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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 114

MARY ANNE GRADY FLORES,

Appellant.

20 Eagle Street
Albany, New York
October 11, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next matter on this
2 afternoon's calendar is appeal number 114, the People of
3 the State of New York v. Mary Anne Grady Flores.

4 Good afternoon, counsel.

5 MR. SALISBURY: Good afternoon, Your Honor; Lance
6 Salisbury on behalf of Appellant Mary Anne Grady Flores.
7 I'd like to reserve two minutes for rebuttal, please.

8 CHIEF JUDGE DIFIORE: Two minutes, sir.

9 MR. SALISBURY: The central issue in this case is
10 the invalid order of protection.

11 CHIEF JUDGE DIFIORE: Mr. Salisbury, we recently
12 decided People v. Smith.

13 MR. SALISBURY: Correct, Your Honor.

14 CHIEF JUDGE DIFIORE: And we held that the filing
15 of an affidavit of errors is a jurisdictional requirement.

16 MR. SALISBURY: Correct. This is - - -

17 CHIEF JUDGE DIFIORE: How do we - - -

18 MR. SALISBURY: Sorry.

19 CHIEF JUDGE DIFIORE: - - - get by Smith here?

20 MR. SALISBURY: This is a pre-Smith case. This
21 appeal began percolating before Smith. At the time of this
22 case, the law was in a - - - in a state of flux. That's
23 reflected in the - - - in the record here. You see
24 appellant was relying in part, in fact, upon the OCA, the
25 2008 OCA memo, in the instructions from the town court



1 which indicated you should not file and - - - and - - -

2 JUDGE STEIN: That happened in Smith, too, didn't
3 it?

4 MR. SALISBURY: It - - - well, it's a little
5 different here in that in this case appellant went beyond
6 in a - - - in a motion to the county court and requested
7 indicated we are following the case law and everything at
8 the time it indicated not to and requested if this is
9 incorrect please in- - - - instruct us and we will go back
10 and file the affidavit of errors.

11 JUDGE STEIN: If - - - if - if we were to find
12 Smith applicable here is there anything that Ms. Flores
13 could do to - - - to have her appeal heard to - - - to
14 extend the time or anything - - -

15 MR. SALISBURY: I - - -

16 JUDGE STEIN: - - - that you're aware of?

17 MR. SALISBURY: Yes. You'll notice in the - - -
18 under, I believe, CPL 460, there's a one-year time period
19 for cause where you can go back and file the affidavit of
20 errors. Here in that motion that was filed well within the
21 one-year time limit. The appellant specifically requested
22 permission to do that. The county court did not entertain
23 that motion, remained silent, the respondent remained
24 silent. I think which goes to the matter of the issue of -
25 - - of flux so that if - - - if the court was to so



1 determine that I think you could remand to the lower court,
2 one, to allow the filing of affidavit of errors pursuant to
3 that, and then I guess in terms of - - - of judicial
4 efficiency follow then and implement the findings of this
5 court on - - - on the merits of the case.

6 JUDGE RIVERA: So just to clarify is your
7 position then that - - - that the motion that you're
8 talking about is filed within that one-year time frame but
9 that the court never decided the motion?

10 MR. SALISBURY: The - - - the court remained - -
11 - remained silent on it. The court never answered that - -
12 - that motion. The appellant sought - - - we've raised
13 that issue and laid out the arguments of - - - of how we
14 thought we were proceeding correctly at that time.

15 JUDGE RIVERA: So you're - - - so you're
16 suggesting if the court views Smith as an obstacle you
17 cannot overcome that since that motion's not decided it
18 should be remanded for a decision on that motion. Is that
19 what you're - - -

20 MR. SALISBURY: Well, I - - - I think clearly,
21 yes that the - - - the time period allows for the - the
22 party to go back and file the affidavit of errors. And
23 here clearly given the - - - the state of flux the law was
24 in at that time - - - and we would argue it was more a
25 procedural matter at that time, had not yet been determined



1 to be a jurisdictional defect, that, yes, the - - - the
2 appellant has to be allowed then to remand to file the
3 affidavit of errors - - -

4 JUDGE WILSON: In county court, did the People
5 object on the grounds that the affidavit of errors was
6 absent?

7 MR. SALISBURY: No, Your Honor. The - - - the
8 first time they've raised that objection is here at - - -
9 at this Court.

10 JUDGE FAHEY: Go ahead. Go ahead. Let's talk
11 about the First Amendment.

12 MR. SALISBURY: Okay.

13 JUDGE FAHEY: All right.

14 MR. SALISBURY: It - - - this order of protection
15 does implicate the First Amendment rights of - - - of the
16 appellant. The - the overly broad nature of the - - - the
17 vague nature of the case - - - of the order of protection,
18 rather, implicates when we look at - - - at the Supreme
19 Court in McCullen, in Schenck, in Madsen - - -

20 JUDGE FAHEY: Well, talk to us a little bit about
21 - - - about the order itself. Does the order identify a
22 victim?

23 MR. SALISBURY: Well, the - - -

24 JUDGE FAHEY: Because it refers to Colonel Evans.

25 MR. SALISBURY: The - - - it refers to Colonel



1 Evans, but I think we - - - we find the rationale for the
2 order of protection was Colonel Evans' supporting
3 deposition.

4 JUDGE FAHEY: Um-hmm.

5 MR. SALISBURY: And in that supporting
6 deposition, he doesn't seek an order to protect himself.
7 Indeed, he - - - he discusses the demonstrations that have
8 occurred, you know, at the base gates. And then he states
9 as the authorized representative of the base, I'm seeking
10 the order of protection to keep the demonstrators away from
11 the base.

12 JUDGE FAHEY: What - - - was there any
13 specificity in the order at all?

14 MR. SALISBURY: No. There was no - - -

15 JUDGE FAHEY: Have you compared the order to any
16 of the Supreme Court cases that - - - that have applied
17 similar situations where - - - particularly with abortion
18 rights protesters?

19 MR. SALISBURY: Right. I think you see there
20 that this - - - this order of protection would clearly fail
21 as being overbroad and - - - and vague on those grounds.
22 If you - - - if you look at Schenck - - -

23 JUDGE FAHEY: Um-hmm.

24 MR. SALISBURY: - - - there the - - - the court
25 overturned the floating buffer zone but it held up - - -



1 held the permanent buffer zone space of fifteen feet from -
2 - - from the driveway.

3 JUDGE FAHEY: Right. Right. But there - - - but
4 there was specificity in those cases.

5 MR. SALISBURY: Correct. Correct, Your Honor.
6 Now - - -

7 CHIEF JUDGE DIFIORE: So, counsel, the order of
8 protection directed Ms. Grady Flores from being - - - to
9 stay away from the property.

10 MR. SALISBURY: Right.

11 CHIEF JUDGE DIFIORE: She was arrested on the
12 driveway?

13 MR. SALISBURY: She was arrested on the shoulder
14 of the - - - of the roadway adjacent where the driveway
15 meets - - - meets the - - - well, I'm sorry. Let me
16 correct myself. She was not actually arrested there, Your
17 Honor. She was arrested some distance away - - -

18 CHIEF JUDGE DIFIORE: For being there.

19 MR. SALISBURY: - - - for being there, being on -
20 - - on the shoulder - - -

21 CHIEF JUDGE DIFIORE: Right.

22 MR. SALISBURY: - - - taking photographs, Your
23 Honor.

24 CHIEF JUDGE DIFIORE: So I thought that she - - -
25 that it was actually on the property of the base is my



1 point.

2 MR. SALISBURY: Well - - -

3 CHIEF JUDGE DIFIORE: There was an easement. I
4 know there's some discussion about the easement.

5 MR. SALISBURY: Right.

6 CHIEF JUDGE DIFIORE: My question to you is if
7 she was arrested on the property there does that limit your
8 First Amendment argument?

9 MR. SALISBURY: No.

10 CHIEF JUDGE DIFIORE: In terms of it being over
11 broad because the order directed her to stay away from the
12 property and she - - - if she was in fact arrested on the
13 property does that narrow the argument?

14 MR. SALISBURY: Not sufficiently, Your Honor. It
15 - - - and I think particularly here because of the
16 confusion over the - - - the base boundaries. And you see
17 the - - - the instructions of the trial court had given
18 definition - - - you know, such give some definition where
19 you see at - - - at - - - in the supplemental appendix I
20 believe on - - - in page 12 where the trial court agreed
21 with - - - with trial counsel that she had - - - at that
22 time had a definition of if she was in the roadway she was
23 adhering to the - the order. As the trial court gained
24 more information over the course of 2014, that definition
25 changed. You see at - - - at the end of the case.



1 JUDGE GARCIA: Counsel, I'm sorry. You're almost
2 out of time but a little bit differently, they have this
3 order of protection. In those cases, Schenck and some of
4 the others, you get the order, they appeal it as overly
5 broad, it goes up to the Supreme Court. Here she's accused
6 of violating it, right? Is - - - is there an obligation to
7 have challenged the order initially? I mean do we want
8 people who have order of protection, let's say it's an
9 assault and then you claim in the assault case hey, you
10 know, it was overly broad. Sorry, you know.

11 MR. SALISBURY: To answer your question, Your
12 Honor, she - - - the appellant did - - - did object. I
13 believe there is - - - there is enough material in this
14 record for you to make that valid inference. You see, for
15 instance, appellant went so far as to be one of a - - - of
16 a group who filed the - - - an Article 78 action from the
17 underlying case against the order of protection. When you
18 read the record here, you'll note that the - - - the
19 prosecution never raised an issue of lack of preservation
20 and even noted at trial that following arguments on the
21 motion in the court's decision, that matter was now
22 preserved - - - reserved for - - - for appellate argument.

23 JUDGE GARCIA: No. I understand the preservation
24 argument in - - - in this case. But my other concern I
25 guess it would be is can you really wait and challenge it,



1 or in this case you lose on a challenge and then you're
2 accused of violating the order and then you say, no, the
3 order isn't any good. I mean those cases like Schenck,
4 they - - - they appealed the order and said that it's
5 unconstitutional before they were arrested outside of the
6 clinic or wherever it was. This case you're arrested. You
7 already - - - you should have challenged the order before.

8 MR. SALISBURY: Well - - -

9 JUDGE GARCIA: Do we really want people coming in
10 and challenging protective orders and all after they
11 violated them or is that a challenge you should make
12 directly?

13 MR. SALISBURY: Well, I believe there was a
14 challenge made directly - - -

15 JUDGE GARCIA: Then why doesn't that bind us here
16 for a court hearing?

17 MR. SALISBURY: It was never - - -

18 JUDGE GARCIA: - - - if you lost.

19 MR. SALISBURY: - - - answered. I believe if you
20 look in the supplemental appendix at page 20 and then pages
21 24 and 25, you'll see at oral arguments and motions in this
22 case there was discussion on the fact that the trial court
23 had not yet decided the motions made on the October 2012
24 case. So there - - - there had been no decision.

25 JUDGE GARCIA: So it was pending?



1 MR. SALISBURY: It was pending.

2 JUDGE GARCIA: That's what we're talking about,
3 it was pending?

4 MR. SALISBURY: Pending.

5 JUDGE GARCIA: So there was no - - - no decision
6 on whether this was a valid order or not?

7 MR. SALISBURY: Correct.

8 JUDGE FAHEY: Since then, though, there - - -
9 there has been a decision on - - - on this, hasn't there,
10 on this type of order? I thought that Onondaga County had
11 dealt with another defendant in a similar situation.

12 MR. SALISBURY: That's correct. The Judge
13 Brunetti decision, a Supreme Court on - - - on exactly the
14 same type of order had determined that it was overly vague
15 and in- - - - invalid on - - - on many of the same grounds
16 that - - - that we're raising here.

17 JUDGE FAHEY: Yeah.

18 MR. SALISBURY: So it had - - - had been
19 addressed subsequently.

20 JUDGE FAHEY: Yeah. Well, Mr. Maxwell has
21 something to say about that.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 MR. SALISBURY: Yeah. Thank you, Your Honor.

24 CHIEF JUDGE DIFIORE: Counsel.

25 MR. MAXWELL: Good morning - - - or afternoon,



1 excuse me.

2 CHIEF JUDGE DIFIORE: Good afternoon, sir.

3 MR. MAXWELL: May it please the court. If I may,
4 I'd like to pick up on that last thread just - - - just to
5 start. In one of the amici briefs there was a reference to
6 Walker v. City of Birmingham, that's in 388 U.S. 307 that
7 talks about that challenging it. And here, it's hard to
8 piece together everything, but it seems to me that most or
9 all of the complaining about the order of protection
10 happened after - - - after this arrest, the October
11 issuance of the order followed by the February violation of
12 the order and then going to, in our case, Justice Gilbert
13 in an Article 78, and he denied it. So there was
14 conflicting Article 78s.

15 JUDGE FAHEY: Well, that's basically a
16 preservation argument, though. And it - - - it seems
17 pretty clear that they brought this up in the omnibus
18 motion, so it - - - it seems to be preserved. Now could it
19 have been done better? Sure. But - - -

20 MR. MAXWELL: Yeah.

21 JUDGE FAHEY: - - - you know, the - - - the more
22 interesting point - - - well, there's two things. First is
23 the point that Judge DiFiore brought up and Judge Wilson
24 also mentioned is the county court didn't rule on the
25 motion because the jurisdictional problem is - - - is a



1 stumbling block here I think for us to get into the
2 secondary analysis.

3 MR. MAXWELL: Yeah. On the - - - on the Smith
4 case, the analysis, I admit, I - - - I have been bothered
5 for years waiting for you to come out with that decision
6 because it always - - - every time we do a lower court
7 appeal we're scrambling. And getting the Smith decision
8 around the same time that we got the leave granted - - -

9 JUDGE FAHEY: It was the same day.

10 MR. MAXWELL: - - - was the - - - yes.

11 JUDGE FAHEY: The Smith decision came out on - -
12 - on the 23rd, I think, of June, and that was the same day
13 that I signed the CLA. Yeah.

14 MR. MAXWELL: And I brought it up in the brief
15 because at that point I thought I'd be foolish not to.

16 JUDGE WILSON: But - - - so that is the first
17 time you brought it up?

18 MR. MAXWELL: Yes.

19 JUDGE WILSON: You didn't bring it up in the
20 county court?

21 MR. MAXWELL: Not in - - - I don't think I
22 brought it up in this case. Other cases we talked about
23 it.

24 CHIEF JUDGE DIFIORE: Does a jurisdictional
25 effect require a pres- - - - you to bring it up in the



1 country court?

2 MR. MAXWELL: No. Of course not.

3 JUDGE FAHEY: No. The only question really is is
4 that apparently the defendant brought this issue up and it
5 wasn't ruled on.

6 MR. MAXWELL: I have - - - I have to be honest,
7 Judge. I don't remember.

8 JUDGE FAHEY: Oh, okay.

9 MR. MAXWELL: I - - - I - - -

10 JUDGE FAHEY: That's no problem. That's no
11 problem.

12 MR. MAXWELL: I can't help you with whether he
13 brought it up. I'm not - - -

14 CHIEF JUDGE DIFIORE: Mr. Maxwell, let me direct
15 you to the accusatory instrument in which it's alleged that
16 Ms. Grady Flores violated a dually issued order of
17 protection, whatever the language is. Did you attach - - -
18 was the order of protection attached to the accusatory
19 instrument? I'm struggling to find where it is that it's
20 alleged that an order of protection was actually in effect,
21 she knew about it. I don't see that anywhere.

22 MR. MAXWELL: Well, what I recall, Your Honor, is
23 that the order of protection was issued in October. Even
24 at trial she testified that she - - - she knew it was
25 issued - - -



1 CHIEF JUDGE DIFIORE: I'm talking about the
2 accusatory instrument and the sufficiency of that charging
3 instrument.

4 MR. MAXWELL: Again, I don't remember if we
5 physically attached it. I don't - - - I just don't see a
6 serious issue of lack of notice. She - - - the accusatory
7 instrument - - -

8 JUDGE FEINMAN: And I think the question is
9 really directed to the facial sufficiency of, you know,
10 Alejandro-type analysis.

11 CHIEF JUDGE DIFIORE: Um-hmm.

12 MR. MAXWELL: I - - -

13 JUDGE FEINMAN: Forgive me. I don't remember the
14 CPL section. It's 100-point-something.

15 MR. MAXWELL: 45, maybe. But I - - -

16 CHIEF JUDGE DIFIORE: 40.

17 JUDGE FEINMAN: 40.

18 CHIEF JUDGE DIFIORE: (1) (b).

19 MR. MAXWELL: I believe we issued a accusatory
20 instrument that clearly referenced the order, that the
21 order was - - - it's a routine stay away order using the
22 officer code administration form and stay away is the words
23 of the statute and - - - and the form. She was on notice.
24 The accusatory instrument charged her with - - - with both
25 crimes - - - or both - - - with the crime and the



1 violation. And it charged her with being in the driveway.
2 Sergeant Ramsey talked about her being in the area where
3 the - - - where the other group was, the - - - the people
4 were actually protesting that day on the north side of
5 Molloy Road. So that she was, again, in this mouth of the
6 driveway. When we talk about boundaries of - - - of the
7 base, I think that gets us off track because I think stay
8 away was appropriate here.

9 JUDGE STEIN: Yes. But if - - - if we apply
10 Madsen and Schenck and - - - and those cases, doesn't this
11 order burden speech more than necessary? I mean couldn't
12 it have been more limited to not blocking the entrance or
13 staying, you know, with - - - so many feet from the
14 entrance or not being disorderly? I don't know. I - - -
15 it just seems that this - - - this is about as broad as you
16 can get when it comes to - - - to First Amendment rights.

17 MR. MAXWELL: Well, I agree, Your Honor, that it
18 could have been worded any number of ways.

19 JUDGE FAHEY: But - - -

20 MR. MAXWELL: But - - -

21 JUDGE FAHEY: - - - Mr. Maxwell, it - - - it
22 sounds like a domestic violence order, not a First
23 Amendment speech order. I live about five blocks away from
24 the - - - the abortion clinic where the Schenck order came
25 out of and there were - - - I remember going to work every



1 day and there were lines on the street that had been
2 actually painted there to tell everybody where to stand so
3 the court could supervise the - - - the effect of the First
4 Amendment. And then when people violated those orders,
5 trespass charges were brought against them, appropriately
6 so. But that's not what we had here at all. We just had
7 kind of a standard domestic violence order which I wouldn't
8 want to undermine the jurisprudence there, but this is an
9 entirely different kind of situation.

10 MR. MAXWELL: But, Your Honor, I think what was
11 done here was reasonable, was fair, and the - - - the case
12 law - - - I'm looking at - - -

13 JUDGE FAHEY: Well, let me ask you this. And you
14 I've always found to be an intellectually honest advocate,
15 and I say that as a compliment because I recognize that, as
16 an advocate. But the question is - - - is how would you
17 know where you could protest the actions that are taking
18 place at the military base based upon this order of
19 protection? Where would I know to stand if I came by just
20 reading this order?

21 MR. MAXWELL: Well, Your Honor, you - - - I
22 believe you would know because you've been there before
23 when you got arrested the first time. You go to the - - -
24 to the same place, you know you're in violation of that
25 order.



1 JUDGE WILSON: Why does this order prevent the
2 defendant from sexually abusing or strangling Mr. Evans?

3 MR. MAXWELL: Well, we wouldn't want to encourage
4 that kind of thing. But - - -

5 JUDGE WILSON: Well, of course, but - - - but you
6 get my point which is - - -

7 MR. MAXWELL: It's a - it's a standard form.

8 JUDGE WILSON: Well, but it's a form where things
9 - - - I mean there was - - - it was deliberately filled out
10 to say to stay away from the school of Mr. Evans. Somebody
11 typed his name in the form there. I mean what I'm getting
12 at is that both the supporting deposition and the order,
13 which is an order of the court, show an extreme
14 carelessness, for lack of a better word. And, you know,
15 these orders ought to give people concrete ideas of what it
16 is they can't do and their ought to be a concrete reason
17 for why they can't do it, and it doesn't look to me like
18 that kind of care was exercised at all.

19 MR. MAXWELL: Well, Your Honor, this is something
20 that happens every day in our town courts. The judges get
21 a request for an order of protection, and I think the
22 interpretation from this court and, you know, the courts is
23 that that should be broadly construed to give protection to
24 - - -

25 JUDGE STEIN: But as - - - as Judge Fahey said,



1 most of these cases, these domestic violence cases, there's
2 been some act against a person, and it seems to me here
3 that the act is one of trespass. So who's the victim of a
4 trespass? Is - - - is it anybody who might be on that
5 property at any time?

6 MR. MAXWELL: Well, Your Honor, I - - -

7 JUDGE STEIN: I mean that's part of, you know, my
8 - - - my problem.

9 MR. MAXWELL: Yes. But Colonel - - - I think
10 Colonel Evans qualified as a witness and - - - and a
11 victim. He had an - - -

12 JUDGE STEIN: Well, but was he - - - was he - - -
13 did he see anything that happened here?

14 MR. MAXWELL: I'm not - - - I don't know from the
15 - - - from the first - - - from the October incident where
16 he was from the - - -

17 JUDGE STEIN: I thought he testified that he had
18 never seen her before.

19 MR. MAXWELL: He didn't recognize her.

20 JUDGE FEINMAN: He wasn't afraid.

21 MR. MAXWELL: Pardon me, Your Honor?

22 JUDGE FEINMAN: And I thought he also testified
23 he wasn't afraid.

24 MR. MAXWELL: Well, again, I don't believe you
25 should have a being afraid of test.



1 JUDGE RIVERA: Well, what is it that he knew? He
2 knew that there were protesters outside. Is that what you
3 mean?

4 MR. MAXWELL: Yes. And he's - - - and one of the
5 things he said, he's responsible for security of the base.

6 JUDGE RIVERA: Did - - - did he know where the
7 protesters were at any particular time, though?

8 MR. MAXWELL: He - - - when these protests happen
9 he gets notified, and the police respond.

10 JUDGE RIVERA: So for all he knows the protesters
11 are not on the property. They're across the road and
12 perhaps 100 yards down?

13 MR. MAXWELL: Well, once he's notified, he - - -
14 like when this incident, this February incident, he
15 monitored what was going on. And the problem as he saw it,
16 I think the record supports this, is security of the base
17 and blocking the access. He's not trying to limit
18 particular speech. He's not trying to avoid personal
19 criticism.

20 JUDGE RIVERA: Yeah. But the - - - but the
21 problem is that the order - - - I don't know about anything
22 he's got in his affidavit clarify for the person who's
23 subject to a judicial order and contempt and incarceration
24 and all the rest exactly where - - - where that demarcation
25 is, right? That's the point of the First Amendment, right?



1 So where am I overstepping my rights or where can I
2 exercise my rights without fear of police action? And I'm
3 not sure the record gives you that because, again, going
4 back to what several members of the bench have already
5 pointed out, you've got this form that doesn't appear to
6 have been intended for this particular type of peaceful,
7 political speech.

8 MR. MAXWELL: Well, but it does not go out of its
9 way or directed towards limiting speech. And just real
10 quick, as I'm running out of time, looking at McCullen v.
11 Coakley, the case out of Massachusetts, talked about: "The
12 government may impose reasonable restrictions on time,
13 place, or manner of - - - of protected speech where the
14 content of the speech isn't - - - isn't limited." And so I
15 - - - I think that supports our - - - our position, and I'd
16 ask you to not grant any relief.

17 CHIEF JUDGE DIFIORE: Thank you, sir.

18 Mr. Salisbury.

19 MR. SALISBURY: Thank you, Your Honor. A couple
20 of - - - of quick points. In - - - in terms of the issue
21 raised in terms of the qualifications of - - - of Colonel
22 Evans, I think it's important to note there's - - - there's
23 nothing in the record that - - - that suggests he was
24 present for the October 2012 incident, that he had - - -
25 was an actual witness to the - - - to the crime. And I



1 think he - - - he doesn't qualify, if you look at
2 Somerville and Creighton, under that - - - that standard.
3 Nor did he - - -

4 CHIEF JUDGE DIFIORE: Was that argument waived
5 when you consented or stipulated to the order, the validity
6 of the order in the trial court?

7 MR. SALISBURY: No, Your Honor. I believe if you
8 look at the record there, I think it's pages 64 and 65 and
9 then 71 and 72 of - - - of appellant's brief, you see it
10 was clear the intent on both parties was merely to
11 introduce the order of protection at trial. And in fact,
12 both parties stated that repeatedly on the record. We're -
13 - - in - - -

14 JUDGE STEIN: I understood that whole colloquy to
15 - - - to mean that you understood that the court had ruled
16 that it was a valid order and therefore it was not
17 something you could raise again in that proceeding.

18 MR. SALISBURY: Correct.

19 JUDGE STEIN: Is that - - - am I correct? Okay.

20 MR. SALISBURY: And - - - and the prosecutor even
21 raised that and the court agreed that - - - that for the -
22 - - you know, the case of the law at the trial level. That
23 was decided - - - that wasn't an issue for trial. That was
24 - - - and now - - -

25 JUDGE RIVERA: You - - - you had preserved your -



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MR. SALISBURY: Correct.

JUDGE RIVERA: - - - position with respect to the validity of the order.

MR. SALISBURY: Correct. We had raised that in our motions and then the motions had been - - - been denied, so it was - - - was preserved, Your Honor. In terms of the - - - Judge.

JUDGE RIVERA: Can I just ask you is your position that the form that's in use cannot be used at all or is your position that the form that's in use cannot be used at all or is your position that the form has to be somehow modified to match the facts of the situation presented to the judge? I just want to clarify that.

MR. SALISBURY: The - - - the form can be used but it should be modified, and what you increasingly see trial courts doing is providing specificity there what they mean by - - - by stay away. They'll provide definitions. So you see, for instance, in a - - - where the two parties are in high school together there - - - they may define you have to be ten feet away from each other in the hallway, or you have to be - - - I've seen forms where you have to be on the other side of the - - - the street.

JUDGE RIVERA: So what should the judge have written down on this form? If you're not challenging the



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use of the form, what - - - what should the judge have written on this form?

MR. SALISBURY: He should have - - - he should have provided some specificity. I think given the First Amendment implications here, we have the guidelines of - - - of Schenck and other cases to provide some specificity of - - - of what stay away means here. Because as - - - as Judge - - - I believe it was Judge Fahey raised the question if you just look at this order and show up, you don't know what you - - - you can do and - - - and comply.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. SALISBURY: Thank you, Your Honor.

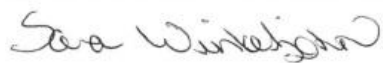
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Mary Anne Grady Flores, No. 114 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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