No. 124744

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. MIGUEL DELEON, Defendant-Appellee.	) On Appeal from the Circuit) Court of the First Judicial) District,) Cook County))) 18 CR 13629))) The Honorable) Arthur F. Hill, Jr.,) Judge Presiding.

BRIEF OF *AMICUS CURIAE*
ILLINOIS COALITION AGAINST SEXUAL ASSAULT
IN SUPPORT OF THE PEOPLE OF THE STATE OF ILLINOIS

Sarah L. Beuning (ARDC 6291147)
Illinois Coalition Against Sexual Assault
100 N. 16th St.
Springfield, IL 62703
Tel: 217-753-4117
Fax: 217-753-8229
sbeuning@icasa.org

Counsel for Amicus Curiae
Illinois Coalition Against Sexual Assault

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POINTS AND AUTHORITIES

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INTEREST OF AMICUS CURIAE

Founded in 1977 as Illinois Coalition of Women Against Rape and re-named Illinois Coalition Against Sexual Assault ("ICASA") in 1984, ICASA is a not-for-profit organization that unites the services and resources of sexual assault crisis centers statewide. ICASA consists of 30 community-based sexual assault crisis centers working together to end sexual violence in Illinois. Each center provides free services to victims of sexual assault, including 24-hour crisis intervention services, counseling, and medical and legal advocacy. In Fiscal Year 2019, ICASA-certified centers provided 133,365 hours of direct services to victims of sexual assault.

ICASA's mission includes supporting victims, educating the community about sexual assault, and developing public policy that protects victims, promotes prevention, and advances justice. ICASA is a voice for sexual assault victims, and it participated in the amendment process that established rights for crime victims in the Illinois State Constitution.

ICASA offers a unique perspective on the needs of victims of sexual assault in Illinois and the barriers they face when engaging with the criminal justice system. ICASA has considerable experience working with victims of sexual assault and is able to provide insight into the re-traumatization, intimidation and harm victims suffer when having to attend multiple court proceedings and repeat their testimony about their assault. ICASA also advocates for victims to be treated with dignity and respect; to be protected

from the accused during criminal proceedings; to be free from harassment, intimidation and abuse; and to have their safety and their family's safety considered when setting conditions of release.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Article I, Section 8.1(a) of the Illinois Constitution affords victims of sexual assault and other violent crimes 12 specific, enforceable rights, including the right to be reasonably protected when engaging with the criminal justice system. Ill. Const. 1970, art. I (amended 2014) § 8.1(a). The statutory provisions at issue implement victims' constitutional rights by establishing a temporary protective order while the criminal case is pending. The trial court's determination regarding the constitutionality of 725 ILCS 5/112A-11.5(a)(1) and (a-5) ("the Statute") is in opposition to the Illinois Constitution's protections for crime victims' rights.[1]

The statutory provisions at issue appropriately provide that a prima facie case for a protective order may be established based on the probable cause finding in the indictment. This provision gives victims reasonable protection from the accused during the pendency of the criminal charges. It also protects them from having to testify repeatedly about the traumatic incident that they experienced and having to attend multiple court

[1] The trial court's ruling does not affect the constitutionality of the remaining provisions of the statute, as it did not rule on the constitutionality of other provisions and because Sections 112-11.5(a)(1) and (a-5) are severable under 5 ILCS 70/1.31.

proceedings. The prima facie case approach has been accepted by courts in other areas of pre-trial restraints pending criminal prosecution. Indeed, the same prima facie evidence is frequently used to protect property via pre-trial forfeiture orders. Victims deserve at least the same protection as property.

The statutory provisions at issue do not require a defendant to testify, nor do they violate the right not to incriminate oneself. The fact that the procedure for the entry of a protective order in a criminal proceeding is not identical to the procedure for the entry of a protective order in a civil proceeding does not render it unconstitutional, because criminal defendants and civil respondents are not similarly situated. Additionally, defendants may bear the burden of proving some defenses in criminal cases, and the burden-shifting framework with which the trial court takes issue is a common evidentiary framework.

The statutory provisions at issue serve an important state interest and are constitutional; therefore, ICASA respectfully requests that this Court reverse the trial court finding and uphold the statute.

ARGUMENT

The trial court ignored the rights of victims and assumed more protection for defendants than has been established by the law. ICASA encourages this Court to consider the constitutional and statutory rights of victims of sexual assault and other violent crimes in determining the constitutionality of 725 ILCS 5/112A-11.5(a)(1) and (a-5).

I. This Court Should Uphold 725 ILCS 5/112A-11.5(a)(1) and (a-5) as Statutory Provisions that Implement and Protect Crime Victims' Rights.

In finding the Statute unconstitutional on its face, the trial court's order focuses exclusively on the defendant's constitutional rights. It is also important to recognize the constitutional and statutory rights of victims, especially in respect to laws where the Illinois General Assembly specifically set forth a purpose to protect and enforce victims' rights.

This Court has found that constitutional review is *de novo* and is guided by the principle that "[s]tatutes are presumed constitutional, and the party challenging the constitutionality of a statute has the burden of clearly establishing its invalidity." *People v. Gray*, 2017 IL 120958, ¶ 57. Courts "must construe a statute so as to uphold its constitutionality if reasonably possible." *Id.*; *see also People v. Kimbrough*, 163 Ill. 2d 231, 237 (1994) ("It is well established that all statutes are presumed to be constitutionally valid"). Furthermore, a "statute is facially invalid only if there is no set of circumstances under which the statute would be valid." *Id. at* ¶ 58.

In addressing crime victims' constitutional rights, this Court has also stated that "[a]ll parts of the constitution must be construed together and, although one article or section is entitled to the same weight as any other article or section, the whole must be construed so that the general intent will prevail." *People v. Richardson*, 196 Ill. 2d 225, 230 (2001). This Court further explained that "a specific constitutional provision will prevail over a general section if the two are incompatible." *Id.* As described below, the provisions of

the Article establishing constitutional crime victims' rights are specific and should prevail when considering the Statute.

A. Crime victims' rights are protected by the Illinois Constitution.

The Illinois Constitution includes protections for crime victims in the Bill of Rights, which is the cornerstone of our state's legal system. Ill. Const. 1970, art. I (amended 2014) § 8.1(a); *see also People v. Robinson*, 187 Ill. 2d 461, 463 (1999) (recognizing the Crime Victims' Rights Amendment provides crime victims with distinct rights in criminal prosecutions).

In November 1992, Illinois voters adopted a constitutional amendment that guaranteed crime victims ten rights. These rights included the right to be treated with fairness and respect for their dignity and privacy and the right to be reasonably protected from the accused throughout the criminal justice process. Ill. Const. 1970, art. I (amended 1992), § 8.1(a)(1) and (a)(7). The Rights of Crime Victims and Witnesses Act was amended the following year to implement victims' constitutional rights. 725 ILCS 120.

In November 2014, Illinois voters overwhelmingly approved a revision to the Illinois Constitution that strengthened existing crime victims' rights and added two new rights. Three of the now 12 constitutional rights are relevant to the issue before the Court. First, language affording victims the right to "be free from harassment, intimidation, and abuse" was added to the "right to be treated with fairness and respect for their dignity and privacy" during the criminal justice process. IL Const. 1970, art. I (amended 2014),

§ 8.1(a)1. Second, victims continue to have the right to "be reasonably protected from the accused throughout the criminal justice process." Id. at § 8.1(a)(8). Third, victims were afforded a new right in 2014: "the right to have the safety of the victim and the victim's family considered in denying or fixing the amount of bail, determining whether to release the defendant, and setting conditions of release after arrest and conviction." *Id* at § 8.1(a)(9). The enumeration of these specific rights should prevail over any other general provisions. *Richardson*, 196 Ill. 2d at 230.

B. The purpose of the Statute is to protect and enforce victims' constitutional and statutory rights.

Comprehensive revisions were made to the Rights of Crime Victims and Witnesses Act in 2015 ("the Act") to implement the constitutional amendment approved by the voters in 2014. 99th Ill. Gen Assemb., Pub. Act. 99-413 (H.B. 1121). Section 2 of the Act sets forth the purpose of the revisions as follows:

> The purpose of this Act is to implement, preserve, protect, and enforce the rights guaranteed to crime victims by Article I, Section 8.1 of the Illinois Constitution to ensure that crime victims are treated with fairness and respect for their dignity and privacy throughout the criminal justice system, to ensure that crime victims are informed of their rights and have standing to assert their rights in the trial and appellate courts, to establish procedures for enforcement of those rights, and to increase the effectiveness of the criminal justice system by affording certain basic rights and considerations to the witnesses of crime who are essential to prosecution.

725 ILCS 120/2.

Section 4(a) of the Act was amended to reflect the additions to the list of victims' constitutional rights. 725 ILCS 120/4(a).

In 2017, the General Assembly adopted comprehensive procedures to implement victims' constitutional and statutory rights to be reasonably protected from the accused, as well as their rights to be treated with fairness and dignity with respect for their privacy and to be free from harassment, intimidation and abuse, and their right to have their safety and their family's safety considered when setting conditions of release. 100th Ill. Gen Assemb., Pub. Act. 100-597 (S.B. 558). First, the General Assembly amended Section 4.5(c-5) of the Rights of Crime Victims and Witnesses to add subsection 16, which provides:

> The right to be reasonably protected from the accused throughout the criminal justice process and the right to have the safety of the victim and the victim's family considered in denying or fixing the amount of bail, determining whether to release the defendant, and setting conditions of release after arrest and conviction. A victim of domestic violence, a sexual offense, or stalking may request the entry of a protective order under Article 112A of the Code of Criminal Procedure of 1963.

725 ILCS 120/4.5(c-5)(16).

The General Assembly also amended Chapter 112A of the Code of Criminal Procedure to establish procedures for entering protective orders in criminal cases involving domestic violence, sexual assault and stalking. The Statute provides that the court shall issue a protective order if there is prima facie evidence of domestic violence, sexual assault, or stalking. 725 ILCS 5/112A-11.5(a). Prima facie evidence includes the charging document, a

conviction, or the existence of a protective order entered in a civil proceeding. *Id*. If the court finds prima facie evidence, the court gives the defendant an opportunity to be heard on the remedies or conditions requested. 725 ILCS 5/112A-11.5(d).

The protective order statute was amended in 2018 to add Section 112A-11.5(a-5), which provides that if the court is relying on the charging document, the accused may challenge the entry of a protective order by establishing a meritorious defense to the charge by a preponderance of the evidence. 100th Ill. Gen Assemb., Pub. Act. 100-597 (S.B. 558).

While the remedies for the protective orders that may be granted pursuant to the Statute mirror those that can be ordered in civil proceedings under the Illinois Domestic Violence Act of 1986, 750 ILCS 60, the Civil No Contact Order Act, 740 ILCS 22, and the Stalking No Contact Order Act, 740 ILCS 21, the procedures for obtaining the orders are different. In particular, the criminal court is not required to conduct an evidentiary hearing to determine whether there is evidence of domestic violence, sexual assault or stalking. Instead, the court relies on the charging document, a conviction or the existence of a protective order entered in a civil proceeding to enter a protective order. 725 ILCS 5/112A-11.5(a).

In enacting the Statute, the General Assembly provided in the text of the law a description of its purpose:

> The purpose of this Article is to protect the safety of victims of domestic violence, sexual assault, sexual abuse, and stalking

> and the safety of their family and household members; and to minimize the trauma and inconvenience associated with attending separate and multiple civil court proceedings to obtain protective orders. This Article shall be interpreted in accordance with the constitutional rights of crime victims set forth in Article I, Section 8.1 of the Illinois Constitution, the purposes set forth in Section 2 of the Rights of Crime Victims and Witnesses Act, and the use of protective orders to implement the victim's right to be reasonably protected from the defendant as provided in Section 4.5 of the Rights of Victims and Witnesses Act.

725 ILCS 5/112A-1.5. Clearly, this law and the Rights of Crime Victims Act are intended to protect victims and to implement the crime victims' rights provided for in the Illinois Constitution in real and meaningful ways that help victims.

C. Protecting victims is an important State interest.

The State possesses an important interest in protective order proceedings to prevent domestic violence, sexual violence, and stalking. *People ex. rel. Williams v. Rhodes*, 185 Ill. App. 3d 114, 117 (4th Dist. 1989). The State of Illinois has not only enacted statutes to protect victims during the pendency of criminal charges, but also embedded crime victims' rights in its Constitution. Ill. Const. 1970, art. I (amended 2014) § 8.1(a); 725 ILCS 120; 725 ILCS 5/112A-11.5(a).

The U.S. Supreme Court has held that a state's rape shield statute protecting victims "represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy." *Michigan v. Lucas*, 500 U.S. 145, 149-150 (1991) (limiting the defendant's right to present evidence). Similarly, this

Court, in *People v. Foggy*, rejected a constitutional challenge to the statutory privilege afforded to confidential communications made by victims of sexual assault to rape crisis counselors. 121 Ill. 2d 337 (1988). In holding that the absolute privilege did not deny the defendant due process or the right to confront his accuser, this Court relied on the State's legitimate interest in protecting rape victims from public disclosure of statements they made in confidence. *Id.*

Furthermore, the United States Department of Justice has declared that "[s]exual violence is a pressing public health concern that has extensive consequences for victims, offenders, families, communities, and our nation." U.S. Dep't of Justice, Office on Violence Against Women, SASP Formula Grant Program, 2016 Report, p. 17 (August 2018), https://www.justice.gov/ovw/page/file/1086476/download.

The Federal government has recognized that "[s]exual assault and sexual violence are associated with varied and serious physical, psychological, and emotional health consequences for victims, such as depression, post-traumatic stress disorder (PTSD) and related symptoms, shame, and substance abuse." SASP Formula Grant Program 2016 Report at p. 18. Nearly one-third of rape victims develop rape-related PTSD. Kilpatrick, D.G., Edmunds, C.N., & Seymour, A.K., Rape in America: A Report to the Nation. National Victim Center & Medical Univ. of South Carolina, 7 (1992).

Also, rape victims reported having contemplated suicide 4.1 times more often than non-victims, and they are 13 times more likely to have made a suicide attempt. *By the Numbers Sexual Violence Statistics*, ICASA, 50 (April 2007), https://icasa.org/docs/emotional_&_physical_effects_-_draft-4.doc (citing *Health Consequences of Sexual Abuse,* 9(7) *The Harvard Mental Health Letter* (Jan. 1993)).

Addressing the consequences of victims seeking criminal justice, one researcher concluded that victims "already physically and psychologically traumatized by the sexual violence that they have endured, may be further traumatized during the process of investigating the offence and any consequent legal proceedings." Rogers, Deborah J., *Legal and Forensic Issues*, Chapter 11 of *The Trauma of Sexual Assault: Treatment, Prevention and Practice*, 227 (eds. Jenny Petrak and Barbara Hedge, 2002).

The 2006 National Violence Against Women Survey reported that "only one in five women who were raped as adults reported their rape to the police." Tjaden, Patricia & Thoennes, Nancy, U.S. Dep't of Justice, Office of Justice Programs, Nat'l Inst. of Justice Special Report, *Extent, Nature, and Consequences of Rape Victimization: Findings from the National Violence Against Women Survey*, 1-2 (Jan. 2006), https://www.ncjrs.gov/pdffiles1/nij/210346.pdf. The primary reasons cited for failure to report included fear of the rapist and embarrassment. *Id.*

Victims are afraid of their perpetrators and want to limit contact. Also, the court process can be intimidating, confusing and disruptive to their lives. Testifying about their sexual assault can be especially traumatic for victims. Having to see the defendant in court and recount the details of the sexual assault causes some victims to relive the sexual violence and be re-traumatized. *Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Technology*, Violence Against Women Bulletin, National Crime Victim Law Institute at Lewis & Clark Law School, 1-2 (September 2011) https://law.lclark.edu/live/files/11775-allowing-adult-sexual-assault-victims-to-testify "Facing the perpetrator in court and recalling horrifying and personal details of the rape forces the victims to 'relive the [crime] mentally and emotionally' leading some to feel 'as though the sexual assault [is] recurring' and to re-experience 'a lack of control and terror.'" *Id.*

It is estimated that less than 20% of rape victims report their sexual assault to the police, and those who do so are interviewed and provide a detailed report of their sexual assault to law enforcement. If the case goes to criminal trial, the victim will also likely testify about the sexual assault and must see their offender. It is important to create a criminal justice system where victims feel safe and respected, rather than intimidated and re-traumatized. Also, when the system is protective of victims, they are more likely to report the crimes perpetrated against them and cooperate with prosecutions.

There is no need to require victims to testify another time, and potentially be re-traumatized, when a grand jury has already found probable cause for indictment. Limiting the number of times victims are required to describe their sexual assault in court is important to meet the State's constitutional goals of protecting victims from harassment, intimidation and abuse and treating them with respect and dignity. The State has a compelling interest in protecting the victim, which is not outweighed by the potential of temporary and limited restrictions on the accused's movements.

II. Relying on an Indictment as Prima Facie Evidence for a Protective Order is Constitutionally Sound.

A grand jury is only to indict an accused when the evidence presented supports a determination that there is probable cause to believe the accused committed a crime. *See People v. Rodgers*, 92 Ill. 2d 283, 242-243 (1982). A criminal indictment is grounds for limiting the liberty of a defendant and imposing conditions while the defendant is out of custody awaiting trial. The United States Supreme Court has determined that a "grand jury, all on its own, may effect pre-trial restraint on a person's liberty by finding probable cause to support a criminal charge." *Kaley v. United States*, 571 U.S. 320, 329 (2014). The *Kaley* opinion also stated that a grand jury finding "may do more than commence a criminal proceeding (with all the economic, reputational, and personal harm that entails); the determination may also serve the purpose of immediately depriving the accused of her freedom." *Id.*

The protective orders that issue based on the Statute are much less restrictive on an accused's liberty than being arrested and held in jail. The restrictions in the protective orders are limited restraints on liberty, which are appropriately supported by the probable cause finding in the indictment.

A. Restrictions on liberty are allowed after charging a defendant with a crime.

Once an indictment has issued, "the defendant no longer retains his complete liberty," because even when allowed to post bail, "his liberty is subject to the conditions required by his bail agreement." *United States v. $8,850 in United States Currency*, 461 U.S. 555, 564 (1983). When a defendant is indicted for a felony sexual assault, the bail statute authorizes the court to rely on the indictment to enter an order relating to monetary and non-monetary bail and imposing conditions of release, referred to as "conditions of bail bond." 725 ILCS 5/110. Section 110(a) of the Code of Criminal Procedure sets forth mandatory release conditions, which include: not violating any criminal statute, surrendering all firearms in the defendant's possession, and surrendering the defendant's Firearm Owner's Identification Card when the defendant is charged with a forcible felony, stalking, aggravated stalking, or domestic violence. 725 ILCS 5/110-10(a).

Moreover, courts may impose additional release conditions if the court finds the conditions are "reasonably necessary . . . to protect the public from the defendant, or prevent the defendant's unlawful interference with the orderly administration of justice." 725 ILCS 5/110-10(b). These discretionary

release conditions may include requirements to "refrain from approaching or communicating with particular persons or classes of persons," and "refrain from going to certain described geographical areas or premises." 725 ILCS 5/110-10(b)(3) & (4).

The defendant is entitled to a "hearing" on bail and release conditions. That is, the defendant can object to the imposition or the amount of monetary bail and to proposed mandatory and discretionary release conditions. Due process does not, however, mandate an evidentiary hearing at which the victim testifies about the offense and is cross-examined by the defendant before bail release conditions may be imposed.

Illinois Courts use bail bond conditions to protect victims. See *People v. Witherspoon*, 2019 IL 123092, ¶ 3 (court ordered "as conditions of the bail bond that defendant have no contact with the victim" and not enter her residence); *People v. Gooden*, 189 Ill. 2d 209, 212 (2000) ("court set bail at $500,000 and further ordered that defendant was to have no contact with the victim"); *People v. Watters*, 231 Ill. App. 3d 370, 380 (5th Dist. 1992) (trial court "permitted defendant to remain on bail pending appeal, provided he had no contact with the victims . . ."); *People ex rel. Hemingway v. Elrod*, 60 Ill. 2d 74, 81 (1975) (balancing the right of an accused to be free on bail against the right of the public to be protected).

The General Assembly, recognizing the need to protect victims even when a defendant is not released on bail, passed a new law in 2019 that

authorizes the court to "impose a no contact provision with the victim or other interested party that shall be enforced while the defendant remains in custody" for situations where the defendant is unable to post bond. 101st Ill. Gen Assemb., Pub. Act. 101-138 (H.B. 2308).

The General Assembly could reasonably decide to expand release provisions designed to protect victims beyond bail conditions, which the victim has no way to enforce. It did so when it enacted the Statute and authorized criminal courts to issue protective orders that impose conditions of release and restrictions on the defendant's liberty. Section 112A-14.5 sets forth the remedies that may be ordered, including prohibiting the defendant from coming within a specific distance of the victim, the victim's residence or other location; prohibiting the defendant from contacting the victim; ordering the defendant to stay away from property or animals owned by the victim; and any other relief that is necessary and appropriate for the victim's protection. 725 ILCS 112A-14.5. These "remedies" are very similar to the mandatory and discretionary release conditions found in the bail statute. The fact that the restrictions on the defendant's liberty are called "remedies" and are set forth in a document called a protective order does not change the fundamental nature of the restrictions. They are still conditions of release designed to protect the victim while the criminal charge is pending.

The protective order may be enforced in ways that afford more protection for the victim than bail conditions. Section 112A-23 expressly

authorizes the court to enforce protective orders through criminal and civil contempt proceedings and addresses when a violation is a crime. 725 ILCS 5/112A-23(a), (b). Prosecution for violating a protective order does not bar concurrent prosecution for any other crime. 725 ILCS 5/112A-23(a). Section 112A-26 authorizes a law enforcement officer to arrest a defendant without a warrant if the officer has probable cause to believe the defendant violated or is violating a protective order. 725 ILCS 112A-26(a). Protective orders are entered into the Law Enforcement Agencies Data System (LEADS), which makes it possible for officers to verify the existence and the conditions of an order. 725 ILCS 112A-28. The Criminal Code of 2012 includes the crimes of violating the protective orders. 720 ILCS 5/12-3.4, 12-3.8 & 12-3.9.

The procedure set forth in the Statue is like the procedure for the setting of conditions of bail bond. The court relies on the indictment to enter a bail order and affords the defendant the opportunity to be heard on the conditions of release. The Statute authorizes the court to rely on the indictment to issue a protective order, and the defendant is given the opportunity to be heard on which restrictions the protective order should contain.

It is appropriate to allow the same charging document that supports bail conditions to support a protective order that specifically protects the victim from the accused while the criminal trial is pending. Based on the indictment, the court should be able to issue an order that prohibits the

defendant from contact with the victim and empowers the victim to call the police to seek protection in the moment that it is violated. Due process requires nothing more when the release conditions are set forth in a protective order. Due process does not mandate the victim testify about the offense or be cross-examined by the defendant before a court can issue an order that protects the victim.

B. Property should not be more protected than victims: pre-trial forfeiture orders based on indictments have been upheld by the United States and Illinois Supreme Courts.

Courts routinely allow property to be protected under federal and state forfeiture laws. The United States Supreme Court has held that pre-trial orders freezing assets to protect them from dissipation may issue "based on a finding of probable cause to believe that the assets are forfeitable." *United States v. Monsanto*, 491 U.S. 600, 615-616 (1989) (recognizing an "established rule of permitting pretrial restraint of assets based on probable cause").

Several cases have allowed pre-trial restraints on a defendant's property based on the grand jury's probable cause determination, even in the face of constitutional challenges. *See Kaley*, 571 U.S. at 340-341 (holding defendants cannot challenge grand jury's probable cause finding in pre-trial forfeiture case where Sixth Amendment and Due Process Clause claims were raised); *Monsanto*, 491 U.S. at 615-616 (holding "the Government may – without offending the Fifth or Sixth Amendment – obtain forfeiture of property that a defendant might have wished to use to pay his attorney");

Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 619-620 (1989) (affirming district court's pre-trial restraining order; holding statute allowing restraint of assets on indictment is consistent with Fifth and Sixth Amendments); *People v. 1998 Ford Explorer*, 399 Ill. App. 3d 99, 100 (2d Dist. 2010) (finding "no constitutional infirmity in the [Illinois forfeiture] statute as applied" to claimants alleging violation of due process).

The State interests that are advanced by the pre-trial restraints on property include: (1) separating a criminal from ill-gotten gains, (2) recovering all forfeitable assets, which in some cases are deposited into a fund to support law enforcement, and (3) "the desire to lessen the economic power of organized crime and drug enterprises." *Caplin & Drysdale, Chartered,* 491 U.S. at 629-630; *see also*, 725 ILCS 150/2 (declaring intent "that the forfeiture provisions of this Act be construed in light of the federal forfeiture provisions contained in 21 U.S.C. 881 as interpreted by the federal courts"); *People v. Parcel of Property Commonly Known as 1945 N. 31st St.*, 217 Ill. 2d 481, 496 (2005) ("Our General Assembly has expressly found that civil forfeiture has a significant beneficial effect in deterring the rising incidence of the abuse and trafficking of substances prohibited by the Illinois Controlled Substances Act").

These interests have been found to be legitimate, important and compelling government interests allowing pre-trail restraint of property based on a grand jury's probable cause determination. *Id.* Protecting victims

is a legitimate, important and compelling government interest as well, as demonstrated in the constitutional provision and the Rights of Victims and Witnesses Act. *See* Ill. Const. 1970, art. I (amended 2014) § 8.1(a); 725 ILCS 5/112A; *see also Rhodes*, 185 Ill. App. 3d at 117 ("State possesses an important interest in [protective order] proceedings in preventing the occurrence of spousal abuse and other acts of domestic violence.").

The Statute clearly provides that "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." 725 ILCS 5/112A-11.5(a). It further explicitly allows the prima facie evidence requirement to be satisfied based on the charging document. *Id.*

This is similar language to the provision regarding federal forfeiture protective orders: "the court may enter a restraining order or injunction . . . upon the filing of an indictment or information charging a violation for which criminal forfeiture may be ordered . . . alleging that the property . . . would, in the event of a conviction, be subject to forfeiture." 21 U.S.C. § 853(e)(1). The U.S. Supreme Court has repeatedly held this provision is constitutional. *See Kaley*, 571 U.S. at 323 (affirming *Monsanto*, which "held a pre-trial asset restrain constitutionally permissible whenever there is probable cause to believe that the property is forfeitable."); *Monsanto*, 491 U.S. at 615-616; *Caplin & Drysdale*, 491 U.S. at 635.

The limited restrictions on the defendant's movements provided for in a protective order under the Statute do not require more due process than federal forfeiture. Forfeiture laws allow the government to seize property and remove it entirely from the defendant, even in cases where such assets would have been used to hire the attorney of the defendant's choice. Victims of sexual assault, domestic violence and stalking deserve at least as much protection by our justice system as forfeitable property.

III. The Defendant May Not Avoid a Protective Order Simply by Asserting the Right Against Self-incrimination.

The Fifth Amendment to the United States Constitution states that [n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const., amend. V. Similarly, the Illinois State Constitution provides that "[n]o person shall be compelled in a criminal case to give evidence against himself . . ." Ill. Const. 1970, art I, §10.

Analysis of these Fifth Amendment and Illinois Constitutional rights does not end simply because a person asserts his rights. The "guarantee against self-incrimination protects a witness from being forced to give testimony leading to the imposition of criminal penalties, but it does not insulate a witness from every possible detriment resulting from his testimony." *Giampa v. Illinois Civil Service Comm'n*, 89 Ill. App. 3d 606, 613 (1st Dist. 1980).

Despite the right not to be compelled to give evidence against oneself, civil proceedings may be allowed to go forward, even when there are

simultaneous criminal proceedings based on the same conduct. *See Jacksonville Sav. Bank v. Kovack*, 326 Ill. App. 3d 1131, 1135 (4th Dist. 2002) ("The fifth amendment does not, however, require a stay of civil proceedings pending the outcome of similar or parallel criminal proceedings"); *see also Kulikowski v. Roth*, 330 Ill. App. 13, 17 (1st Dist. 1946) (holding tort action did not involve a criminal penalty and "calling defendant as a witness . . . did not constitute involuntary incrimination.").

One example of a case that was allowed to proceed while criminal charges were pending is *Giampa*, 89 Ill. App. 3d 606. In that case, a former employee appealed a trial court's review of an order of the Illinois Civil Service Commission that resulted in the plaintiff being discharged from employment based on criminal charges against plaintiff, including for rape. The court in that case noted that "[t]here is nothing inherently repugnant to due process in requiring plaintiff to choose between giving testimony at the disciplinary hearing and keeping silent, even though giving testimony at the hearing may damage his criminal case and keeping silent will most likely lead to loss of his employment." *Id.* at 613. The court went on to find that "the fact that criminal charges were pending against plaintiff at the time of the hearing does not violate his right to be privileged against self-incrimination." *Id.* at 614.

In *People v. Houar*, a woman filed a petition for an emergency order of protection against her ex-husband seeking protection for their four minor

children. 365 Ill. App. 3d 682 (2d Dist. 2006). The protective order hearing was allowed to proceed even when criminal charges were pending based on the same alleged conduct. *Id.* Also, the *Houar* court made a negative inference based on the respondent's refusal to testify. *Id.* In reviewing the argument related to the negative inference, the appellate court held as follows:

> It is clear from *Giampa* and *Jacksonville* that pending criminal charges do not make improper the drawing of a negative inference from a party's failure to testify in a civil proceeding. We see no reason to apply a different rule in the order-of-protection context. Certainly a respondent in a civil order-of-protection hearing is in a difficult position if criminal proceedings are pending. If the respondent testifies, he or she risks self-incrimination in the criminal matter. Refusal to testify, however, may result in a negative inference and the loss of valued interests such as child visitation or custody. Nevertheless, such tension exists whether the proceedings involve domestic violence or, as seen in *Giampa* and *Jacksonville*, employee misconduct or illegal receipt of funds.

Id. at 690.

In the cases described above, trial courts were allowed to make negative inferences from the refusal to testify. *See Id.* The statute at issue does not provide for such a negative inference if the defendant decides not to testify.

The respondent has the right to refuse to testify in light of pending criminal charges, but that right does not allow him to avoid a protective order. *See Jacksonville Sav. Bank*, 326 Ill. App. 3d at 1135 ("'A defendant has no absolute right not to be forced to choose between testifying in a civil

matter and asserting his [f]ifth [a]mendment privilege.'")(quoting *Keating v Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir. 1995)).

Being given a right to make a choice not to testify in order to protect oneself from potential self-incrimination in a criminal matter does not mean that the choice is without consequences. The Statute provides the defendant with an opportunity to rebut the prima facie case by presenting evidence of a meritorious defense to avoid the issuance of a protective order. 725 ILCS 5/112A-11.5(a-5). While this is an option provided to the defendant, it is not required.

Also, the evidence presented by the defendant is not required to be his own testimony. The defendant may call other witnesses (but not the victim) or present documents. In the end, the defendant is given the choice of whether to provide such evidence. While that choice may put him in a difficult position, it does not violate his right not to be compelled to be a witness against himself. *See Jacksonville Sav. Bank*, 326 Ill. App. 3d at 1335 (holding being restricted in defending against civil proceeding "does not deny him his fifth amendment right to remain silent").

The Statute creates a process for petitioning for and defending against a protective order in the criminal court. It does not violate the defendant's Fifth Amendment or Illinois Constitutional right not to be compelled to be a witness or give evidence against himself in a criminal case. The defendant may assert that right, but his choice to do so should not forestall a protective

order when the prima facie case has been established by an indictment. This Court should not allow the defendant to avoid issuance of a protective order by simply asserting his right to silence.

IV. Differences Between Criminal and Civil Procedures for Protective Orders Do Not Violate Equal Protection.

The trial court, without citing any constitutional provision, declared 725 ILCS 5/112A-11.5(a)(1) and (a-5) unconstitutional because these provisions are "in conflict with" the procedure for obtaining a protective order in a civil proceeding. To the extent this can be construed as a finding that the Statute violates equal protection, it must be rejected.

A. Crime Victims' Constitutional and Statutory Rights Provide a Rational Basis for Different Procedures for Obtaining Protective Orders in Criminal Cases than in Civil Proceedings.

Equal protection mandates that similarly situated persons be treated in a similar manner. *Kimbrough*, 163 Ill. 2d at 237. It does not prohibit the General Assembly from dividing persons into different classes and treating the classes differently. *Id.* If the statutory classification does not impinge on a fundamental constitutional right and is not based on a "suspect class," courts apply the "rational basis" test. *Id.* If the statutory classification bears a rational basis to a legitimate state interest, there is no violation of equal protection. *Id.* Sections 112A-11.5(a)(1) and (a)(5) do not impinge on a fundamental constitutional right, nor are they based on a suspect classification such as race, national origin or sex.

A defendant who has been criminally charged with sexual assault is not similarly situated to a person who is solely involved in a civil proceeding involving an allegation of sexual assault. There is a rational basis for treating these individuals differently. Crime victims have constitutional and statutory rights to be free from harassment, intimidation, and abuse; to be reasonably protected from the accused throughout the criminal justice process; and to have the safety of the victim and the victim's family considered in setting conditions of release after arrest. Ill. Const. 1970, art. I (amended 2014), § 8.1(a)(1), (7) & (9). The General Assembly has a legitimate state interest in enforcing these right and protecting crime victims when they are engaged in the criminal justice system.

This Court rejected an equal protection challenge in *In re Detention of Samuelson*, 189 Ill. 2d 548 (2000). Samuelson argued that the Sexually Violent Persons Commitment Act, which authorizes civil commitment of persons previously convicted of a sexually violent offense or found not guilty of a sexually violent offense by reason of insanity, was unconstitutional because it did not afford the same rights as afforded to defendants in criminal cases. In upholding the law, this Court concluded that "it is by no means irrational for the General Assembly to treat civil litigants different from criminal ones." *Id*. at 563; s*ee also People v. Runge*, 346 Ill. App. 3d 500 (3d Dist. 2004) (rejecting argument that criminalizing escape by persons committed to the Department of Human Services under the Sexually Violent

Persons Commitment Act and not persons committed to the Department of Human Services in other civil proceedings violated equal protection).

There is a rational basis for treating defendants criminally charged with sexual assault differently from persons in civil proceedings responding to an allegation of sexual assault. The Statute does not violate equal protection.

B. The Burden Shifting in 725 ILCS 5/112A-11.5(a-5) is an Accepted Evidentiary Process.

The trial court takes issue with the burden shifting provided for in the Statute. Once the State establishes a prima facie case, "[t]he respondent may rebut prima facie evidence . . . by presenting evidence of a meritorious defense." 725 ILCS 5/112A-11.5(a-5). Defendants can be required to meet a burden of proof when they raise certain defenses. Also, this type of burden shifting is recognized as acceptable in a number of areas of law, including in forfeiture actions, which are also related to criminal proceedings.

States can constitutionally assign the burden of proving some defenses to the defendant. For example, the United States Supreme Court in *Leland v. Oregon* held that Oregon's law placing the burden of proving insanity beyond a reasonable doubt on the defendant did not violate due process. 343 U.S. 790 (1952). In *Patterson v. New York*, the Supreme Court rejected a due process challenge to a New York statute that placed on the defendant the burden of proving the affirmative defense of extreme emotional disturbance by a preponderance of the evidence. 432 U.S. 197 (1977).

Also, under the Illinois Forfeiture Act, "[w]hen the State satisfies its burden of establishing probable cause, the burden shifts to the claimant to show by a preponderance of the evidence that the property is not subject to forfeiture. *1945 North 31st St.*, 217 Ill. 2d at 498; *see also* 725 ILCS 150/9(G); *United States v. $87,118.00 in United States Currency and $3,490.00 in United States Currency*, 95 F.3d 511, 518 (1996) ("If claimant fails to rebut the government's proof, the government's showing of probable cause, standing alone, will support a judgment of forfeiture.").

As described above, courts have upheld shifting the burden of proof to the defendant for some defenses. In the present case, the establishment of a prima facie case with the opportunity for the defendant to provide rebuttal evidence is clearly provided for in the Statute. 725 ILCS 5/112A-11.5(a-5). This statutory provision passes constitutional muster and is an appropriate process for determining whether to impose a protective order pending trial.

CONCLUSION

The Statute is a key law delivering on the constitutional promise to protect and enforce victims' rights. Victims should not be required to suffer additional harm and trauma to participate in the criminal justice system. The process established for seeking protective orders in the criminal court is consistent with other laws that have been repeatedly upheld as constitutional. This Court should reverse the trial court's finding of unconstitutionality and hold that the protective order procedures provided in

725 ILCS 5/112A-11.5(a)(1) and (a-5) are constitutional and protect and enforce the victim's constitutional and statutory rights.

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Respectfully Submitted,

By: /s/ Sarah L. Beuning
Sarah L. Beuning (ARDC 6291147)
Illinois Coalition Against Sexual Assault
100 N. 16th St.
Springfield, IL 62703
Tel: 217-753-4117
Fax: 217-753-8229
sbeuning@icasa.org
Counsel for Amicus Curiae
Illinois Coalition Against Sexual Assault

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-nine pages.

/s/ Sarah L. Beuning
SARAH L. BEUNING
Counsel for Amicus Curiae
Illinois Coalition Against Sexual Assault