

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

In the Matter of

**VERIFIED
ANSWER**

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

Petitioners,

Index No. 2013-1102

-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

As and for their ANSWER to the Petition herein, Respondents, by their attorney Edward Z. Menkin, Esq., respond as follows:

1. Respondents ADMIT the allegations in ¶1 that the Petitioners are residents of the State of New York.
2. Respondents ADMIT the allegations in ¶2 that Robert Jokl, Jr., is a Town Justice for the Town of Dewitt and that Donald M. Banack, Jr., is a Village Justice for the Village of East Syracuse and an Acting Town Justice for the Town of Dewitt.
3. Respondents DENY the allegations in ¶3 that the Respondents have acted in excess of their jurisdiction and that their Orders were violative in any way of law or lawful procedure.
4. Respondents DENY the allegations in ¶4 that the Temporary Orders of Protection in issue herein are "final" orders reviewable under Article 78 of the CPLR.
5. Respondents ADMIT the allegations in ¶5 which recognize that the Temporary Orders of Protection at issue herein were entered in the course of an (ongoing) criminal proceeding but Respondents DENY the remaining allegations in ¶5 that such the Temporary Orders are violative of the constitutional rights of the Petitioners and the Petitioners' assertion that said Orders are reviewable under Article 78 of the CPLR.

6. Respondents ADMIT the allegations in ¶¶ 6, 7, 8, 11 & 14.

7. Respondents DENY the allegations in ¶9 that the Temporary Orders are violative of the constitutional rights of the Petitioners.

8. Respondents lack sufficient information to either admit or deny the allegations in ¶10 that the Petitioners do not know Earl A. Evans or have any knowledge of his person or conduct. Even if true, such allegations are completely irrelevant and immaterial to both this proceeding and to the underlying criminal prosecution of the Petitioners. Being the complainant in the criminal action and being the officer in charge of the Air National Guard base at Hancock Field, he is undeniably a material witness and, as a matter of law, a proper beneficiary of an Order of Protection.

9. Respondents ADMIT the allegations in ¶12 that the Petitioners have the constitutional right to assemble and petition but DENY that the Temporary Orders of Protection in issue herein are violative of the constitutional rights of the Petitioners.

10. Respondents DENY the allegations in ¶13 which are conclusory and erroneous as matters of both law and fact.

11. Respondents DENY the allegations in ¶15 which are conclusory and erroneous as matters of both law and fact.

REQUEST FOR SANCTIONS

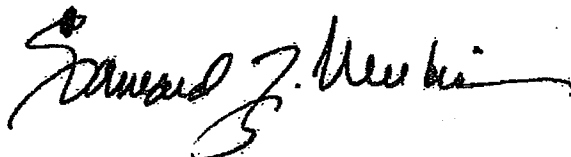
12. Petitioners' instant attempt to circumvent lawful procedure and to institute a "review" under Article 78 of the CPLR of non-final orders in a pending criminal matter is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law. Such an effort constitutes frivolous conduct under 22 NYCRR § 130-1.1. Simply put, this Court does not have jurisdiction to entertain the Petition. This proceeding is not only illegitimately interruptive of pending criminal matters in the Town of Dewitt courts but is a frivolous waste of Respondents' resources and this Court's time and attention.

13. The Town of Dewitt and its taxpayers have borne the cost of dozens of extraordinarily lengthy trials and proceedings arising from the protests at the Air National Guard base, including but not limited to overtime salaries for court clerks and court security personnel. These costs are not covered by insurance. The Town of Dewitt has had to retain private counsel to respond to the instant Petition inasmuch as its Public Officials Liability Policy does not cover the costs of defense of this action.

14. Respondents request that the Court exercise its discretion under 22 NYCRR § 130-1.1 and award costs and attorney's fees to the Respondents.

WHEREFORE, it is respectfully requested that the instant Petition be dismissed in its entirety and that the Court award appropriate sanctions, including attorney's fees, against the Petitioners.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Edward Z. Menkin". The signature is written in a cursive style with a prominent initial "E" and a long, sweeping underline.

Edward Z. Menkin, Esq.
Attorney for Respondents
555 East Genesee Street
Syracuse, New York 13202

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

In the Matter of

**ATTORNEY'S
AFFIRMATION**

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

Petitioners,

Index No. 2013-1102

-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

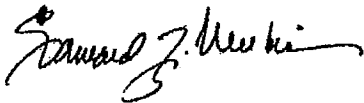
EDWARD Z. MENKIN, being an attorney at law admitted to practice before this Court hereby respectfully Affirms as follows:

1. I am counsel to the Respondents herein and have been privately retained by the Town of Dewitt on their behalf due to the denial of defense costs by the Town's professional liability carrier.
2. I am familiar with the underlying facts and circumstances of the instant matter.
3. The Temporary Orders of Protection issued by the Justices of the Dewitt Town Court in the instant matter are routine forms which are authorized by statute (CPL §530.13) and follow the format of the template of CRM Form 2 promulgated for such use in non-family offense matters by the New York State Unified Court System.¹ A sample of such Form is annexed hereto as Exhibit A.
4. On February 13, 2013 (a full two weeks prior to the filing of the instant Petition), Petitioner Grady-Flores was arrested during another "drone protest" at Hancock Field and charged with both Disorderly Conduct (a violation) and Criminal Contempt in the Second Degree (A misdemeanor). A copy of the Misdemeanor Information against this Petitioner is annexed hereto as Exhibit B. The Contempt charge was predicated upon an allegation that she violated the Temporary

¹ (see <http://www.nycourts.gov/forms/familycourt/domesticviolence.shtml>)

Order of Protection entered on October 25, 2012, the same Order of Protection being challenged in the Article 78 Petition proceeding presently before this Court. The criminal action against her remains pending in the Town of Dewitt Court. Petitioners fail to mention or refer to this matter in their submissions to the Court.

Respectfully submitted & affirmed:



EDWARD Z. MENKIN, Esq.
Attorney for Respondents

ACCUSATORY INSTRUMENT
INFORMATION - C.P.L. 100.15

Town of DeWitt Police Department
Case #: 13-156348

**STATE OF NEW YORK :: COUNTY OF ONONDAGA
DEWITT TOWN COURT**

*The People of the State of New York
against*

Mary A. Grady-Flores
Defendant

12/29/1956
Date of Birth

**MISDEMEANOR
INFORMATION**

I, Officer M. Kurgan, the complainant herein, of the Town of DeWitt Police Department, accuse **Mary A. Grady-Flores**, of 514 N. Main St, the DEFENDANT in these actions, and charge that on or about the 13th day of February, 2013, at **6001 East Molloy Rd** in the Town of DeWitt, County of Onondaga, State of New York, at about 2:30 in the afternoon, said DEFENDANT committed the offenses of:

Law Section:

1) PL 215.50 (3) Criminal contempt in the second degree

A person is guilty of criminal contempt in the second degree when he engages in any of the following conduct: 3. Intentional disobedience or resistance to the lawful process or other mandate of a court except in cases involving or growing out of labor disputes as defined by subdivision two of section seven hundred fifty-three-a of the judiciary law.

2) PL 240.20 (5) Disorderly conduct

A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: 5. He obstructs vehicular or pedestrian traffic.

To Wit:

On the aforementioned date, time and location, the defendant, **Mary A. Grady-Flores** did, after being asked to move, continue to stand in the driveway of 6001 East Molloy Rd and obstruct vehicle's from being able to drive onto the property. She did this, in violation of a duly served order of protection, ordering her to stay away from 6001 East Molloy Rd.

All contrary to the provisions of the statute in such case made and provided.

That the source of deponent's information and the grounds of his belief as to all matters herein stated upon information and belief are based upon and derived from:

- Personal knowledge gained by direct police observation of the acts described in the to wit clause.

NOTE: False statements made herein are punishable as a Class A misdemeanor pursuant to section 210.45 of the Penal Law of the State of New York.

AFFIRMED UNDER PENALTY OF PERJURY this
13th day of February, 2013

 #350

COMPLAINANT

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

In the Matter of

**AFFIRMATION
Of
HON. ROBERT JOKL**

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

Petitioners,

Index No. 2013-1102

-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

ROBERT JOKL, being an attorney at law admitted to practice before the Courts of the State of New York, hereby affirms under penalties of perjury as follows:

1. I am a Town Justice for the Town of Dewitt and, as such, have a judicial responsibility for presiding over the prosecution of the offenses now pending against the Petitioners in the Town of DeWitt Justice Court.

2. In connection with said prosecutions, the People applied for, and I granted, Temporary Orders of Protection issued by the Court during the pendency of these proceedings.

2. In my judgment Colonel Earl Evans, being the Mission Support Group Commander for the Air National Guard headquartered at 6001 East Malloy Road in the Town of Dewitt, is an important witness in the People's case in proving their allegations of criminality of the Petitioners' conduct and that he is a proper subject of protection as a "designated witness" pursuant to the Order of Protection provisions of CPL §530.13(1)(a). I therefore exercised my judicial discretion in issuing such Orders.

Respectfully submitted & affirmed:



ROBERT JOKL, JR.

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

**In the Matter of
MARK SCIBILIA-CARVER, CLARE GRADY,
MARY ANNE GRADY FLORES, and DANIEL BURGEVIN,**

Petitioners,

**AFFIDAVIT
Of
HON. DONALD M. BENACK, JR.**

Index No. 2013-1102

-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

DONALD M. BENACK, JR., being duly sworn, deposes and states as follows:

1. I am a Village Justice for the Village of East Syracuse and an Acting Town Justice for the Town of Dewitt, and, as such, have a judicial responsibility for presiding over the preliminary stages of the prosecution of the offenses now pending against some of the Petitioners in the Town of Dewitt Justice Court.

2. In connection with said prosecutions and in reviewing the Informations and witness statements, I exercised my judgment and discretion and I granted Temporary Orders of Protection during the pendency of these proceedings.

2. The People submitted that Colonel Earl Evans, upon whose Affidavit the Criminal Informations herein were predicated on and who is alleged to be the Mission Support Group Commander for the Air National Guard headquartered at 6001 East Malloy Road in the Town of Dewitt, is an important witness in the People's case in proving the criminality of the Petitioners' conduct. In my view and judgment, he is a proper subject of protection as a "designated witness" pursuant to the Order of Protection provisions of CPL §530.13(1)(a).

Respectfully submitted:

Sworn to before me March 23, 2013:


DONALD M. BENACK, JR.



Notary Public

EDWARD Z. MENKIN
Notary Public, State of New York
No. 02ME4674303
Qualified in Onondaga County
Commission Expires March 30, 2014

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

In the Matter of

**AFFIRMATION
Of
JORDAN McNAMARA**

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

Petitioners,

Index No. 2013-1102

-vs-

**DONALD M. BENACK, JR., Dewitt Town Court Justice, and
ROBERT JOKL, JR., Dewitt Town Court Justice**

Respondents.

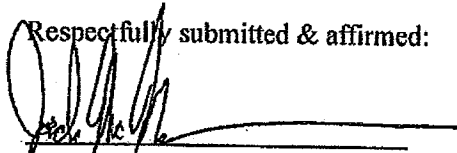
In a Proceeding Pursuant to CPLR Article 78


JORDAN McNAMARA, being an attorney at law admitted to practice before the Courts of the State of New York, hereby affirms under penalties of perjury as follows:

1. I am an Assistant District Attorney employed by the County of Onondaga and, as such, have primary responsibility for the prosecution of the offenses now pending against the Petitioners in the Town of DeWitt Justice Court, said alleged offenses being the predicate(s) for the Temporary Orders of Protection issued by the Court during the pendency of these proceedings.

2. It is my professional judgment that Colonel Earl Evans, being the Mission Support Group Commander for the Air National Guard headquartered at 6001 East Malloy Road in the Town of Dewitt, is an important witness in the People's case in proving the criminality of the Petitioners' conduct and that he is a proper subject of protection as a "designated witness" pursuant to the Order of Protection provisions of CPL §530.13(1)(a).

Respectfully submitted & affirmed:


JORDAN McNAMARA

3-13-13

Michele Robbins
Notary Public, State of New York
No. 01R06218343
Qualified in Onondaga County
Commission Expires March 1, 2014

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

In the Matter of

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

Petitioners,

**RESPONDENTS'
MEMORANDUM
OF LAW
Index No. 2013-1102**

-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

Respondents, by their attorney Edward Z. Menkin, Esq., respectfully submit this Memorandum of Law in Opposition to the Petitioners request for relief pursuant to Article 78 of the CPLR.

POINT I:

**THIS COURT IS WITHOUT JURISDICTION
TO CONSIDER THE INSTANT PETITION.**

The instant Petition fails on two fundamental threshold points: non-finality and improper interference in a pending criminal matter.

CPLR Article 78 requires, as a threshold matter, that the predicate for relief be a matter which is final and which cannot be adequately addressed by either the original decision maker upon application for rehearing or by appeal. (CPLR 7801(1)). Petitioners fail to meet even this minimal jurisdictional requirement.

The Orders of Protection of the Town of Dewitt Justices which the Petitioners seek relief from are, by their own denomination and procedural existence, *Temporary* Orders of Protection which are both viable and enforceable for the duration and pendency of the criminal actions before the Court. Petitioners have not moved in the Court below for modification of the Orders nor have they explained why they failed (or chose not) to do so. The Orders are *temporary*. Should the Petitioners be acquitted, the Orders would be extinguished as a matter of law; should they be convicted, the Orders can properly be imposed at sentencing as permanent Orders for a period of time. (CPL §530.12(4))

Petitioners fail entirely to demonstrate to the Court why these *Temporary* Orders of Protection are “final” orders within the purview of Article 78 consideration. Their sole authority cited in support of such a proposition (i.e., that the Temporary Order of Protection are in reality “final” Orders) is a tortured reading of an unreported Supreme Court case (*Weiner v. State of New York 27 Misc 3d 1203[A]*) which is hardly binding authority and which itself has a confusing set of underlying facts. In *Weiner*, a failed Article 78 proceeding, a father-defendant was charged with a family offense and subjected to a temporary “stay away” order of 5 days duration (hence it was “temporary”). Unlike the instant matter, the Order of Protection in *Weiner* arose under the family offense provisions of CPL §530.12 not, as here, CPL §530.13 which has a broader scope and includes the protection of witnesses. More than four months after the expiration of the temporary “stay away” order and the entry of a new, longer “stay away”, *Weiner* challenged the order. In dismissing the Petition, the Court noted “There is little doubt that the TOP became final and binding on the petitioner at that time [the date of its initial entry]. . . . Such, renders the proceeding time-barred.” (*Id.* at 6) The Court was not addressing the “temporary” nature of the restriction; *it was directly addressing Weiner’s failure to bring his petition in a timely manner*. The case simply fails to support the Petitioners’ claim here. “Temporary” means temporary; “final” means final. The Petitioners are no more entitled to their own set of dictionaries than they are to their own special set of procedural rights.

A second and even more fundamentally fatal defect to the instant Petition arises from its blatant attempt to have this Court wrest jurisdiction and interfere with the exercise of judicial discretion of a lower Court in a pending criminal case. CPLR § 7801 could not be more clear in its instruction that “a proceeding under this article shall not be used to challenge a determination: . . . (2) which was made in a civil action or criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court.”

It is hornbook law that “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.” *Paciona v. Marshall*, 35 N.Y.2d 289, 290 “Orderly procedure under a rule of law dictates that the collateral proceeding [Article 78 review] not be available. This is true so long as the pending criminal action does not involve an exercise by a court of powers outside its jurisdiction or an excess of jurisdiction by a court which otherwise has subject-matter jurisdiction (Matter of State of New York v King, 36 NY2d 59, 62-65).” *Nigrone v. Murtagh*, 36 N.Y.2d 421, 423-424.

There is simply no showing – nor can there be – that the Justices of the Town of Dewitt Court acted beyond their jurisdiction in entering statutorily prescribed and utterly routine Temporary Orders of Protection in favor of a witness all in conformity with CPL §530.13.

Even worse, Petitioners fail to inform the Court that at least one of the Orders of Protection they seek this Court to nullify, modify, or vacate, is the predicate of an additional pending criminal action against Petitioner Grady-Flores. (See accompanying Affirmation of Edward Z. Menkin and the Exhibits annexed thereto.) On February 13, 2013 (a full two weeks prior to the filing of the instant Petition), Petitioner Grady-Flores was arrested during another “drone protest” at Hancock Field and charged with both Disorderly Conduct (a violation) and Criminal Contempt in the Second Degree (A misdemeanor). The Contempt charge was predicated upon an allegation that she violated the Temporary Order of Protection entered on October 25, 2012, the same Order of Protection being challenged in the Article 78 Petition proceeding presently before this Court. The criminal action

against her remains pending in the Town of Dewitt Court. Notwithstanding this circumstance, no mention whatever of this event and its obvious relevance to the Petitioners' cause and position is made in any of the filings submitted to this Court. In essence, the present Article 78 Petition filed by Grady-Flores is a blatant effort to circumvent and undermine a pending criminal proceeding, a procedural ploy which is not only forbidden by statute (CPLR §7801(2)) but by long and well established case law. (*Nigrone v. Murtagh*, 36 N.Y.2d 421; *Paciona v. Marshall*, 35 N.Y.2d 289). Petitioner Grady-Flores is not entitled to come before this Court and ask for an evidentiary ruling or an order exculpating her from criminal liability in a pending proceeding. "Use of the writ [Article 78 review by writ of prohibition] is, and must be, restricted so as to prevent incessant interruption of pending judicial proceedings by those seeking collateral review of adverse determinations made during the course of those proceedings. Permitting liberal use of this extraordinary remedy so as to achieve, in effect, premature appellate review of issues properly reviewable in the regular appellate process would serve only to frustrate the speedy resolution of disputes and to undermine the statutory and constitutional schemes of ordinary appellate review." *Rush v. Mordue*, 68 N.Y.2d 348, 352.

POINT II:
**COL. EVANS IS A PROPER BENEFICIARY OF
AND ENTITLED TO AN ORDER OF PROTECTION.**

Petitioners purported lack of knowledge of Colonel Evans is wholly immaterial and irrelevant to the validity of the Orders of Protection entered here. Col. Evans is indisputably a "witness" to the proceeding (see accompanying Affidavits of Assistant District Attorney Jordan MacNamara and the Hon. Donald Benack, Jr.) and statutorily entitled to the benefit of an Order of Protection (temporary or otherwise) (CPL §530.13(1)).

Petitioners' argument on this point is absurd on its face. The Petitioners' complaint that they do not know Col. Evans and do not think they had any contact with him during their protest is precisely analogous to a burglar complaining that he should not have to stay away from the owner of a house he has just burglarized because, after all, he doesn't know the owner and doesn't think/know that the owner watched him commit his crime. Defendants do not get to pick and choose who will be a witness in a proceeding against them.

POINT III:
RESPONDENTS SHOULD BE AWARDED ATTORNEY'S FEES.

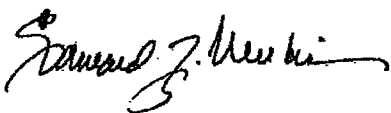
Respondents submit that the filing of the instant Petition is a waste of the time and resources of both this Court and the Respondents. It is an obstructionist tactic sanctimoniously enfolded in the solemnity of First Amendment protections and is virtually unsupportable as an Article 78 proceeding seeking prohibition in a circumstance where the Respondent Judges have undeniably followed permissible statutory procedure. By law, conduct is frivolous if "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law". (22 NYCRR § 130-1.1(c)(1)). In addition, the Petitioners' failure to inform

the Court of the additional enforcement proceeding initiated against Petitioner Grady-Flores bespeaks a lack of candor and a true disregard for procedural integrity. The Petition in this case meets the definition of "frivolous conduct" in every way and is sanctionable.

The Court, in its discretion, may award to any party or attorney in any civil action or proceeding costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct. 22 NYCRR § 130-1.1(a)(1). Sanctions are available in an Article 78 proceeding. *Schulz v. Washington County*, 157 A.D.2d 948 (3rd Dept., 1990).

The Town of Dewitt and its taxpayers have been burdened with the costs of supplying court personnel (clerks and security bailiffs) for the numerous trials and proceedings (well over 40) required to deal with the "Drone Protests" at Hancock Field. Although those proceedings may have been costly, they are/were undeniably required by the protesters' constitutional to Due Process of Law. On the other hand, the instant Petition, frivolous on its face, has imposed a wholly unjustified additional financial burden on the Town which has had to hire private counsel to respond since the Town's professional liability policy has denied coverage. This Court should sanction the Petitioners by imposing the costs of defense, including attorney's fees, upon them.

Respectfully submitted:



EDWARD Z. MENKIN, Esq.

Attorney for Respondents