No. 124744

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Circuit Court of
	)	Cook County, Illinois
Plaintiff-Appellant,	)	
	)	
v.	)	No. 2018 CR 13629
	)	
MIGUEL DELEON,	)	The Honorable
	)	Arthur F. Hill, Jr.,
Defendant-Appellee.	)	Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

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ARGUMENT

I. The Pretrial Release Conditions Do Not Provide a Basis to Affirm the Circuit Court's Judgment Finding 725 ILCS 5/112A-11.5 Unconstitutional.

The People's opening brief explained that § 112A-11.5 is constitutional under either *Medina v. California*, 505 U.S. 437 (1992), or *Mathews v. Eldridge*, 424 U.S. 319 (1976), because, among other reasons, it does not deprive criminal defendants of any right that they cannot already be deprived of via pretrial release conditions. Indeed, like a no-contact order, the conditions of bond release in this case included that defendant not contact A.D. or visit her home, school, or workplace. Peo. Br. 11-12, 14-15; C171; R23.

Defendant agrees that the petition for protective order did not seek to deprive him of any rights beyond those already dictated by the release conditions, the constitutionality of which he does not challenge. Def. Br. 9-12. He argues that the circuit court was thus "wrong" when it held "that its finding of unconstitutionality was necessary to the decision or judgment rendered and the decision or judgment could not rest on an alternate ground." *Id.* at 13. Instead, defendant argues, the circuit court could and should have denied the petition because the victim had already obtained "every bit of concrete relief" sought in the protective order petition via the pretrial release conditions. *Id.* Defendant is incorrect.

A. If the circuit court erroneously resolved the constitutional issue, this Court should vacate its judgment.

If, as defendant argues, the circuit court could have resolved this case on the non-constitutional ground of "redundancy," then this Court should vacate the circuit court's judgment finding the statute unconstitutional. This Court has "admonished circuit courts that cases should be decided on nonconstitutional grounds whenever possible, reaching constitutional issues only as a last resort, . . . and only if necessary to decide the case." *Vasquez Gonzalez v. Union Health Serv., Inc.,* 2018 IL 123025, ¶ 19 (internal quotation marks omitted). One reason underlying this rule is that "[i]mprovident or unnecessary declarations that a statutory enactment is constitutionally infirm compromise the stability of our legal system." *Id.*

When "the procedures that must be followed and the standards that should be applied before a circuit court declares a statute unconstitutional" are "not followed," the judgment declaring the statute unconstitutional "must . . . be vacated." *Id.* ¶18. *See also People v. Jackson*, 2013 IL 113986, ¶ 14 (because case could be decided on a nonconstitutional ground, "we vacate the circuit court's order and remand the cause for further proceedings").

Thus, if this Court agrees with defendant that the circuit court's Rule 18(c)(4) statement was erroneous, and the case could have been resolved on non-constitutional grounds, it should vacate the circuit court's judgment finding § 112A-11.5 unconstitutional.

B. The circuit court had to enter the protective order even though it did not restrain defendant beyond the release conditions.

But defendant is incorrect to think that the circuit court could deny the § 112A-11.5 petition as redundant. Even though the release conditions already restrained defendant's rights, the circuit court could not decline to issue the protective order on that basis for two reasons: (1) issuing the protective order was mandatory, and (2) the protective order was not redundant because it provided additional benefits to the victim that the release conditions did not.

First, § 112A-11.5 conferred no discretion on the circuit court to deny the petition on the basis that its protections were redundant. The statutory language is mandatory: "the court *shall* grant the petition and enter a protective order if the court finds prima facie evidence that a crime involving . . . a sexual offense . . . has been committed." 725 ILCS 5/112A-11.5(a) (emphasis added). The necessary prima facie evidence was appended to the petition in the form of an indictment that charged a sexual offense. 725 ILCS 5/112A-11.5(a)(1). And defendant did not establish a meritorious defense by a preponderance of the evidence. *See* 725 ILCS 5/112A-11.5(a-5). Thus, the circuit court was obligated to issue the protective order.

Second, contrary to defendant's assertion, *see* Def. Br. 13, the protections conferred by the protective order and the pretrial release conditions order were not identical. As defendant concedes, any protective

order would have been entered into the Law Enforcement Automated Data System (LEADS), allowing officers at the scene of an alleged incident of abuse or violation of a protective order to verify the terms of the order. *See* 725 ILCS 5/112A-28; Def. Br. 17-18; *see also* Peo. Br. 4, 13. Defendant wonders if the bond conditions were or could have been entered into LEADS, Def. Br. 17-18, but LEADS is a restricted data sharing system for which only certain information may be entered by certified operators, *see* 20 ILCS 2605/2605-375; 20 Ill. Admin. Code §§ 1240.30-60, and nothing in the Bail Article, 725 ILCS 5/110-1, *et seq*., or elsewhere suggests that the bond conditions were or could have been entered into LEADS.

Further, the People's opening brief pointed out that protective orders have effect beyond Illinois's borders; thus, victims may enforce protective orders in other States, protecting them if they leave Illinois. Peo. Br. 4, 14. Defendant's Full Faith and Credit argument misses the point. *See* Def. Br. 17. A protective order must be "enforced by the court and law enforcement personnel of the other State . . . as if it were the order" of that State. 18 U.S.C. § 2265(a). But defendant cites to no comparable statute requiring another State to enforce Illinois's pretrial release conditions. A violation of pretrial release conditions may violate Illinois law, but enforcing the release conditions could be much more difficult than enforcing a protective order; for example, to enforce pretrial release conditions, one would first have to bring a

proceeding in an Illinois court to establish the violation, followed by extradition.

Moreover, contrary to defendant's argument, the People did not forfeit these arguments that a protective order confers benefits that the bond conditions do not. *See* Def. Br. 16-17 (contending the People waived "those points"). Defendant did not argue in the circuit court that the allegedly redundant bond conditions provided a basis to deny the petition, so the People had no reason to explain the advantages of protective orders over bond conditions. So defendant likely forfeited this argument by not raising it in the circuit court. *See People v. Cruz*, 2013 IL 113399, ¶ 20 ("Generally, an issue not raised in the trial court is forfeited on appeal."). Moreover, a "purpose of this Article [112A] is to protect the safety of victims of domestic violence, sexual assault, sexual abuse, and stalking," 725 ILCS 5/112A-1.5, and the People cannot forfeit an argument that a statute fulfills its stated purpose. While claims can be forfeited, parties do not forfeit every point not raised below, and defendant's precedent is not to the contrary. *See* Def. Br. 17 (citing *People v. Hughes*, 2015 IL 117242, ¶¶ 46-47 (discussing forfeiture of "claims"). And forfeiture, which limits the parties but not the Court, *see* Def. Br. 17, cannot trump the "duty to uphold the constitutionality of a statute whenever reasonably possible." *People v. Rizzo*, 2016 IL 118599, ¶ 23.

Finally, defendant does not dispute (or even address) the People's additional points that officers may make a warrantless arrest if there is

probable cause to believe that a defendant has violated a no-contact order, 725 ILCS 5/112A-26, or that a no-contact order can be enforced by a criminal court and in criminal contempt proceedings, *see* 725 ILCS 5/112A-23(a), (b); *see also* Peo. Br. 13-14. Thus, the pretrial release conditions provided no basis for the circuit court to deny the protective order petition, and the circuit court could not have denied the petition on the non-constitutional ground of "redundancy."

II. The Statute Is Constitutional.

While the circuit court correctly found that it could not avoid the constitutional question, it incorrectly held the statute unconstitutional. To rebut the strong presumption that § 112A-11.5 is constitutional, defendant must clearly establish that it violates the constitution. *See* Peo. Br. 5-6 (citing *People v. Pepitone*, 2018 IL 122034, ¶ 12; *Rizzo*, 2016 IL 118599, ¶ 23). And defendant's facial challenge, the most difficult to mount successfully, requires him to show that there is no set of circumstances under which the statute would be vailid. *See* Peo. Br. 6 (citing *In re M.A.*, 2015 IL 118049, ¶ 39).[1]

[1] Although defendant argues that the statute is unconstitutional both on its face and as applied, because he agrees that the requested protective order would not have restrained his rights beyond the bond conditions, which he does not challenge, § 112A-11.5 cannot be unconstitutional as applied to him because it did not "adversely affect defendant specifically." *Rizzo*, 2016 IL 118599, ¶ 25. Moreover, the circuit court could not have found § 112A-11.5 unconstitutional as applied to defendant because it neither held an evidentiary hearing nor made any findings of fact. *Id.* ¶¶ 25-26; *see also Vasquez Gonzalez,* 2018 IL 123025, ¶ 24.

A. Defendant raises a procedural due process claim, to which substantive due process tests are inapplicable.

Defendant falls well short of clearing this high hurdle. To begin, defendant mistakenly urges review under the strict scrutiny standard applicable to substantive due process challenges affecting fundamental rights. Def. Br. 21-24. But he did not raise a substantive due process claim in the circuit court, and he does not raise one here.

Defendant's claim alleges a procedural due process violation.[2] A "procedural due process claim asserts that the deprivation at issue is constitutionally invalid because the process leading up to it was deficient, whereas a substantive due process claim asserts that the deprivation at issue is constitutionality invalid in and of itself, irrespective of the process leading up to it." *People v. Cardona*, 2013 IL 114076, ¶ 17. Defendant does not argue that his right to contact the victim can never be restricted. To the contrary, he concedes that the pretrial release conditions imposed such a restriction and does not challenge them. *See* Def. Br. 22-24. And, in the circuit court, he argued that the statute violated due process because it provided "no opportunity to challenge" the indictment. C156. Thus, his argument was, and remains, one of procedural due process.

[2] Defendant has not argued before this Court that § 112A-11.5 violates his right against compelled self-incrimination or conflicts with the Civil No Contact Order Act, thereby forfeiting these additional bases relied on by the circuit court.

None of defendant's cited cases, *see* Def. Br. 20-21, suggests that the substantive due process tests apply to a procedural due process challenge. *See Pepitone,* 2018 IL 122034, ¶ 14 (applying rational basis test to substantive due process claim); *People v. Johnson*, 225 Ill. 2d 573, 584-85 (2007) (applying rational basis review to substantive due process challenge to amendment to sex offender registry statute); *In re R.C.*, 195 Ill. 2d 291, 299-303 (2001) (applying strict scrutiny to substantive due process challenge to Adoption Act but not to vagueness or procedural due process challenges); *Comm. for Educ. Rights v. Edgar*, 174 Ill. 2d 1, 37 (1996) (applying rational basis test to equal protection challenge to public school funding scheme); *People v. Shephard*, 152 Ill. 2d 489, 499-503 (1992) (applying rational basis test to equal protection challenge to drug possession penalty enhancement provision); *People v. Martin*, 119 Ill. 2d 453, 458-59 (1988) (plain error review appropriate for claim that trial court erred in considering improper aggravating factor).

In any event, even if it applied, defendant effectively concedes that § 112A-11.5 would withstand strict scrutiny. As discussed above, defendant does not object to the restrictions § 112A-11.5 places on a criminal defendant's liberty. *See supra* p. 1-2. Rather, he suggests that these same restrictions may be achieved via pretrial release conditions, meaning that § 112A-11.5 is "redundant" and "doesn't accomplish anything." Def. Br. 23-24, 26. But defendant cites no precedent upholding a substantive due process

challenge to a statute because it is redundant. Indeed, that § 112A-11.5 is able to provide additional protections to victims of sexual violence without imposing further restrictions on a criminal defendant's liberty interests demonstrates narrow tailoring. In short, defendant's reliance on cases addressing substantive due process challenges are not relevant here; moreover, if strict scrutiny applied to his claim (which it does not), § 112A-11.5 would survive such scrutiny.

B. Section 112A-11.5 does not violate procedural due process.

Properly analyzed as a procedural due process claim, defendant's claim fails. As explained in the People's opening brief, Peo. Br. 7-9, the United States Supreme Court has set forth two tests to analyze claims of procedural due process violations. First, in "matters of criminal procedure and the criminal process," a state procedure violates due process only if "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina*, 505 U.S. at 445 (internal quotation marks omitted). Second, deprivations of property, including those outside the criminal process, are analyzed under the *Mathews* balancing test, which was devised in the administrative hearing setting. *See Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017). Here, *Medina* applies because it "provides the appropriate framework for assessing the validity of state procedural rules that are part of the criminal process," including "the

allocation of burdens of proof." *Nelson*, 137 S. Ct. at 1255 (internal quotation marks and brackets omitted).

Defendant counters that these proceedings must be civil rather than criminal because the protective order entered when the indictment charges a sexual offense is called a "civil no contact order." Def. Br. 22; *see also* 725 ILCS 5/112A-2.5(2); 725 ILCS 5/112A-2.5(1), (3) (protective orders for domestic violence crimes are titled domestic violence orders; for stalking offenses, they are termed stalking no contact orders). But borrowing terminology from civil proceedings does not change the fact that proceedings under Article 112A are, in fact, part of the criminal process.

Article 112A is part of the Code of Criminal Procedure, falling under Title IV, Proceedings to Commence Prosecutions. The General Assembly created Article 112A proceedings so that protective orders would be "entered in conjunction with a delinquency petition or a criminal prosecution," 725 ILCS 5/112A-2.5, and allow victims to avoid the "trauma and inconvenience associated with attending separate and multiple civil court proceedings to obtain protective orders," 725 ILCS 5/112A-1.5. An Article 112A petition is filed by the State's Attorney or the named victim. 725 ILCS 5/112A-4.5(b). The request for a protective order is heard "at any court proceeding in the delinquency or criminal case after service of the petition," which "may be served by delivery to the respondent personally in open court in the criminal or juvenile delinquency proceeding." 725 ILCS 5/112A-5.5(c), (f).

Because Article 112A is a state procedural rule that is a part of the criminal process, *Medina* supplies the applicable test. And defendant's claim fails under *Medina* because using a grand jury's probable cause determination to restrict a defendant's rights does not offend a fundamental principle of justice; on the contrary, it embodies one. *See* Peo. Br. 9-12. Longstanding precedent establishes that an indictment "'conclusively determines the existence of probable cause' to believe the defendant perpetrated the offense alleged." *Kaley v. United States*, 571 U.S. 320, 329 (2014) (quoting *Gerstein v. Pugh*, 420 U.S. 117, n.19 (1975)). Not only does the indictment establish probable cause to commence a criminal proceeding, it "may also serve the purpose of immediately depriving the accused of her freedom." *Id.* Because indictments have long provided a sufficient basis to arrest, restrain, and try defendants, and to freeze their assets, it follows that they likewise have long provided a sufficient basis upon which to restrain a defendant's ability to contact the alleged victim of his crime. *See* Peo. Br. 11-12. Thus, defendant cannot show that the statute "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina*, 505 U.S. at 445.

Even if *Medina* did not supply the applicable test, defendant's due process claim would also fail under *Mathews*, which makes clear that "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333;

see also Peo. Br. 12-19. *Mathews* set forth three factors to help evaluate due process claims: (1) the government's interest and the burdens a requested procedure would impose on the government; (2) the private interest at stake; and (3) the risk of an erroneous deprivation of that interest without the procedure, and the probable value, if any, of the additional safeguard. *Id*. at 335.

As to the first *Mathews* factor, the opening brief demonstrated that the government has a substantial interest in protecting a victim of sexual abuse pending trial without requiring the victim to testify in a mini-trial. Peo. Br. 13-14. As discussed above, *see supra* p. 3-6, the State may logically prefer the protections offered by a no-contact order over bond release conditions. Additionally, the State has a substantial interest in limiting the anxiety and discomfort that would likely result if the victim were required to testify multiple times in front of the accused abuser. *See* 725 ILCS 5/112A-1.5. Meanwhile, the hearing contemplated by the circuit court, where the victim would testify and be subject to cross-examination, also would require the government to preview its theory and supporting evidence before trial, which could undermine its ability to obtain a conviction. *See Kaley*, 571 U.S. at 335 (rejecting due process claim that would have required hearing to challenge indictment before defendant's assets are frozen).

As to the second factor, the private interest at stake, defendant has conceded that the protective order may impose no restraint against contact

with the victim beyond that already imposed as a standard pretrial bond condition, which was the case here. *See supra* p. 1-2; Def. Br. 9-13. Accordingly, this factor is entitled to little or no weight.

And as to the third factor — the risk of an erroneous deprivation of that interest without the procedure and the probable value, if any, of the additional safeguard — the pretrial deprivation of an "interest is *erroneous* only when unsupported by a finding of probable cause." *Kaley*, 571 U.S. at 337 (emphasis in original). The third prong, then, "boils down to" whether requiring the victim to testify and be subject to cross-examination will uncover "mistaken grand jury findings of probable cause." *Id.* at 338 (internal quotation marks omitted). It will not. Because probable cause "requires only the kind of fair probability on which reasonable and prudent people, not legal technicians, act," cross-examining the victim would "provide little benefit." *Id.* (internal quotation marks and brackets omitted); *see also* Peo. Br. 15-16.

Moreover, defendants have multiple meaningful opportunities to be heard, including the right to assert a defense and present supporting evidence at a hearing under § 5/112A-11.5(a-5). And because the no-contact order remains in effect only "until disposition, withdrawal, or dismissal of the underlying charge," 725 ILCS 5/112A-20(b)(1), defendants can move to dismiss an indictment, including on the basis that the grand jury was improperly selected or acted contrary to its duties under Article 112. 725

ILCS 5/114-1(a)(4), (5). Defendants also have the right to proceed to trial where they can present evidence and require the State to prove their guilt beyond a reasonable doubt with all of the safeguards of a criminal trial. And as to the potential length of the deprivation, a defendant can demand a speedy trial. 725 ILCS 5/103-5 (State must bring defendant to trial within 120 days if defendant in custody; 160 days if defendant on bail or recognizance). In sum, the government's substantial interest in protecting a victim of sexual abuse far outweighs the defendant's interest in liberty rights that may already be restrained, especially considering that the proposed procedure would do little if anything to further protect those rights.

Thus, applying *Mathews*, other jurisdictions have rejected due process challenges to similar statutes. *See* Peo. Br. 17-18. The Washington Supreme Court applied *Mathews* to reject a due process challenge to a protective order statute that did not allow cross-examination of the minor victim. *Aiken v. Aiken*, 387 P.3d 680, 687-88 (Wash. 2017); *see also id.* at 688 (cross-examination could be used to intimidate). The Minnesota Supreme Court rejected a due process challenge to a similar statute, explaining that the fact that the no-contact-order hearing immediately follows a pretrial release hearing "ensures that a defendant receives the notice and opportunity to be heard afforded by a pretrial-release hearing *before* a court imposes a domestic abuse no contact order." *State v. Ness*, 834 N.W.2d 177, 183 (Minn. 2013) (emphasis in original).

In short, requiring victims to testify is likely to further traumatize them and unlikely to remedy any potentially erroneous probable cause determinations. Meanwhile, Article 112A furthers powerful governmental interests in protecting victims without restricting defendants' liberty interests beyond restrictions imposed by standard pretrial release conditions. Because defendant's due process challenge is meritless, and because he does not even purport to defend any of the other bases for the circuit court's finding of non-constitutionality, this Court should reverse the circuit court's judgment.

CONCLUSION

This Court should reverse the judgment of the circuit court.

February 18, 2020

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is fifteen pages.

/s/ Eldad Z. Malamuth
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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 18, 2020, the foregoing **Reply Brief of Plaintiff-Appellant People of the State of Illinois** was at the same time (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my e-mail address to the e-mail addresses of the persons named below:

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Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail thirteen copies of the Brief and Appendix to the Clerk of the Supreme Court of Illinois, Supreme Court Building, 200 East Capitol Avenue, Springfield, Illinois 62701.

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