 250 feet away from petitioner."].

[14]*See In re Chavah T.*, 99 A.D.3d 915, 916 (2d Dep't 2012)["A temporary order of protection was issued on November 2, 2011, which excluded the father from the family home and directed him to stay at least *500 feet* away from the child."]; *Smith v. Falco-Boric*, 87 A.D.3d 1146 (2d Dep't 2011)[" In a family offense proceeding pursuant to Family Court Act article 8, Donna L. Falco–Boric appeals from an order of protection of the Family Court, Dutchess County (Forman, J.), dated August 12, 2010, which, after a fact-finding hearing and upon, in effect, a finding that she had committed certain family offenses, directed her, inter alia, to stay *500 feet* away from the petitioner, Brian G. Smith, until and including August 12, 2011."]; *Lockwood v. Lockwood*, 23 Misc.3d 679, 680 (N.Y.Fam.Ct.,2009)["This Court issued a Final Order of Protection on September 25, 2007, which directed, among other things, Respondent to stay 500 feet away from Petitioner and their two children."]., *People v. Ndiaye*, 2005 WL 2604086 (N.Y.Just.Ct.,2005)["The order of protection issued by the Hon. Valentino Sammarco on December 22, 2004 in Dutchess County Family Court states that Alioune Ndiaye observe the following conditions:

[01] Stay away from:

[A] Selly Diaite (DOB: 07/27/1969)—At least *500 feet*; except for pick up and drop off for visitation at McDonalds by Marist College in Poughkeepsie."].

[15]*See, e.g., People v. Clisby*, 82 A.D.3d 1288 (3d Dep't 2011)[Criminal Contempt conviction upheld where "[t]he order clearly and unequivocally states that defendant cannot, under any circumstances, be within *1,000 feet* of the victim's residence and is not in any way conditioned upon the victim being present."]; *People v. Shortell*,105 A.D.3d 1078 (3d Dep't 2013)[Criminal contempt conviction upheld where "[among other things, the order directed defendant to stay *1,000 feet* away from three individuals and an apartment complex."]; *In re Dezerea G0.*, 97 A.D.3d 933 (3d Dep't 2012)["The custody order, as well as related orders of protection set to expire in 2023, forbid the father from unsupervised contact with the child and order the mother to ensure that the father remained at least *1,000 feet* from the child except during visitation supervised by specified individuals or a named program."]; *People v. . LaBarge* 80 A.D.3d 892 (3d Dep't 2011)["At the time of this conversation, there had been in effect for over two years an order of protection prohibiting defendant—who had been convicted of assault in the third degree and endangering the welfare of a child—from going within *1,000 feet* of the victim or her home."].

[16]*Vitti v. Vitti*, 202 A.D.2d 917 (3d Dep't 1994)["Family Court orally issued two orders of protection: one on behalf of petitioner and one for the benefit of the parties' children. These orders prohibited, *inter alia*, any contact between respondent and his family, directed respondent

order is rendered vague. In fact, a specified distance in a "stay away" order of protection is so critical to is validity that, absent one, a police officer's enforcement of such an order by arresting the ordered person for "merely standing approximately 200 to 350 feet away from his former wife and the marital residence" may not automatically insulate him from liability for false arrest.[18]

Here, the order does not specify how far away the Petitioner must stay from the person or the geographic locations. Thus, it is not an unequivocal mandate–the hallmark of a valid court order that may be punishable by contempt.

2. *Failure to Provide Address of Home, Place of Employment, Etc.*

Another potential defect here is that the terms of the order do not specify geographic locations of the protected party's home, place of employment and place of education. As a result, the order may be too vague to be enforced. The court agrees with

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to refrain from abusive and harassing conduct and, further, ordered respondent to stay at least *1,500 feet* away from petitioner, the children and/or their residence."].

[17]*See Norton v. Kenderes*, 22 A.D.3d 817, 818 (2d Dep't 2005)["That branch of the defendant's motion, denominated as one for leave to renew his prior motion to vacate or modify an order of protection dated September 25, 2001, which, among other things, directed him to stay at least *2,500 feet* away from the home of the plaintiff, was not based upon new facts that were unavailable at the time of the original motion."].

[18]*Rakidjian v. County of Suffolk*, 28 A.D.3d 734, 735 (2d Dep't 2006)["Furthermore, the evidence submitted in support of the motion [for summary judgement], which included an unsigned arrest report and inadmissible hearsay statements attributed to the plaintiff's former wife, failed to establish that the arresting officers reasonably concluded that the plaintiff, who was merely standing approximately 200 to 350 feet away from his former wife and the marital residence, had violated the stay-away provision of the order of protection."].

those trial courts that have so ruled,[19] but must follow a 2013 decision on the issue[20] until such time as the court may examine its record on appeal which is not yet available.

3. *Proper Statutory Status of Named Beneficiary*

Based upon the record of proceedings in the Town Justice Court as support for the issuance of the temporary order of protection, there is no basis for classifying the protected party as either a "victim" or a "designated witness to the alleged offense" so as to be an eligible protected party under CPL §530.13(1)(a).[21] Because the party is not the

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[19]*See, e.g., People v. Gunatilaka*, 156 Misc.2d 958 (N.Y.City Crim.Ct. 1993)[Order of Protection found invalid requiring dismissal of criminal contempt charge. "By its terms, the order of protection directs the defendant to: '(a) stay away from the home, school, business or place of employment of Prenali Mendis, and (b) refrain from harassing, intimidating, threatening or otherwise interfering with Prenali Mendis.' The order [did] not reflect the location of Prenali Mendis' home, school, business or place of employment."]; *People v. Freeman,* 2001 WL 1538521 (N.Y.City Ct.2001)["The "stay away" portion of this order was marked directing the Defendant to "stay away" from the home, school, business and place of employment of the victim and her children. The address of each location was not listed in the order. ..... Court finds that the use of an adjectival phrase consisting of the victim's name defining the "stay away" location i.e. Mary Smith's house, etc. instead of identifying the place by its unchanging street address in an order of protection fails to meet the *McCormick-McCowan-Clar*k constitutional due process criteria."].

[20]*People v. Shortell*, 105 A.D.3d 1078 (3d Dep't 2013)["Although the order did not specifically recite that the individuals resided at that apartment complex, the record establishes that they resided there and defendant was aware of such fact. Under the circumstances, we find defendant's argument unavailing."].

[21]*People v. Somerville*,72 A.D.3d 1285 (3d Dep't 2010)["We do find merit, however, in defendant's objection to one of the orders of protection issued by County Court. The court had the authority, based on defendant's convictions, to enter an order of protection in favor of "the victim or victims, or of any witness designated by the court, of such offense" (CPL 530.13[4][a]). Here, the court issued orders of protection in favor of all individuals present at Coley's apartment that night who also testified at trial, namely, Coley, Barbara Randall (Coley's aunt), Megan Coley (Coley's daughter), and William Baldwin and Priscilla Baldwin (Coley's parents). However, the witnesses referred to in the statute must be those who actually witnessed the offense for which defendant was convicted (*see People v. Creighton,* 298 A.D.2d 774, 776, 749 N.Y.S.2d 309 [2002]), rather than simply all witnesses who testified at trial. Although the testimony of Regina

"victim" here, the People's analogy to a sex offense victim who is unable to identify his attacker contained in their post-argument memorandum is misplaced.

The protected party is not the victim of Obstructing Governmental Administration or Disorderly Conduct, nor is he a witness to those offenses. There was never a proffer before the Town Justice as to what testimony the protected party would offer beyond that contained in his deposition. The deposition simply describes a group of "protesters who failed to remain in a designated area of the Base and entered an un-designated area of the Base." The deponent does not identify the Petitioner, and the People have never advanced to the Town Justice Court that the witness could identify the Petitioner. Moreover, the deponent's description of what happened on the base is totally irrelevant to what happened in the public place---- alleged violations of law occurring in a public place being the gravamen of the three charges. An examination of the Informations in this case makes clear that the allegations are based upon the personal knowledge of the deputy, and not in any way, shape or form based upon the observations of the protected party. Therefore, the protected party is neither a "witness" nor a "victim" of the offenses as contemplated by the statute.

Coley, Barbara Randall, Megan Coley and Priscilla Baldwin supports the view that each of these individuals witnessed at least some of the conduct supporting defendant's assault and/or resisting arrest convictions, William Baldwin clearly testified that he did not witness defendant's altercation with the police. As such, the order of protection with respect to William Baldwin must be vacated."].

4. Good Cause

CPL 530.13(1) permits a court to issue a temporary order of protection "for good cause shown," thereby setting up a dual pronged requirement: [1] "good cause" [2] that must be "shown". The statute does not define good cause.[22] Moreover, the statute does not establish who must show "good cause" or how or when the good cause is to be shown.

As observed on the return date, an express declaration of the "good cause" that a court is relying on to support the issuance of an temporary order of protection is not necessary if it may be inferred from the circumstances surrounding the incident as reflected in accusatory instruments and supporting depositions.[23] More than that occurred here

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[22]*People v. VanGlahn*, 189 Misc.2d 613, 615-616 (N.Y.Dist.Ct.,2001)["CPL § 530.13, among other things, authorizes a local criminal court, as a condition of release on bail or on recognizance, to issue an order of protection directing a defendant against whom a criminal action is pending to stay away from, refrain from communicating with, or refrain from engaging in harassing conduct toward the victim of the alleged crime "upon good cause shown." What constitutes "good cause," and how thorough the hearing for demonstrating that "good cause" need be are not spelled out in the statute, but the legislature's intent in authorizing the issuance of orders of protection under Article 530, originally limited to the protection of victims of domestic violence but now expanded to include victims of, and witnesses to, any offense, is to prevent intimidation, abuse and threats by a defendant against those involved in the accusation against him or her (*see People v. Meggie,* 184 Misc.2d 883, 712 N.Y.S.2d 316 [Nassau Dist.Ct., 2000, Gartner, J.]; *People v. Koertge,* 182 Misc.2d 183, 701 N.Y.S.2d 588 [Nassau Dist.Ct., 1998, Feichter, J.]; *cf. People v. Forman,* 145 Misc.2d 115, 546 N.Y.S.2d 755 [Crim.Ct., New York County, 1989, Gruner–Gans, J.]). There is nothing in the legislative history of CPL § 530.13 (*see e.g.* L.1981, ch 575 § 1, L.1986, ch. 794 § 2) indicating that the "best interests" of a victim are to be considered when determining whether "good cause" for issuance of an order of protection exists. Indeed, it appears that a criminal court is not the place to determine whether young people on the verge of adulthood should, because of their sexual activity, be banned from seeing each other (*cf. Hodgson v. Minnesota,* 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 [1990]; *see also Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 [1965])."].

[23]*People v. Hayday,* 144 A.D.2d 207, 208 (3d Dep't 1988)["County Court possessed good cause for the issuance of the order of protection based upon evidence before the Grand Jury, which, upon motion of defendant, was made available to him (*see,* CPL 530.13[1]; *People v.*

according to the People's post-argument memorandum—the judge made express reference to the commander's deposition.[24] However, "good cause" is neither established by, nor may it be inferred from, the accusatory instruments and supporting deposition. The court rejects the People's argument based upon 22 NYCRR 200.23.

On the issue of what constitutes "good cause," one trial court has opined that, since "good cause" is not defined, legislative intent should guide courts in deciding what constitutes "good cause." On that point, it is important to note that temporary orders of protection were extended to non-family offenses to prevent witness intimidation[25] and "to protect individuals from bodily harm or annoyance from another."[26] Since that is the case,

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Faieta, 109 Misc.2d 841, 848, 440 N.Y.S.2d 1007). As to the initial order, there was sufficient information before the local criminal court to grant a temporary order of protection and, in any event, there is no constitutional or statutory right to confront an accuser prior to trial (U.S. Const. 6th Amend.; N.Y. Const., art. 1, § 6)."].

[24]See "Motion Decision" of Trial Court dated February 28, 2014.

[25]*People v. Koertge*, 182 Misc.2d 183, 186-187 (N.Y.Dist.Ct.,1998)["In 1981, the Legislature added CPL § 530.13 (L.1981, ch. 575, § 1) amending the Criminal Procedure Law to allow for orders of protection to be issued by local criminal courts to the victims of crimes other than those committed upon family members. The order would be issued upon good cause shown. In 1986, the Legislature amended CPL § 530.13 (L.1986, ch. 794, § 2) to add witnesses to the list of those who could seek the protection of a temporary order of protection. The memoranda in support *187 of this legislation indicate that the legislation was necessary in response to legislative findings that victim and witness intimidation by defendants released on bail or on their own recognizance was a significant problem for prosecutors."].

[26]*People v. Smith*, 4 Misc.3d 909, 911-912 (2004)["Orders of protection are intended to provide *protection to persons* who have been subjected to harassment or violence" (Governor's Mem approving L 1988, ch 702, 1988 McKinney's Session Laws of NY, at 2290 [emphasis added]) and "To assure *protection to people* who may be subjected to a dangerous or potentially

every victim or witness does not automatically qualify as a protected party, which is why this court is rarely asked to issue a temporary order of protection for police officer witnesses.

5. The Flaw in CPL 530.13

CPL 530.13(1), as it relates to this case, provides in relevant part as follows: "When any criminal action is pending..... the court.....may for good cause shown issue a temporary order of protection .....***as a condition of a pre-trial release***.....In addition to any other conditions, such an order may require that the defendant: (a) stay away from the home, school, business or place of employment of the victims of, or designated witnesses to, the alleged offense." There is an obvious defect in the statute: CPL 530.13 temporary orders of protection may be ordered as a condition of "a pretrial release," a status not found in the Criminal Procedure Law.

CPL 510.10 provides that "[w]hen a principal, whose future court attendance at a criminal action or proceeding is or may be required, initially comes under the control of a court, such court must, by a securing order, either release him on his own recognizance, fix bail or commit him to the custody of the sheriff." Here, an order of recognizance was

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explosive . . . situation." (Mem of State Exec Dept, 1988 McKinney's Session Laws of NY, at 2135 [emphasis added].) "Various courts . . . are empowered to issue 'Orders of Protection' to individuals, which are *intended to protect individuals* from bodily harm or annoyance from another." (Mem of Div of State Police in support of L 1989, ch 164, 1989 McKinney's Session Laws of NY, at 2097 [emphasis added]."].

issued. While a family offense order of protection under CPL 530.12[27] would have been expressly authorized by law, such is not the case here. Nonetheless, the court is not finding the order invalid on the basis of the "pretrial release" terminology.

B. Habeas Corpus as a Proper Remedy Under CPLR Article 70

1. Introduction

CPLR 7001 provides: " Except as otherwise prescribed by statute, the provisions of this article are applicable to common law or statutory writs of habeas corpus and common law writs of certiorari to inquire into detention." By doing so, CPLR 7001 recognizes that the procedures outlined in Article 70 apply to two types of habeas proceedings: "common law" and "statutory."[28] CPLR 7002(a) provides that "[a] person

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[27]CPL § 530.12(1): When a criminal action is pending involving a complaint charging any crime or violation between spouses, former spouses, parent and child, or between members of the same family or household.....the court.....may issue a temporary order of protection.....***as a condition of any order of recognizance*** ....."

[28]*See Practice Commentary* to CPLR § 7001 ["The drafters of the CPLR made no attempt to specify the circumstances in which habeas corpus is a proper remedy. This was viewed as a matter of substantive law. Third Prelim.Rep., *supra*, at 49. It may be helpful, however, to note some of the areas in which habeas corpus is encountered. In the context of criminal convictions, the habeas corpus remedy was traditionally restricted to those situations in which the court that pronounced judgment lacked jurisdiction. The Court of Appeals, however, expanded the use of the writ "to test a claim that the relator has been imprisoned after having been deprived of a fundamental constitutional or statutory right in a criminal prosecution." *People ex rel. Keitt v. McMann*, 1966, 18 N.Y.2d 257, 262, 273 N.Y.S.2d 897, 899, 220 N.E.2d 653, 655. The *Keitt* court agreed with the CPLR Advisory Committee that "one of the hallmarks of the writ has been its great flexibility and vague scope." Third Prelim.Rep., *supra*, at 49. On the other hand, the court noted that "traditional orderly proceedings, such as appeal," provide the usual means of vindicating constitutional and statutory rights. *Id.* at 262, 273 N.Y.S.2d at 900, 220 N.E.2d at 655."]. *See also People ex rel. Keitt v. McMann*, 18 N.Y.2d 257, 262 (1966)["Because this

illegally imprisoned or otherwise restrained in his liberty within the state" may apply for habeas relief. Thus, the question before the court is whether, at common law or by statute, an order of protection of the type issued would render a person sufficiently "restrained in his liberty" so as to be entitled to habeas review.

2. *Habeas Corpus at Common Law*

On the return date, the court alerted the parties to its research on the scope of habeas corpus at common law. Both sides have submitted impressive post-argument memoranda on the issue. An appropriate start to a discussion of the scope of habeas relief under common law is Blackstone's Commentaries. Blackstone viewed the common-law personal liberties that the writ of habeas corpus was meant to protect as "the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law."[29]

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proceeding was brought under CPLR 7002 (subd. (a)) of which permits one 'illegally imprisoned or otherwise restrained in his liberty within the state' (see, also, CPLR 7003, subd. (a)) to institute habeas corpus proceedings, we have examined the history of the section and have concluded that the Legislature did not intend to change the instances in which the writ was available under the now repealed Civil Practice Act. Rather, it seems to us, what the Legislature did was not to make a new habeas corpus rule, but merely recognize that we have, by the slow process of decisional accretion, made increasing use of 'one of the hallmarks of the writ * * * its great flexibility and vague scope' (Third Preliminary Report of Advisory Committee on Practice and Procedure (N.Y.Legis.Doc., 1959, No. 17), p. 49; see Paulsen, Post-Conviction Remedies in New York, 1959 Report of N.Y.Law Rev.Comm. (N.Y.Legis.Doc., 1959, No. 66(L)), p. 453 et seq.)."].

[29]See 2 William Blackstone, Commentaries *134; Rollin C. Hurd, *A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus*, 4 (Da Capo Press 1972) (1858).

In 1875, our Court of Appeals would trace the common law use of habeas corpus as follows: "[Habeas] was in use before magna charta, and came to us as a part of our inheritance from the mother country, and exists as a part of the common law of the State."[30]

In 1963, the U.S. Supreme Court also traced the roots of the habeas remedy to the common law, saying, "English courts have long recognized the writ as a proper remedy even though the restraint is something less than close physical confinement....To determine whether habeas corpus could be used to test the legality of a given restraint on liberty, this Court has generally looked to common-law usages and the history of habeas corpus both in England and in this country."[31]

In 2008, the Court would reaffirm that habeas corpus at common law "at its core, an equitable remedy," and "above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances," using the phrase "all manner of illegal confinement."[32]

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[30]*People ex Rel. Tweed v. Warden*, 60 N.Y. 559 (1875).

[31]*Jones v. Cunningham*, 371 U.S. 236, 239 (1963)

[32]*Boumediene v. Bush*, 553 U.S. 723, 779-780 (2008)["Indeed, common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances. See 3 Blackstone (describing habeas as "the great and efficacious writ, in all manner of illegal confinement"); see also *Schlup v. Delo*, 513 U.S. 298, 319, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) (Habeas "is, at its core, an equitable remedy"); *Jones v. Cunningham*, 371 U.S. 236, 243, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963) (Habeas is not "a static, narrow,

A perfect example of the minimal degree of restraint necessary at common law to invoke the "usage" of habeas corpus was a case where "habeas corpus was appropriate to question whether a woman alleged to be the applicant's wife was being constrained by her guardians to stay away from her husband against her will. The test used was simply whether she was 'at her liberty to go where she please.'"[33] Applying that test here, Petitioner is surely "restrained of his liberty" for he is not entitled to go where he pleases.

3. Habeas Corpus Under The Statute

[a] Interpretation of "Restrained" Consistent Case with Law

The Court of Appeals has said this about the habeas corpus statute:

- "We have intimated that to adhere to the rigidities of traditional practice and procedure would be contrary to the spirit and purposes of the writ.
- While cases may arise where the right to invoke habeas corpus may take precedence over 'procedural orderliness and conformity', we are not holding that habeas corpus is either the only or the preferred means of vindicating fundamental constitutional or statutory rights.
- Departure from traditional orderly proceedings, such as appeal, should be permitted only when dictated, as here, by reason of practicality and

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formalistic remedy; its scope has grown to achieve its grand purpose")."].

[33] *Jones v. Cunningham*, 371 U.S. 236, 239 (1963), citing *Rex v. Clarkson*, 1 Str. 444, 93 Eng.Rep. 625 (K.B. 1722).

necessity."[34]

This case presents a prime example of a case where adherence "to the rigidities of traditional practice and procedure would be contrary to the spirit and purposes of the writ," and where "departure from traditional orderly proceedings, such as appeal.....[is] dictated [] by reason of practicality and necessity,"[35]

[b] Interpretation of "Restrained" Consistent with Public Policy

While habeas corpus is usually not the preferred mode to seek judicial review of criminal-case orders that may be raised in a pretrial motion or on a direct appeal,[36] it may nevertheless be used even when an appeal would later be available.[37] However, here the Criminal Procedure Law does not provide a statutory remedy by which petitioner may seek judicial review of the terms of a temporary order of protection to address what the court

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[34]*People ex rel. Keitt v. McMann*, 18 N.Y.2d 257, 262 (1966)(citations omitted).

[35]*People ex rel. Keitt v. McMann*, 18 N.Y.2d 257, 262 (1966)(citations omitted).

[36]*People ex rel Goss v. Smith*, 69 N.Y.2d 727 (1987), *affirming* 116 A.D.2d 968 (4th Dept 1986).

[37]*People v. Schildhaus*, 8 N.Y.2d 33, 36 (1960)["Although the challenge to the jurisdiction of the Magistrates' Court could have been raised by the defendant on appeal from the judgment of conviction (see People v. Scott, 3 N.Y.2d 148, 164 N.Y.S.2d 707), and although that might have been a more orderly and regular method of procedure, the right to invoke habeas corpus, 'the historic writ of liberty', 'the greatest of all writs', is so primary and fundamental that it must take precedence over considerations of procedural orderliness and conformity. See U.S.Const., art. I, s 9; N.Y.Const., art. I, s 4; People ex rel. Tweed v. Liscomb, 60 N.Y. 559, 566, 591, supra; People ex rel. Sabatino v. Jennings, 246 N.Y. 258, 260, 158 N.E. 613, 614, 63 A.L.R. 1458."].

found to contain one or more fatal defects in that order.[38]

Consider the anomaly: a defendant in a criminal case who is convicted of a crime has the statutory right to appeal the validity of an order of protection issued at sentence,[39] while an un-convicted person, presumed innocent, has no express statutory remedy to challenge a temporary order.

As the Third Department once said: "Individuals are not free to disregard a court order they believe is misguided or mistaken, but must instead move in the issuing court for modification or vacatur of the allegedly erroneous order."[40] The problem for the petitioner here is that he has done so, not only in the issuing court, but also in County Court, and, if this court does not reach the merits, he is faced with having to violate the order to seek judicial review of its validity.

Surely the petitioner could guarantee his entitlement to habeas corpus review of a detention order by violating the order, thereby providing grounds for his re-incarceration under CPL 530.13(8), which gives the trial court the right to revoke

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[38]A direct appeal is not authorized by CPL 450.10. A review by a superior court is not authorized by CPL 530.30, as Judge Fahey ruled. Article78 relief is not available for the reason set forth by Judge Gilbert in Exhibit E to the petition. *See also People v Hernandez*, 98 NY2d 8, 10 (2002)["No appeal lies from a determination made in a criminal proceeding unless specifically provided for by statute."].

[39]CPL 405.15(3).

[40]*People v. Malone*, 3 A.D.3d 795 (3d Dep't 2004).

recognizance and remand a defendant to jail. He could also invite a plenary prosecution for criminal contempt under Penal Law 215.50, and it's consequent securing order setting bail. He could also precipitate a Judiciary Law criminal contempt proceeding by purposely violating the order.

Petitioner should not be forced to purposely violate a court order so as to create a procedural remedy by which the order's validity may be reviewed. To require him to do so by narrowly construing the word "restrained" would be judicial condonation of the very breach of peace that the order is designed to protect against. It would be against public policy[41] to interpret a statue in such a way as to encourage violations of court orders in order to test their validity. "[S]uch an interpretation resulting in such a consequence would be against public policy, and therefore one not probably within the intent of the Legislature enacting the statute, and that for this reason it should not be adopted."[42]

4. Judiciary Law 2-b

In finding that Petitioner may seek review of the validity of a temporary order of protection in Supreme Court via habeas corpus, the court also relies upon Judiciary Law

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[41] *Commissioner of Dept. of Social Services of City of New York v. Spellman,* 243 A.D.2d 45, 49 (1st Dep't 1998)["The public policy of the State is what the Legislature says it is, where the Legislature has spoken" (*Matter of Steinberg v. Steinberg,* 18 N.Y.2d 492, 497, 277 N.Y.S.2d 129, 223 N.E.2d 558). Any argument for change in the statutory scheme must be addressed to the Legislature."].

[42] *In re Grand Jury,* 135 N.Y.S. 103, 109 (1912).

§ 2-b(3), which provides, in relevant part, that "[a] court of record has power..... to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it."

The First Department, in grantng judicial review of an order entered in connection with a criminal investigation, applied Judiciary Law 2-b(3) as follows: "[E]ven absent statutory authority, the Supreme Court may grant relief if it has general jurisdiction of the subject matter."[43] The Court also cited Judiciary Law 140-b,[44] which incorporates the jurisdiction exercised "by the court of chancery in England" on July 4, 1976—Independence

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[43] *Alphonso C. v. Morgenthau*, 50 A.D.2d 97, 99 (1st Dep't 1975)["However, it is recognized that, even absent statutory authority, the Supreme Court may grant relief if it has general jurisdiction of the subject matter. Section 2-b of the Judiciary Law provides, in pertinent part, that a court of record has the power 'to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it.' The jurisdiction of the Supreme Court of the State of New York includes: "all the jurisdiction which was possessed and exercised by the supreme court of the colony of New York at any time, and by the court of chancery in England on the fourth day of July, seventeen hundred seventy-six, with the exceptions, additions and limitations created and imposed by the constitution and laws of the state. Subject to those exceptions and limitations the supreme court of the state has all the powers and authority of each of those courts and may exercise them in like manner" (Judiciary Law, § 140-b). (Also, see, generally NY Const arts VI and VII.). We must therefore examine whether the courts of England or our own State courts had the authority to issue an order such as in the case at bar."].

[44] Judiciary Law 140-b: The general jurisdiction in law and equity which the supreme court possesses under the provisions of the constitution includes all the jurisdiction which was possessed and exercised by the supreme court of the colony of New York at any time, and by the court of chancery in England on the fourth day of July, seventeen hundred seventy-six, with the exceptions, additions and limitations created and imposed by the constitution and laws of the state. Subject to those exceptions and limitations the supreme court of the state has all the powers and authority of each of those courts and may exercise them in like manner.

Day. The First Department then went on to frame the issue: "We must therefore examine whether the courts of England or our own State courts had the authority to issue an order such as in the case at bar." The Court found that such courts did have such power, but only upon a showing of probable cause or its equivalent.

Here, Petitioner has exhausted all possible remedies by first moving the trial court to amend/vacate the order and thereafter moving County Court to do so, both efforts being unsuccessful. Having done so, he makes his claim ripe for review by whatever procedural device may be available.[45]

5. Temporary Orders of Protection Compared to Conditions of Parole

On a final note, the court appreciates that, while a 1944 Court of Appeals decision deemed an at-liberty parolee to be in custody,[46] a 1970 Court of Appeals decision, *People v. Markley,*[47] is repeatedly cited for the proposition that a person who has been

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[45]*See People ex rel. Rosenthal v. Wolfson,* 48 N.Y.2d 230, 232 (1979); *People ex rel. Klein v. Krueger,* 25 N.Y.2d 497 (1969); *People ex rel. Shapiro v. Keeper of City Prison* 290 N.Y. 393, 49 N.E.2d 498, (1943).

[46]*People ex rel. Natoli v. Lewis*, 287 N.Y. 478, 481-482 (1942)["To appreciate the reason for the statutory provisions it must be borne in mind that the relator was a prisoner from the date of his conviction until the date of his arrest in 1940 for robbery. He was always in the legal custody of the superintendent of Elmira Reformatory. Correction Law, s 213. True it is that he was not always within the institution walls, for during his parole he was permitted to go abroad. Nevertheless he was always in constructive custody subject to be retaken and returned to actual custody."].

[47]*People v. Markley*, 26 N.Y.2d 648 (1970).

released on parole is no longer restrained of his liberty to such a degree as to entitle him to habeas relief.[48] The only support for that ruling was a reference to an article at 92 A.L.R.2d 682. That article was superceded by 26 ALR 4th 455. By comparison of the footnotes in each article with the date of the decision in *Markley*, the only New York case cited in 92 A.L.R.3d could have been *People ex rel. Willard v. McMann.*[49] That ruling was not based on any legal analysis whatsoever, but simply a concession by the parties."[50] Thus, this court is left with no guidance as to a rationale for such a ruling, and is left with comparing the status of a parolee to that of a person subject to a temporary order of protection.

The first comparison this court makes is that there was no parole at common law. In fact, a convicted felon was usually executed,[51] but if not, was for the most part

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[48]*E.g., People ex rel. Murray v. Bartlett*, 89 N.Y.2d 1002 (1997).

[49]*People ex rel. Willard v. McMann,* 32 A.D.2d 874 (4th Dep't 1969).

[50]*People ex rel. Willard v. McMann,* 32 A.D.2d 874 (4th Dep't 1969)["It is conceded that relator is presently released on parole, and therefore habeas corpus would not be the proper remedy."].

[51]*Avery v. Everett*, 65 Sickels 317, 110 N.Y. 317 (1888)["At common law, there was an English and American institution of "civil death" as a punishment associated with conviction (or "attainder") for treason or felony. As the New York Court of Appeals explained in 1888, under the English common law, a person sentenced for felony was placed in a state of attainder. There were three principal incidents consequent upon an attainder for treason or felony,--forfeiture, corruption of blood, and an extinction of civil rights, more or less complete, which was denominated civil death. Forfeiture was a part of the punishment of the crime . . . by which the goods and chattels, lands and tenements of the attainted felon were forfeited to the king . . . . The blood of the attainted person was deemed to be corrupt, so that neither could he transmit his estate to his heirs, nor could they take by descent from the ancestor . . . . The incident of civil death attended every attainder of treason or felony, whereby, in the language of Lord Coke, the

deemed civilly dead,[52] and his status was by no means comparable to an otherwise free un-convicted person. Second, it has long been the law in New York that "[p]arole is not a right, but a privilege, to be granted or withheld as discretion may impel."[53]

It must also be remembered that a parolee has already been convicted of a crime, whereas Petitioner here has not. Parolees agree to conditions of parole in order to gain their release from prison, whereas Petitioner did not agree to the conditions of the order here. Parolees are subject to conditions, whereas Petitioner here is subject to a court order. A parolee enjoys the remedy of an administrative appeal and thereafter judicial review via CPLR Article 78. Here, Petitioner has no remedy. Simply stated, when it comes to

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attainted person 'is disabled to bring any action, for he is extra legem positus, and is accounted in law civiliter mortuus,' or, as stated by Chitty, 'he is disqualified from being a witness, can bring no action, nor perform any legal function; he is in short regarded as dead in law.'"].

[52] *Jones v. Jones*, 249 A.D. 470, 471 (3d Dep't 1937)["At common law there is no imprisonment for life, but that punishment was first prescribed by statute in 1796 (chapter 30) and the attribute of civil death was attached thereto by specific and separate enactment (chapter 57, Laws 1799), to conform the new penalty to the common-law rule with reference to the punishment of other felonies, but only 'for greater caution' (Troup v. Wood, supra, 4 Johns.Ch. 228)."]; see also *People v. Roderman*, 34 Misc.2d 497, 518-519 (N.Y.Co.Ct.1962)["Obviously, it was an idle formality for, as at common law practically all felonies were punishable with death, either with or without benefit of clergy, the imputation of intent actually made no difference 'for it was considered immaterial whether a man was hanged for one felony or another.' (Powers v. Commonwealth, 110 Ky. 386, 413, 61 S.W. 735, 741, 63 S.W. 976, 53 L.R.A. 245). Matter of G.F.C.'s Adoption 118 Misc.2d 705, 707, 461 N.Y.S.2d 949, 951 (N.Y.Sur.,1983). The challenged statutes have a long history. Attainder of all civil rights, including the right of parental management of children, was an immediate consequence of judgment following conviction of any felony at common law, when every felony was a capital crime (see generally *Avery v. Everett,* 110 N.Y. 317, 18 N.E. 148 [1888])."].

[53] *People ex rel. Cecere v. Jennings,* 250 N.Y. 239, 241 (1929).

convicted felon parolees and un-convicted alleged misdemeanants, there is no comparison.

6. Article 78 Writ of Prohibition as Proper Remedy

Respondent argues that Petitioner's failure to seek relief under CPLR Article 78 renders use of the habeas remedy either premature or uncalled for. While the court would be happy to take Respondent up on his offer, case law suggests otherwise.

"A writ of prohibition may be obtained only when a clear legal right of a petitioner is threatened by a body or officer acting in a judicial or quasi-judicial capacity 'without jurisdiction in a matter over which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding over which it has jurisdiction.'"[54] "The fact that a ruling is incorrect is not enough to permit article 78 review. '[E]rrors of law ... are not to be confused with a proper basis for using the extraordinary writ."[55]

Here, Respondent had jurisdiction over the criminal case and had the authority to issue the temporary order of protection, a portion of which this court has found invalid. And while Article 78 relief is available "to prevent a court from exceeding its authorized powers in a proceeding over which it has jurisdiction,"[56] that did not occur here.

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[54] *Morgenthau v. Erlbaum*, 59 N.Y.2d 143 (1983), citing *Matter of Dondi v. Jones*, 40 N.Y.2d 8, 13, quoting *Matter of State of New York v. King*, 36 N.Y.2d 59, 62.

[55] *Johnson v. Price*, 28 A.D.3d 79, 81-84 (1st Dep't 2006), citing *Matter of State of New York v. King*, 36 N.Y.2d 59, 62 (1975).

[56] *Matter of Pirro v. Angiolillo*, 89 N.Y.2d 351, 355 (1996).

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CONCLUSION

For the foregoing reasons, the Petition is granted. Therefore, the court need not reach the Petitioner's First Amendment claims, nor need it accept Petitioner's post-argument entreaty to invoke *coram vobis*.[57]

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[54]*Morgenthau v. Erlbaum*, 59 N.Y.2d 143 (1983), citing *Matter of Dondi v. Jones*, 40 N.Y.2d 8, 13, quoting *Matter of State of New York v. King*, 36 N.Y.2d 59, 62.

[55]*Johnson v. Price*, 28 A.D.3d 79, 81-84 (1st Dep't 2006), citing *Matter of State of New York v. King*, 36 N.Y.2d 59, 62 (1975).

[56]*Matter of Pirro v. Angiolillo*, 89 N.Y.2d 351, 355 (1996).

[57]Not to be confused with *coram nobis*.

It is hereby,

ORDERED, ADJUDGED AND DECREED that the petition herein be and is hereby granted, and it is further,

ORDERED, ADJUDGED AND DECREED that Petitioner is hereby discharged of all restraints imposed upon his liberty by the Temporary Order of Protection issued by the Town of Dewitt Justice Court on May 7, 2013.

The signing of this Judgment shall not constitute entry or filing under CPLR §2220. The prevailing party is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

The Decision/Order shall constitute the judgment of this Court.

SO ORDERED.

ENTER.

Dated: March 19, 2014

John Brunetti
Acting Supreme Court Justice