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,	)	No. 2018 CR 13629
	)	
v.	)	
	)	
MIGUEL DELEON,	)	The Honorable
	)	Arthur F. Hill, Jr.,
Defendant-Appellee.	)	Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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NATURE OF THE CASE

Defendant was charged with four counts of criminal sexual assault. Pursuant to 725 ILCS 5/112A-11.5, the People petitioned for a no-contact order on behalf of the victim, A.D. The circuit court denied the petition, finding the statute facially unconstitutional. The People appeal from that judgment.

No question is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether it violates due process to issue a no-contact order that restrains a defendant indicted for a sexual offense from contacting the victim.

2. Whether it violates the right against compelled self-incrimination to permit, but not require, a defendant during no-contact order proceedings to present evidence of a meritorious defense.

3. Whether 725 ILCS 5/112A-11.5 is unconstitutional because its burden of persuasion differs from separate civil proceedings authorizing no-contact orders.

JURISDICTION

Jurisdiction lies under Supreme Court Rule 603. The circuit court entered its judgment on March 7, 2019; the People filed a notice of appeal on April 4, 2019 and a corrected notice of appeal on Monday, April 8, 2019. *See* 5 ILCS 70/1.11 (if last days falls on weekend, it is excluded from time computation).

STATUTE INVOLVED

725 ILCS 5/112A-11.5

(a) Except as provided in subsection (a-5) of this Section, the court shall grant the petition and enter a protective order if the court finds prima facie evidence that a crime involving domestic violence, a sexual offense, or a crime involving stalking has been committed. The following shall be considered prima facie evidence of the crime:

> (1) an information, complaint, indictment, or delinquency petition, charging a crime of domestic violence, a sexual offense, or stalking or charging an attempt to commit a crime of domestic violence, a sexual offense, or stalking;
>
> * * *
>
> (4) the entry of a protective order in a separate civil case brought by the petitioner against the respondent.

(a-5) The respondent may rebut prima facie evidence of the crime under paragraph (1) of subsection (a) of this Section by presenting evidence of a meritorious defense. The respondent shall file a written notice alleging a meritorious defense which shall be verified and supported by affidavit. The verified notice and affidavit shall set forth the evidence that will be presented at a hearing. If the court finds that the evidence presented at the hearing establishes a meritorious defense by a preponderance of the evidence, the court may decide not to issue a protective order.

* * *

(d) If the court issues a final protective order under this Section, the court shall afford the petitioner and respondent an opportunity to be heard on the remedies requested in the petition.

STATEMENT OF FACTS

Defendant was charged by indictment with (1) criminal sexual assault by inserting his finger into A.D.'s sex organ by use of force or threat of force, 720 ILCS 5/11-1.20(a)(1), C11, C16; (2) criminal sexual assault by using his mouth to contact A.D.'s sex organ by the use of force or threat of force, 720 ILCS 5/11-1.20(a)(1), C12, C17; (3) criminal sexual assault by inserting his finger into A.D.'s sex organ, knowing that A.D. was unable to give knowing consent, 720 ILCS 5/11-1.20(a)(2), C13, C18; and (4) criminal sexual assault by using his mouth to contact A.D.'s sex organ, knowing that A.D. was unable to give knowing consent, 720 ILCS 5/11-1.20(a)(2), C14, C19. The conditions of bond release included that defendant not contact A.D. or visit her home, school, or workplace. C81, 171; R23.

Pursuant to 725 ILCS 5/112A-11.5, the Cook County State's Attorney filed a petition for a plenary civil no-contact order directing defendant to refrain from (i) contacting A.D., (ii) harassing or stalking her, and (iii) entering her place of employment. C41-42. A.D.'s counsel also filed a memorandum of law in support of the petition. C47-51. Defendant filed a memorandum opposing the no-contact order, arguing that § 112A-11.5 was unconstitutional, C53-57; C63-66; C155-58, and the People responded in support of § 112A-11.5, C67-76; C159-68.

The circuit court denied the petition and found § 112A-11.5 unconstitutional, holding that it (1) violated due process by allowing a

protective order to issue based on an indictment without testimony from the victim; (2) violated defendant's right against self-incrimination by requiring him to present a meritorious defense to rebut the indictment; and (3) shifted the burden to defendant, in conflict with 740 ILCS 22/204 and 22/215.5. C79-80, 172-73.

STANDARD OF REVIEW

This Court reviews matters of law, such as the constitutionality of a statute, de novo. *People v. Rizzo*, 2016 IL 118599, ¶ 23.

ARGUMENT

A tenet of our legal system is that a criminal indictment permits certain restraints on a defendant's rights. One such restraint imposed in sexual abuse cases precludes the accused from contacting the alleged victim of his offenses. Traditionally, this restraint is imposed as a condition of pretrial bond release. Article 112A of the Criminal Code also permits restraint via a no-contact order, which has advantages for the victim, including entry in the Law Enforcement Automated Data System (LEADS) and entitlement to full faith and credit in other States. The circuit court incorrectly determined that this provision was unconstitutional.

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 v. California*, 505 U.S. 437, 445 (1992) (internal

quotation marks omitted). Restraining a defendant charged with sexual abuse from contacting his alleged victim until the case is resolved does not offend fundamental principles of justice; on the contrary, it *is* a fundamental principle of justice. Moreover, defendant's due process claim would also fail under the test applicable to property deprivations outside the criminal process because it provides him the opportunity to be heard at a meaningful time in a meaningful manner.

Second, offering defendant the opportunity during no-contact order hearings to rebut the indictment with evidence of a meritorious defense does not violate his right against self-incrimination, for defendant is not compelled to testify or produce evidence.

Finally, nothing in Article 112A conflicts with the Civil No Contact Order Act because the former governs procedures following criminal charges while the latter governs civil proceedings independent of the criminal process. And even if the statutes conflicted, that conflict would not render one of the provisions unconstitutional. Instead, this Court would simply apply the more specific, recent statute. Accordingly, the circuit court incorrectly found § 112A-11.5 unconstitutional.

I. A Party Raising a Facial Constitutional Challenge Carries a Heavy Burden.

"As this court has *often* emphasized, 'Constitutional challenges carry the heavy burden of successfully rebutting the strong judicial presumption that statutes are constitutional.'" *People v. Rizzo*, 2016 IL 118599, ¶ 23

(emphasis in original) (quoting *People v. Patterson*, 2014 IL 115102, ¶ 90). "To rebut the presumption, a party challenging a statute must establish clearly that it violates the constitution." *People v. Pepitone*, 2018 IL 122034, ¶ 12.

"A statute is facially invalid only if there is no set of circumstances under which the statute would be valid." *In re M.A.*, 2015 IL 118049, ¶ 39; *see also Rizzo*, 2016 IL 118599, ¶ 45 ("If any state of facts can reasonably be conceived of to justify the enactment, it must be upheld."). And "this court will uphold statutes whenever reasonably possible, resolving all doubts in favor of their validity." *Pepitone*, 2018 IL 122034, ¶ 12. "Consequently, a facial challenge to the constitutionality of a legislative enactment is the most difficult challenge to mount successfully." *M.A.*, 2015 IL 118049, ¶ 39.

II. The Statute Provides Notice to Defendant and Opportunity to Rebut the Indictment.

Article 112A provides the only means for victims of domestic violence, sexual abuse, or stalking to obtain protective orders as part of the criminal process. This process is distinct from independent civil proceedings that victims may seek regardless of whether criminal charges are filed. *See* 740 ILCS 21/80 (stalking no-contact order); 740 ILCS 22/204 (civil no-contact orders for victims of sexual abuse); 750 ILCS 60/201 (orders of protection for victims of domestic violence).

Under Article 112A, the circuit court must grant "a protective order if the court finds prima facie evidence" that the defendant committed "a crime

involving domestic violence, a sexual offense, or a crime involving stalking." 725 ILCS 5/112A-11.5(a). The statute explains that prima facie evidence includes an indictment charging a qualifying crime or an attempt to commit a qualifying crime. 725 ILCS 5/112A-11.5(a)(1).

The victim or State's Attorney may petition for a protective order any time after the charge is filed and a summons is issued. 725 ILCS 5/112A-5.5(a), (c). The circuit court may consider the petition at any proceeding in the criminal case so long as defendant receives at least ten days notice. 725 ILCS 5/112A-5.5(f).

The defendant "may rebut prima facie evidence of the crime" by filing "a written notice alleging a meritorious defense which shall be verified and supported by affidavit" and establishing that defense by a preponderance of the evidence. 725 ILCS 5/112A-11.5(a-5). The circuit court has discretion with respect to remedies and must consider the balance of hardships before granting such remedies as exclusive possession of a jointly possessed household or ordering a defendant not to attend a public school. 725 ILCS 5/112A-14, 725 ILCS 5/112A-14.5.

III. Using the Indictment as Prima Facie Evidence, Rather Than Requiring the Victim to Testify, Does Not Violate Due Process.

The Fourteenth Amendment prohibits a State from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. The Supreme Court of the United States has set forth two tests to analyze claims of 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). This principle applies to regulation of "'the burden of producing evidence and the burden of persuasion.'" *Id.* (quoting *Patterson v. New York*, 432 U.S. 197, 201 (1977)). Second, deprivations of property, including those outside the criminal process, are analyzed under the balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), 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); *see also id.* (*Medina* stops applying "after a conviction has been reversed or vacated, with no prospect of reprosecution," "[b]ecause no further criminal prosecution is implicated"). The statute at issue here is part of the Code of Criminal Procedure under Title IV, Proceedings to Commence Prosecutions. The General Assembly created Article 112A proceedings so that protective orders would issue as part of the criminal process, allowing 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.

Thus, protective orders are "entered in conjunction with a delinquency petition or a criminal prosecution," 25 ILCS 5/112A-2.5, making *Medina* applicable.

How the statute operates also calls for application of *Medina*. An Article 112A petition is filed by the State's Attorney prosecuting the crime or the named victim. 725 ILCS 5/112A-4.5(b); *see also* 725 ILCS 5/112A-3(a) ("Named victim means the person named as the victim in the delinquency petition or criminal prosecution."). 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). And, if issued, the protective order restrains the same rights already controlled by pretrial bond conditions. *See infra* pp. 11-12. Because Article 112A is a state procedural rule that is a part of the criminal process, *Medina* supplies the applicable due process test.

A. Using the indictment to restrain rights while a criminal case is pending offends no fundamental principle of justice.

The statute at issue here offends no fundamental principle of the justice system; on the contrary, it embodies fundamental principles of justice. The circuit court determined that § 112A-11.5(a)(1) violates a criminal defendant's due process rights because it "allows the State to make a prima facie case for the issuance of a protective order by merely producing a copy of

the indictment, without requiring the complaining witness to testify and be subject to cross examination." C172 (capitalization altered). But longstanding precedent establishes that the grand jury's probable cause determination provides sufficient basis to restrict a defendant's rights, including by prohibiting him from contacting his victim.

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)). "The grand jury gets to say — without any review, oversight, or second-guessing — whether probable cause exists to think that a person committed a crime." *Id.* at 328. Thus, an indictment "is enough to call for trial of the charge on the merits." *Costello v. United States*, 350 U.S. 359, 363 (1956).

The conclusive effect of an indictment is not only time-honored, it is also sensible. The existence of probable cause to believe that a person committed a crime "can be determined reliably without an adversary hearing." *Gerstein*, 420 U.S. at 120. Ascertaining whether probable cause exists "does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt." *Id.* at 121-22.

Moreover, 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." *Kaley*, 571 U.S. at 329. "If the person charged is not yet in custody, an indictment triggers 'issuance of an arrest warrant without further inquiry' into the case's strength." *Id.* at 329 (quoting *Gerstein*, 420 U.S. at 117 n.19). The indictment also provides a basis for a pretrial restraining order freezing a defendant's forfeitable assets, even if the defendant wishes to use those funds to hire private counsel for his defense. *Kaley*, 571 U.S. at 341. This is true despite the fact that the defendant is not entitled to a hearing to challenge the grand jury's finding of probable cause. *Id.* An indictment affects the defendant's privacy and liberty interests in a variety of other ways, including permitting the government to obtain a buccal swab and analyze the defendant's DNA. *See Maryland v. King*, 569 U.S. 435, 465-66 (2013).

Because indictments have long been recognized as sufficient to arrest defendants, restrain and try them, and freeze their assets, it follows that they likewise have long provided a sufficient basis upon which to restrain their ability to contact the alleged victim of their crime. *See United States v. Monsanto*, 491 U.S. 600, 615-16 (1989) ("Indeed, it would be odd to conclude that the Government may not restrain property, such as the home and apartment in respondent's possession, based on a finding of probable cause, when we have held that (under appropriate circumstances), the Government

may restrain *persons* where there is a finding of probable cause to believe that the accused has committed a serious offense."). Indeed, it is standard to condition a criminal defendant's release on bond on him not contacting his victim or going to her residence. *See* 725 ILCS 5/110-10(b)(3)-(4) (conditioning release on defendant refraining from approaching or communicating with certain persons or going to certain locations or premises); *see also* 725 ILCS 5/110-10(d) (when "victim is a family or household member as defined in Article 112A, conditions shall be imposed" that "shall include requirements that the defendant . . . (2) refrain from entering or remaining at the victim's residence for a minimum period of 72 hours following the defendant's release").

Thus, § 112A-11.5 deprives criminal defendants of no right that they cannot already be deprived of based solely on the issuance of the indictment. Indeed, the conditions of bond release here, which defendant does not challenge, included that he not contact A.D. or visit her home, school, or workplace. C171; R23. In short, restraining criminal defendants based on indictments does not offend a fundamental principle of justice; it is one.

B. Article 112A provides an opportunity to be heard at a meaningful time and in a meaningful manner.

Defendant's due process claim would also fail under *Mathews*. "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. The "possible length of wrongful deprivation" of the right also "is an

important factor in assessing the impact of official action on the private interests." *Id.* at 341 (internal quotation marks omitted); *see also id.* at 341-343 (average delay of time until hearing to cut off disability benefits exceeding one year was not reason to depart from ordinary principle that something less than evidentiary hearing is sufficient prior to adverse administrative action). *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. 424 U.S. at 335.

These three factors demonstrate that § 112A-11.5 is consistent with due process. The circuit court faulted the statute for allowing a no-contact order to issue "without requiring the Complaining witness to testify and be subject to cross examination." C172. But the government has a substantial interest in both protecting victims of sexual abuse pending trial, and doing so without requiring the victim to testify in a mini-trial.

The State may logically prefer the protections of a no-contact order over bond release conditions. The no-contact order is entered in 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. Officers may make an arrest without a warrant if there is probable cause to

believe a defendant has violated a no-contact order. 725 ILCS 5/112A-26. The no-contact order can be enforced by a criminal court and in criminal contempt proceedings. *See* 725 ILCS 5/112A-23(a), (b). The no-contact order also would be entitled to enforcement in other states, protecting victims if they leave Illinois.

Additionally, the State has a substantial interest in limiting the victim's anxiety and discomfort that would likely result from testifying multiple times in front of the accused abuser. Indeed, Article 112A's stated purpose is to "protect the safety of victims . . . and to minimize the trauma and inconvenience associated with attending separate and multiple civil court proceedings to obtain protective orders." 725 ILCS 5/112A-1.5.

Meanwhile, the hearing contemplated by the circuit court 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 requiring hearing to challenge indictment before defendant's assets are frozen). The hearing would also consume significant prosecutorial time and resources. *See id.* at 335.

As to the second factor, the private interest at stake, a defendant has no significant interest in associating with someone he has been charged with abusing and who has no interest in associating with him. Moreover, the no-contact order imposes no restraint against contact with the victim beyond that already imposed as a standard pretrial bond condition. *See supra* pp. 11-

12. Here, where the conditions of defendant's release on bond precluded him from contacting A.D. or visiting her home, school, or workplace, C171; R23, the protective order deprived defendant of no additional private right or interest.

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 United States Supreme Court has held that 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). In other words, even if a criminal defendant is found not guilty following trial, no error results from his pretrial restraint so long as there was probable cause. 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." *Kaley*, 571 U.S. at 338 (internal quotation marks omitted).

Due to the nature of probable cause determinations, requiring the victim to testify and be cross-examined would "provide little benefit." *Id.* As the Supreme Court has "often told litigants," probable cause "requires only the kind of fair probability on which reasonable and prudent people, not legal technicians, act." *Kaley*, 571 U.S. at 338 (internal quotation marks and brackets omitted); *see also Gerstein*, 420 U.S. at 120-22 (probable cause "can be determined reliably without an adversary hearing" where "credibility

determinations are seldom crucial"). That is why grand jury determinations can be made without an adversary hearing, without cross-examination of witnesses, and without presentation of exculpatory evidence. *Id.* at 338-39. The value of these additional safeguards in determining probable cause would "'be too slight.'" *Id.* at 339 (quoting *Gerstein*, 420 U.S. at 122).

And defendants have multiple meaningful opportunities to be heard at meaningful times. A criminal defendant has the right to assert a defense and present supporting evidence at a hearing under § 5/112A-11.5(a-5). Moreover, as to the potential length of the deprivation, the no-contact order remains in effect only "until disposition, withdrawal, or dismissal of the underlying charge." 725 ILCS 5/112A-20(b)(1).

Article 112A proceedings are thus contingent on the criminal charges, which defendants can challenge. 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). And defendants have the right to proceed to trial where they can present evidence and require the State to prove guilt beyond a reasonable doubt with all of the safeguards of a criminal trial. A defendant can insist on trial within 120 days if in custody or 160 days if on bail or recognizance. 725 ILCS 5/103-5. Thus, defendants can take action to ensure that the deprivation lasts no longer than four or five months, significantly shorter than the delay of over a year in *Mathews*. *See* 424 U.S. at 431-32.

In short, if there is probable cause to believe that defendant committed criminal sexual assault, then there are powerful governmental interests in protecting the victim's desire that defendant have no contact with her, and in doing so without a mini-trial preview of the government's case that would take up resources, threaten the ability to secure convictions, and further traumatize the victims. Meanwhile, the probable cause determination will not be assisted by requiring the victim to testify and face cross-examination. And defendants have multiple meaningful opportunities to challenge the protective order and the underlying criminal charges.

Following this reasoning, other jurisdictions have rejected due process challenges to similar statutes. 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 and cause fearful responses); *Gourley v. Gourley*, 145 P.3d 1185, 1189 (Wash. 2006) (no due process violation in protective order hearing despite neither live testimony from, nor cross-examination of, minor abuse victim). The statute protected the opportunity to be heard in a meaningful manner at a meaningful time by requiring the filing of a petition supported by affidavit, notice to defendant, a hearing before a judicial officer where the parties had the opportunity to testify if they so chose, a written order, and a one-year limitation on the order. *Aiken*, 145 P.3d at 687; *see also Gourley*,

145 P.3d at 1188 (protective order was only temporary as it lasted for one year and was subject to orders in dissolution action).

Similarly, the Minnesota Supreme Court rejected a due process challenge to a statute providing that a "domestic abuse no contact order may be issued as a pretrial order before final disposition of the underlying criminal case" "in a proceeding that is separate from but held immediately following a proceeding in which any pretrial release . . . issues are decided." Minn. Stat. Ann. § 629.75(b), (c). In *State v. Ness*, 834 N.W.2d 177 (Minn. 2013), the court explained 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." *Id.* at 183 (emphasis in original). That hearing, where a defendant has counsel, allows the defendant to address the appropriateness of the particular liberty restriction involved. *Id.* And since the protective order issues after the pretrial release hearing, this procedure ensures "that there is probable cause to believe that the defendant has committed one of the enumerated offenses." *Id.* at 185; *see also* Utah Code Ann. § 77-36-2.7(3) (protective order may issue when defendant charged with crime involving domestic violence); Iowa Code § 664A.3 (no-contact order shall enter when defendant is charged with domestic violence or sexual abuse and court finds defendant poses threat to

victim's safety). For similar reasons, this Court should reject defendant's due process challenge.

IV. Providing Defendant an Opportunity to Rebut Prima Facie Evidence Does Not Violate His Right Against Compelled Self-Incrimination.

The circuit court also found that § 112A-11.5(a-5) violates a defendant's Fifth Amendment right against compelled self-incrimination because it "requires the Defendant to present evidence of a Meritorious Defense to rebut the Prima Facie evidence." C172. This is incorrect.

Nothing "requires" the criminal defendant to present evidence of a meritorious defense. Instead, the indictment establishes a prima facie showing sufficient for a no-contact order to issue, and the defendant may then rebut that prima facie showing if he or she chooses. This sort of burden-shifting procedure — when one party makes a prima facie showing, the burden shifts to the opposing party to rebut that showing — is found throughout the criminal law. *See*, *e.g.*, *People v. Wear*, 229 Ill. 2d 545, 559-60 (2008) ("If the driver establishes a *prima facie* case for rescission, the burden shifts to the State to come forward with evidence justifying the suspension."); 720 ILCS 5/6-2(e) (once People establish elements of crime, burden is on defendant to prove insanity by clear and convincing evidence); 720 ILCS 5/9-2(c) (in second degree murder, once State establishes elements of first degree murder, defendant must prove mitigating factor by preponderance of evidence); 725 ILCS 5/115-15(a) (in criminal prosecution for controlled

substances, signed and sworn laboratory report is prima facie evidence of contents). If it is permissible to issue a protective order based on an indictment (and it is, *see* Section I, *supra*), shifting the burden after such a prima facie showing is standard, and permissible, legal procedure.

Further, defendant's concern that his testimony, if he chooses to provide any, at an Article 112A hearing could be used at trial, *see* C55, does not raise legitimate self-incrimination concerns. Such choices already exist in the hearings governing pretrial restraints, namely the bond hearing. *See People v. Atencia*, 113 Ill. App. 3d 247, 253 (1st Dist. 1983) (use of defendant's testimony at bail reduction hearing at trial does not violate right against compelled self-incrimination). Similarly, courts have confirmed that it is permissible to put defendants in civil protective order proceedings to the choice between testifying and the risk of suffering negative inferences from refusing to do so. *See J.M. v. Briseno*, 2011 IL App (1st) 091073, ¶ 45; *People v. Houar*, 365 Ill. App. 3d 682, 690 (2d Dist. 2006) (not improper to draw negative inference from failure to testify during protective order proceeding). Thus, a defendant may face a similar decision whether to testify or produce other evidence in a hearing under the Civil No Contact Order Act. *See also* 740 ILCS 22/213 (respondent bears burdens of production and persuasion regarding unavailability or cost of school alternatives in remedy phase).

And even if admitting testimony from the no-contact hearing at trial raised legitimate self-incrimination concerns, this Court would interpret

§ 112A-11.5 to prohibit the use of any compelled testimony in the prosecution's case in chief. *See Pepitone*, 2018 IL 122034, ¶ 12 ("this court will uphold statutes whenever reasonably possible, resolving all doubts in favor of their validity"). This is already the case for a defendant's testimony in support of a pretrial motion to suppress. *See Simmons v. United States*, 390 U.S. 377, 394 (1968). True, the statements would be allowed for impeachment purposes should defendant choose to testify. *People v. Sturgis*, 58 Ill.2d 211, 216 (1974) (suppression hearing testimony can be used for impeachment). But this is because the right against compelled self-incrimination "cannot be construed to include the right to commit perjury." *Harris v. New York*, 401 U.S. 222, 225-26 (1971).

In short, defendant need not present any evidence, so permitting him to do so does not violate his right against compelled self-incrimination.

V. Article 112A Does Not Conflict With the Civil No Contact Order Act and Would Not Be Unconstitutional If It Did.

The circuit court further held that subsections 112A-11.5(a)(1) and (a-5) are unconstitutional because they conflict with sections 22/204 and 22/215.5 of the Civil No Contact Order (CNCO) Act. *See* 740 ILCS 22/204 and 22/215.5. True, the statutes set forth different procedures. The CNCO Act provides that "[a]ny proceeding to obtain . . . a civil no contact order shall be governed by the rules of civil procedure of this State. The standard of proof in such a proceeding is by a preponderance of the evidence." 740 ILCS 22/204(a); *see also* 740 ILCS 22/215.5 (contemplating testimony by

petitioner). Meanwhile, § 112A-11.5(a) allows an indictment, supported by probable cause, to serve as prima facie evidence for a protective order. But the circuit court erred in (1) finding that the differences created a conflict, and (2) holding that a conflict would render the statute unconstitutional.

If "there is an apparent conflict between statutes, they must be construed in harmony if reasonably possible." *In re Jarquan B.*, 2017 IL 121483, ¶ 34 (internal quotation marks omitted); *see also Barragan v. Casco Design Corp.* 216 Ill. 2d 435, 441-42 (2005) ("Where two statutes are allegedly in conflict, a court has a duty to interpret the statutes in a manner that avoids an inconsistency and gives effect to both statutes, where such an interpretation is reasonably possible."). "In other words, before declaring two statutes to be in conflict, we must presume that several statutes relating to the same subject are governed by one spirit and a single policy, and that the legislature intended the several statutes to be consistent and harmonious." *Jarquan B.*, 2017 IL 121483, ¶ 34 (internal quotation marks, brackets, and ellipses omitted). "Legislative intent remains the paramount consideration, but in ascertaining that intent, we may properly consider the purpose of the statutes, the problems that they target, the goals that they seek to achieve, and the consequences which would follow from construing the law one way or the other." *People ex re. Ill. Dep't of Corr. v. Hawkins*, 2011 IL 110792, ¶ 46.

Here, the statutes may easily be interpreted to avoid inconsistency because they operate in distinct situations. The CNCO Act expressly applies

only to orders sought pursuant to that Act, *see* 740 ILCS 22/103 ("'Civil no contact order' means an emergency order or plenary order granted under this Act"). Meanwhile, Article 112A applies only to proceedings under that Article that occur only in conjunction with criminal prosecutions. Because the statutes govern separate proceedings, there is no conflict.

This difference in procedure make sense: only the petitions under Article 112A are part of criminal process and follow the filing of criminal charges. As discussed above, with an indictment, there has already been a probable cause determination and the no-contact order subjects the criminal defendant to the same restraints dictated by the conditions of bond release. *See supra* p. 11-12. More process and different burdens are appropriate in proceedings, such as those under the CNCO Act, that do not follow criminal charges and serve distinct purposes. *See* 740 ILCS 22/102 (providing where reported rape is not prosecuted, "the victim should be able to seek a civil remedy requiring only that the offender stay away from the victim.").

Even if the provisions cannot be harmonized, a true conflict would not render one of the statutes unconstitutional. Instead, a court determines which statute applies to a particular case using tools of statutory interpretation. Where "a general statutory provision and a more specific statutory provision relate to the same subject, we will presume that the legislature intended the more specific provision to govern." *Hawkins*, 2011 IL 110792, ¶ 46; *see also Jarquan B.*, 2017 IL 121483, ¶ 34 (applying statute

specific to probation revocation proceedings and not general statute governing sentencing proceedings). If that presumption does not provide a clear answer, this Court will "presume that the legislature intended the more recent statutory provision to control." *Hawkins*, 2011 IL 110792, ¶ 46.

Here, even if the statutes conflicted, the statutory interpretation tools make clear that the burdens set forth in Article 112A apply. Article 112A is more specific: it applies to a petition filed in conjunction with criminal charges. And a primary purpose of Article 112A is "to minimize the trauma and inconvenience associated with attending separate and multiple civil court proceedings to obtain protective orders," 725 ILCS 5/112A-1.5, which purpose is furthered by allowing the indictment to serve as prima facie evidence. Second, Article 112A is the more recent provision, becoming effective in January 2018, *see* Public Act 100-199, § 5 and subsequently amended, *see* Public Act 100-597, § 5. 740 ILCS 22/204 of the CNCO Act, was enacted in 2004. *See* Public Act 93-236. Thus, there is no conflict between the two statutes, and if there is, the procedures in Article 112A apply.

CONCLUSION

This Court should reverse the judgment of the appellate court.

September 16, 2019

Respectfully submitted,

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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, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is twenty-five pages.

/s/ Eldad Z. Malamuth
ELDAD Z. MALAMUTH
Assistant Attorney General

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 September 16, 2019, the foregoing **Brief and Appendix 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.

/s/ Eldad Z. Malamuth
ELDAD Z. MALAMUTH
Assistant Attorney General

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
vs.	)	**No. 18CR13629**
	)	
MIGUEL DELEON	)	

ORDER

This matter coming before this Honorable Court on the State's motion for the Issuance of a Protective Order under 725ILCS 5/112A-11.5, Attorneys for the People of the State of Illinois (CCSAO), Defendant, complaining witness' attorney and the ~~Illinois Attorney General~~'s office being present this Court having jurisdiction of the parties and the subject matter and being thoroughly advised in the premises, It Is Hereby Ordered:

A) That this Court finds 725ILCS5/112A-11.5 (a) (1) Unconstitutional in that:

1) The provision that allows the State to make a Prima Facie case for the Issuance of a Protective Order by merely producing a copy of the Indictment, without requiring the Complaining witness to testify and be subject to cross examination is a denial of the Defendants Due Process Rights under both the 14th Amendment to the U.S. Constitution and Article 1, Section 2 of the Illinois Constitution

2) The requirements of 725ILCS5/112A-11.5(a)-(5), that requires the Defendant to present evidence of a Meritorious Defense to rebut the Prima Facie evidence is violative of the Defendants Rights against self-incrimination under 5th Amendment of the U.S. Constitution and Article 1, Section 10 of the Illinois Constitution

3) **725ILCS 5/112A-115(a) (1) and (A-5) is in conflict with and shifts the Burden to the Defendant/Respondent compared with the Illinois Civil No Contact Act 740ILCS 22/204 and 22/215.5**

B) **This court finds said Statue unconstitutional on its face and as applied to this case;**
C) **It cannot be reasonably construed in a manner that would preserve its validity;**
D) **The finding of unconstitutionality is necessary to the decision or judgement rendered and the decision or judgement cannot rest on an alternate ground, and**
E) **Notice required by Rule 19 has been served and those served have been given adequate time and opportunity under the circumstances to Defend the Statue**

Date 3-7-19

Entered:

ENTERED
JUDGE ARTHUR F. HILL, JR. 1971
MAR 07 2019
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Judge Arthur F. Hill, Jr.
Circuit Court of Cook County
Criminal Division

DIRECT APPEAL TO THE SUPREME COURT OF ILLINOIS
FROM THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 18 CR 13629
	)	
MIGUEL DELEON,	)	The Honorable
	)	Arthur Hill, Jr.
Defendant.	)	Judge Presiding.

CORRECTED NOTICE OF APPEAL

An appeal is taken from the order or judgment described below.

(1) Court to which appeal is taken: Illinois Supreme Court

(2) Name and address of appellant's attorney on appeal.
Name: The People of the State of Illinois
Address: Eldad Malamuth
Assistant Attorney General
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Email: emalamuth@atg.state.il.us

(3) Date of judgment or order: March 7, 2019

(4) If appeal is not from a conviction, nature of order appealed from: Opinion declaring 725 ILCS 5/112A-11.5 unconstitutional.

(5) A copy of the court's opinion is appended to the notice of appeal.

April 8, 2019

Respectfully submitted,

Kimberly Foxx
State's Attorney of Cook County

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VERIFICATION BY CERTIFICATION

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, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

NAME Mikki A. Miller
TITLE ASA, Assistant State's Attorney

CERTIFICATE 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. The undersigned certifies that on April 8, 2019, the foregoing **Notice of Appeal** was filed with the Clerk of the Circuit Court of Cook County, Illinois, and a copy was served upon the following:

SERVICE CONTACTS

Attorney for Defendant,
Robert Cotter

Attorney General of Illinois

Nikki Miller

NAME Nikki Miller
TITLE Assistant State's Attorney

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