

At a Term of Supreme Court held in  
and for the County of Onondaga,  
in the City of Watertown, New York  
on the 2<sup>nd</sup> day of May, 2013.

H PRESENT: HONORABLE HUGH A. GILBERT  
Supreme Court Justice

STATE OF NEW YORK

SUPREME COURT COUNTY OF ONONDAGA

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In the Matter of

A MARK SCIBILIA-CARVER, CLARE GRADY,  
MARY ANNE GRADY FLORES, and  
DANIEL BURGEVIN,

Petitioners,

MEMORANDUM  
DECISION AND ORDER

Index No. 2013-1102  
RJI No. 33-13-0656

-vs-

DONALD M. BENACK, JR., DEWITT TOWN  
COURT JUSTICE, and ROBERT JOKL, JR.,  
DEWITT TOWN COURT JUSTICE,

Respondents.

In a Proceeding Pursuant to CPLR Article 78

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Petitioners Mark Scibilia-Carver, Clare Grady, Mary Anne Grady  
Flores, and Daniel Burgevin commenced this special proceeding for a judgment  
reviewing Orders of Protection issued by Respondents on October 25, 2012. They  
ask that the Court prohibit enforcement of the Orders to the extent that they  
directed Petitioners to stay away from the business and place of employment of  
Earl A. Evans. The Court issued an Order to Show Cause on February 25, 2013

which was duly served on Respondents who oppose the application.

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Petitioners were charged with disorderly conduct and trespass, violations under the Penal Law, arising out of public protests that occurred at the gates to the 174<sup>th</sup> Air Guard Base in the Town of Dewitt on October 25, 2012. Colonel Earl A. Evans, Group Commander for the Air National Guard, provided a supporting deposition in connection with each Information issued against Petitioners. Respondents issued Temporary Orders of Protection when Petitioners were arraigned. Petitioner Mary Anne Grady Flores was subsequently arrested during another drone protest and charged with Criminal Contempt Second Degree on the grounds that she violated the Temporary Order of Protection dated October 25, 2012.

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Petitioners contend that Respondents violated their constitutional rights in ordering them to stay away from the business and/or place of employment of Earl A. Evans who they do not know. They further assert the overly restrictive terms of the Order of Protection violate their constitutional right to lawfully assemble, petition their government and use public highways. They seek relief in the nature of mandamus and prohibition pursuant to Article 78 with respect to the Temporary Orders of Protection. It is fundamental with regard to this application that Section 7803 of the New York Civil Practice Law and Rules lists "only" four "questions that may be raised in a proceeding under this Article". The first question

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is "whether the body or officer failed to perform a duty enjoined upon it by law", corresponding with a writ of mandamus to compel. This Court cannot find and determine from the Petition or supporting papers any mandated duty of a Town Justice Court which these Respondents failed to perform. The second question is "whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction", relating to a writ of prohibition. The Verified Petition does summarily assert an excess of jurisdiction but does not outline the asserted State and Federal constitutional limitations that would prohibit these Respondents from issuing a temporary Order of Protection as a duly constituted Town Justice. Nor can this Court perceive any excess by these Respondents. The third question is "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion". The Court cannot find this question viable. Question four as to the result of a hearing is not pertinent either.

Respondents supplied the Court with their own Affidavits as well as the Affidavit of Jordan McNamara, Esq., the Assistant District Attorney with primary responsibility over the prosecution of the offenses pending against Grady Flores.

There appears further to be a procedural prohibition against Petitioners herein since they acknowledge there exists an on-going criminal proceeding in Town Justice Court. Generally, the ordeal of a criminal trial and the

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possibility of conviction, standing alone, are not sufficiently harmful to warrant prohibition. **Matter of Van Wie vs. Kirk**, 244 AD2d 13, 25 (1998). As Respondents have pointed out to the Court, a determination in a criminal case is not reviewable in an Article 78 proceeding in the nature of prohibition, unless the Court in making the determination exceeded its jurisdictional powers. **Matter of Paciona vs. Marshall**, 35 NY2d 289, 290 (1974). Respondents note that the People submitted the Affidavit of Colonel Earl Evans and that they determined that he is a proper subject of protection as a “designated witness” CPL §530.13(1)(a). Likewise, Jordan McNamara states that Colonel Evans is an important witness in the prosecution and is therefore a proper subject of protection. Respondents contend that the Court does not have jurisdiction to consider the Petition and should be awarded counsel fees incurred in defending this proceeding.

We concur with Respondents that this Court cannot interfere with the exercise of judicial discretion of a lower Court in a pending criminal case. Petitioners seek the extraordinary remedy of a writ of prohibition but have not and cannot establish that the Justice Court exceeded its jurisdictional powers. Any claimed error of substantive or procedural law must be addressed by the Court making the determination, not on the purported review by this Court in an Article 78 proceeding.

Respondents seek a reimbursement of actual expenses reasonably

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incurred and reasonable attorney fees resulting from frivolous conduct. 22 NYCRR §130-1.1(a)(1). It must be noted that the cited **Schulz vs. Washington County**, 157 AD2d 948, 949 (1990) directs that any damages for frivolous conduct under those rules are sanctions payable to a State entity rather than awarded to Respondents. Furthermore, this Court is not prepared to state that the arguments presented, even though we disagree with them, rise or sink to the level of being completely without merit.

THEREFORE, it is

ORDERED, ADJUDGED AND DECREED that the relief sought herein by Petitioners must, and is, denied and the Petition is respectfully dismissed; and it is further

ORDERED, ADJUDGED AND DECREED that the request for sanctions and counsel fees by Respondents is denied.

Dated: May 17, 2013  
at Watertown, New York

ENTER



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HUGH A. GILBERT  
Supreme Court Justice