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USING A CIVIL DESIGNATION AS A SWORD AND A SHIELD IN DOMESTIC VIOLENCE ORDER OF PROTECTION HEARINGS: EVISCERATING THE CONSTITUTIONAL RIGHTS OF CRIMINAL DEFENDANTS CHARGED WITH DOMESTIC BATTERY IN THE STATE OF ILLINOIS

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Abstract

Domestic violence is a pervasive societal issue that hides from no race, ethnicity, gender, religion, or socioeconomic status. Victims of domestic violence deserve to have their stories told and heard and to be protected from their abusers. However, protections go too far sometimes. This Article argues that one protection that Illinois has enacted into law — a statute that allows a prosecutor of a criminal domestic battery case to obtain a domestic violence order of

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protection on behalf of the complaining witness under a civil proceeding using the criminal complaint charging domestic battery as the basis to obtain the domestic violence order of protection — violates the Constitution of the United States and the Constitution of the State of Illinois in multiple ways. Specifically, such a framework interferes with the right of a criminal defendant to not be compelled to be a witness against himself or herself, the right of a criminal defendant to be proven guilty beyond a reasonable doubt, the right of a criminal defendant to not be subject to penalty twice for the same offense, and the right to due process. This Article also demonstrates how the statute allows prosecutors to take advantage of criminal defendants in domestic violence order of protection proceedings in ways that are not necessarily unconstitutional. Finally, this Article explores how the statutory framework makes it unconstitutionally difficult for an indigent person subject to the constraints of a domestic violence order of protection to appeal the entry of the domestic violence order of protection and to challenge this statutory framework itself. The Constitution of the United States and the Constitution of the State of Illinois do not make exceptions for defendants in criminal domestic battery cases. Just as domestic violence victims need to be protected from their abusers, criminal defendants charged with domestic battery must be — and are constitutionally entitled to be — protected from an abusive criminal justice process.

I. INTRODUCTION

Under the law in the State of Illinois, a complaining witness in a criminal domestic battery case may obtain a domestic violence order of protection as a part of the criminal domestic battery case against a criminal defendant.[1] The law also allows the prosecutor of the criminal domestic battery case to obtain the domestic violence order of protection on behalf of a complaining witness in multiple scenarios: First, if the complaining witness is unable to file the petition for a domestic violence order of protection or, second, on behalf of a minor or a dependent adult who is in the complaining

1. 725 ILL. COMP. STAT. § 5/112A-2.5(1) (2020); 725 ILL. COMP. STAT. § 5/112A-4.5(a) (2020). The law also allows a complaining witness — and a prosecutor on behalf of a complaining witness — in criminal cases to obtain a civil no contact order in criminal cases involving sexual offenses and a stalking no contact order in criminal cases involving stalking offenses. §§ 5/112A-2.5(2)-(3)*;* §§ 5/112A-4.5(b)-(c). This Article focuses on complaining witnesses and prosecutors who obtain a domestic violence order of protection as part of a criminal domestic battery case in Illinois. However, the analysis in this Article is equally as applicable in criminal cases involving civil no contact orders in cases charging sexual offenses and stalking in contact orders in criminal cases charging stalking offenses in Illinois.

witness's care if the complaining witness does not file a petition for a domestic violence order of protection or asks that the prosecutor file the petition.[2] A prosecutor may file a petition for a domestic violence order of protection and include in it the complaint from the criminal case.[3] Just like with any other order of protection, a complaining witness — or a prosecutor — may first obtain an *ex parte* domestic violence order of protection, but a criminal defendant may ask for a hearing before a final domestic violence order of protection is issued.[4] The hearing for the final domestic violence order of protection most often takes place in a criminal courtroom in front of the same judge who is hearing the criminal case.[5] Despite the criminal complaint being used as the basis upon which to obtain the domestic violence order of protection, the prosecutor of the complaint that underlies the criminal case acting on behalf of the complaining witness in attempting to obtain the domestic violence order of protection, and the hearing for the final domestic violence order of protection being heard in a criminal court room likely in front of the very judge who presides over the criminal case, the Illinois legislature has designated — for the most part — the domestic violence order of protection proceedings as civil rather than criminal.[6]

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2. *See id.* § 5/112A-4.5(a)(2) ("A petition for a domestic violence order of protection may be filed: by any person or by the State's Attorney on behalf of a named victim who is a minor child or an adult who has been abused by a family or household member and who, because of age, health, disability, or inaccessibility, cannot file the petition; by a State's Attorney on behalf of any minor child or dependent adult in the care of the named victim, if the named victim does not file a petition or request the State's Attorney file the petition.").

3. *See* 725 ILL. COMP. STAT. § 5/112A-11.5(a)(1) (2020) ("[T]he court shall grant the petition and enter a protective order if the court finds prima facie evidence that a crime involving domestic violence . . . has been committed. The following shall be considered prima facie evidence of the crime: An information, complaint, indictment . . . charging a crime of domestic violence.").

4. *See id.* §§ 112A-17.5(a)-(b), (g); *id.* § 5/112A-11.5(a-5) ("The respondent may rebut prima facie evidence of the crime . . . 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.").

5. *See id.* § 112A-5.5(f) ("The request for a final protective order can be considered at any court proceeding in the . . . criminal case after service of the petition.").

6. *See id.* § 112A-6.1(a) ("Any proceedings to obtain . . . a protective order . . . shall be governed by the rules of civil procedure of this State. The Code of Civil Procedure and Supreme Court and local court rules applicable to civil

One of the purposes of the statute allowing complaining witnesses and prosecutors to obtain a domestic violence order of protection is to provide efficiency to complaining witnesses so they do not have to attend separate and multiple court proceedings in order to get an order of protection.[7] This Article contends that, in seeking such efficiency, the rights of criminal defendants in Illinois charged with domestic battery as provided under the Constitution of the United States and the Constitution of the State of Illinois are dangerously undermined and violated. The law in Illinois mandates that the sections of the statute laying out the procedures for obtaining a domestic violence order of protection are to be interpreted in light of the constitutional rights of the complaining witness.[8] However, what about the constitutional rights of criminal defendants, rights so important that they are included in the Bill of Rights of the Constitution of the United States and considered to be basic tenets of the criminal justice system?[9] The Illinois legislature's decision to designate domestic violence order of protection hearings that are a part of a criminal proceeding as civil rather than criminal allows prosecutors to use the statute and the civil designation as a sword to obtain a domestic violence order of protection on behalf of a complaining witness in a criminal case against a criminal defendant.[10] The statute and the civil designation also provide an unacceptable shield to prosecutors that permits them to do things or set things in motion that would otherwise violate the constitutional rights of criminal defendants.[11] Such should in fact be considered constitutional violations given the circumstances in which domestic violence order of protections arise and that the shield itself may ultimately serve as a sword to the prosecutor in the criminal case.[12] For the sake of justice and protecting the constitutional rights of criminal defendants in domestic battery

proceedings shall apply, except as otherwise provided by law.").

7. *See id.* § 112A-1.5 ("The purpose of this Article is to . . . minimize the trauma and inconvenience associated with attending separate and multiple civil court proceedings to obtain protective orders.").

8. *See id.* ("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.").

9. *See, e.g.*, U.S. CONST. amends. IV-VI, VIII (addressing the right against unreasonable searches and seizures, the right not to be subject to penalty for the same crime twice, the right against self-incrimination, and rights in a criminal trial).

10. *See* 725 ILL. COMP. STAT. § 5/112A-6.1(a) (2020) ("Any proceeding to obtain, modify, re-open, or appeal a protective order and service of pleadings and notices shall be governed by the rules of civil procedure of this State. The Code of Civil Procedure and Supreme Court and local court rules applicable to civil proceedings shall apply, except as otherwise provided by law.").

11. *See id.*

12. People v. DeLeon, 2020 IL 124744 ¶ 9 (Ill. 2020) (noting that the domestic violence order of protection statute operates in criminal proceedings).

cases, the Illinois legislature — and the courts in Illinois — must not permit prosecutors to hide behind the shield.[13]

Part II of this Article provides an overview of the relevant portions of the Constitution of the United States and the Constitution of the State of Illinois.[14] Specifically, Part I focuses on the right of a criminal defendant to have the prosecution prove the charges against him or her beyond a reasonable doubt, the presumption of innocence, the right of a criminal defendant to not put on a defense or to not have to disprove the prosecution's case, the right of a criminal defendant to not be compelled to be a witness against himself or herself, the right of a criminal defendant to not be subject to prosecution more than once for the same crime, and the right to due process. Part II then briefly discusses the crime of domestic battery in Illinois before thoroughly exploring the statute that allows complaining witnesses and prosecutors to obtain a domestic violence order of protection against the criminal defendant and the sections of the statute that discuss the procedure of domestic violence order of protection hearings.[15] Part III analyzes how the statute allows prosecutors to violate the integral constitutional rights the Constitution of the United States and Constitution of the State of Illinois afford to criminal defendants charged with domestic battery.[16] Part III also touches upon how a prosecutor can take advantage of a criminal defendant charged with domestic battery in unfair but constitutional ways to meet the prosecutor's ends under the statute.[17] Part IV briefly discusses how the civil designation unconstitutionally prevents indigent criminal defendants from appealing the entry of a final domestic violence order of protection, exposing an issue of income inequality between those who can afford to hire private counsel and those who cannot, reducing the likelihood that the statutory framework itself is held unconstitutional.[18] This Article then offers a conclusion.

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13. By no means is the purpose of this Article to rail against prosecutors. As a critical part of the criminal justice system, they are simply doing their jobs and what the law allows them to do. The problem lies with the legislature that designated the domestic violence order of protection proceedings as civil, allowing prosecutors to engage in actions that would ordinarily violate the constitutional rights of criminal defendants charged with domestic battery.

14. *Infra* Part II.

15. *Infra* Part II.

16. *Infra* Part III.

17. *Infra* Part III.

18. *Infra* Part IV.

II. LAYING THE GROUNDWORK: THE CONSTITUTION OF THE UNITED STATES, THE CONSTITUTION OF THE STATE OF ILLINOIS, AND THE ILLINOIS DOMESTIC VIOLENCE ORDER OF PROTECTION STATUTE

A defendant charged with a crime in Illinois enjoys several important constitutional rights under the Constitution of the United States and the Constitution of the State of Illinois as he or she makes his or her way through the criminal justice system.[19] Additionally, a defendant charged with domestic battery in Illinois may find himself or herself as a respondent in a petition for a domestic violence order of protection.[20] This Part examines some of the constitutional rights of a criminal defendant, briefly discusses the crime of domestic battery in Illinois, and provides a comprehensive walkthrough of Illinois' domestic violence order of protection statute.[21]

A. Relevant Provisions of the Constitution of the United States and the Constitution of the State of Illinois and Other Rights of Criminal Defendants

The Constitution of the United States and the Constitution of the State of Illinois enshrine certain protections for those charged with crimes.[22] Many of those rights come from the Fifth Amendment of the Constitution of the United States, including the right not to be prosecuted for the same offense twice and the right not to be compelled to be a witness against oneself.[23] The Constitution of the United States and the Constitution of the State of Illinois also guarantee due process, and the Due Process Clauses of each respective constitution gives constitutional protection to some of the

19. *See, e.g.,* U.S. CONST. amends. IV-VI, VIII (addressing the right against unreasonable searches and seizures the right not to be subject to penalty for the same crime twice, the right against self-incrimination, and rights in a criminal trial); ILL. CONST. art. I, §§ 6-8, 9-10 (explaining the right against unreasonable searches and seizures, the right to an indictment or a preliminary hearing, the right against self-incrimination, the right not to be put in jeopardy for the same offense twice, the right not to be compelled to be a witness against oneself, and trial rights).

20. *See* 725 ILL. COMP. STAT. § 5/112A-2.5(1) (2020) ("The following protective orders may be entered in conjunction with . . . a criminal prosecution: a domestic violence order of protection in cases of domestic violence[.]").

21. *Infra* §§ I.A, I.B.

22. *See supra* note 19 and accompany text (sampling some of those protections).

23. *See* U.S. CONST. amend. V (providing criminal defendants with the right not to be subject to penalty twice for the same offense and not to be compelled to be a witness against oneself).

basic tenets of criminal law.[24] Finally, criminal defendants in Illinois who have been found guilty have a right to appeal their cases.[25] The judiciary makes the decision of whether a statute violates any of these constitutional rights.[26]

1. The Prohibition on Double Jeopardy and the Right Not to be Compelled to be a Witness Against Oneself

The Double Jeopardy Clause of the Fifth Amendment of the Constitution of the United States prohibits a criminal defendant from being subject to potential penalty for the same crime twice.[27] Even though this right applies to the State of Illinois through the Fourteenth Amendment of the Constitution of the United States,[28] the Constitution of the State of Illinois contains a similar clause.[29] Jeopardy attaches when the jury is sworn in.[30] If a criminal defendant has been found not guilty on charges, he or she may not be retried for those same charges.[31] The Double Jeopardy Clause is

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24. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"); ILL. CONST. art. I, § 2 ("No person shall be deprived of life, liberty or property without due process of law."); *In re* Winship, 397 U.S. 358, 363-64 (1970) (holding that the Due Process Clause of the Constitution of the United States requires that the prosecution prove the defendant in a criminal case guilty beyond a reasonable doubt).

25. *See* ILL. CONST. art. VI, § 6 ("Appeals from final judgments of a Circuit Court are a matter of right to the Appellate Court in the Judicial District in which the Circuit Court is located except in cases appealable directly to the Supreme Court and except that after a trial on the merits in a criminal case, there shall be no appeal from a judgment of acquittal.").

26. *See* Marbury v. Madison, 5 U.S. 137, 177-80 (1803) (holding that laws contrary to the Constitution of the United States are void, the judiciary determines what the law says, the judicial power of federal courts extends to cases that arise under the Constitution of the United States, and the Constitution of the United States binds courts in making decisions).

27. *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.").

28. *See* Benton v. Maryland, 395 U.S. 784, 794 (1969) (holding that the Double Jeopardy Clause of the Fifth Amendment of the Constitution of the United States applies to the States via the Fourteenth Amendment of the Constitution of the United States).

29. *See* ILL. CONST. art. I, § 10 ("No person shall . . . be twice put in jeopardy for the same offense.").

30. *See* Martinez v. Illinois, 572 U.S. 833, 840 (2014) (noting that jeopardy attaches in a jury trial when the jury is sworn).

31. *See* Bravo-Fernandez v. United States, 137 S. Ct. 352, 357 (2016) (holding that the Double Jeopardy Clause of the Constitution of the United

not to be read literally; the intent of the Double Jeopardy Clause is to prohibit a second punishment in judicial proceedings featuring the same crime.[32] Additionally, the Double Jeopardy Clause serves two interests,[33] one of which is to preserve the finality of judgements.[34] Finally, the Double Jeopardy Clause prohibits the prosecution from litigating an issue that a jury must have decided in its determination to acquit a criminal defendant at trial.[35]

Furthermore, under the Fifth Amendment of the Constitution of the United States, a criminal defendant cannot be compelled to be a witness against himself or herself in a criminal case.[36] Again, even though the Clause applies to Illinois through the Fourteenth Amendment of the Constitution of the United States,[37] the Constitution of the State of Illinois contains a similar provision.[38] There are three elements to consider in determining whether the Clause applies: compulsion, incrimination, and testimony.[39]

In terms of compulsion, a criminal defendant has the right to remain silent unless he or she makes the choice, in exercising his or her free will, to speak.[40] The key test for compulsion is considering whether the criminal defendant's will was overborne.[41] In essence,

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States bars prosecution of the same defendant for the same offense after both a conviction and an acquittal).

32. *See* Yeager v. United States, 557 U.S. 110, 117 (2009) ("'[I]t is very clearly the *spirit* of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection.'" (quoting *Ex parte* Lange, 85 U.S. 163, 170 (1873))).

33. *See id.* (positing that the Double Jeopardy Clause serves two interests).

34. *See id.* at 118 (holding that one of the interests is preserving final judgments (quoting Crist v. Bretz, 437 U.S. 28, 33, (1978))).

35. *See id.* at 119 (citing Ashe v. Swenson, 397 U.S. 436, 443 (1970)) (holding that, under the Double Jeopardy Clause, the prosecution is prohibited from relitigating any issue that a jury necessarily decided when acquitting a defendant in a prior trial).

36. *See* U.S. CONST. amend. V ("[N]or shall be compelled in any criminal case to be a witness against himself.").

37. *See* Griffin v. California, 380 U.S. 609, 611 (1965) (citing Malloy v. Hogan, 378 U.S. 1, 6 (1964)) (holding that the Self-Incrimination Clause of the Fifth Amendment of the Constitution of the United States applies to the States through the Fourteenth Amendment's Due Process Clause).

38. *See* ILL. CONST. art. I, § 10 ("No person shall be compelled in a criminal case to give evidence against himself.").

39. *See, e.g.*, *Malloy*, 378 U.S. at 8 (explaining the element of compulsion); Hoffman v. United States, 341 U.S. 479, 486 (1951) (discussing the element of incrimination); Schmerber v. California, 384 U.S. 757, 761 (1966) (exploring the element of testimony).

40. *See Malloy*, 378 U.S. at 8 (holding that the Fifth Amendment of the Constitution of the United States, as applied through the Fourteenth Amendment to the States, requires that a person has the right to remain silent, to speak if he or she chooses, and not to be punished for choosing to remain silent).

41. *See* Haynes v. Washington, 373 U.S. 503, 513 (1963) (noting that the primary inquiry is determining whether the accused had his or her will

any statements made must be made freely and voluntarily without inducement and knowingly and intelligently.[42] The determination of whether there is compulsion is made on a case-by-case basis.[43] The guarantee applies to testimonial compulsion.[44] Furthermore, a prosecutor cannot call the defendant as a witness in a criminal case; the prosecution cannot prove the allegations through coercion and using a defendant's own words or involuntarily call the defendant to testify against himself or herself.[45] Such is an important tenet of

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overborne when confessing (quoting Lynumn v. Illinois, 372 U.S. 528, 534 (1963))).

42. *See id.* (quoting Wilson v. United States, 168 U.S. 613, 623 (1896) (explaining that whether a confession is admissible depends on whether the confession was made without compulsion or inducement, voluntarily, and freely); People v. Bernasco, 562 N.E.2d 958, 959 (1990) (requiring a knowing and intelligent and voluntary waiver for an accused's statements to be admissible). The requirement of a knowing and intelligent waiver and a voluntary waiver are two separate inquiries. Edwards v. Arizona, 451 U.S. 477, 482-83 (1981). A waiver is knowing and intelligent depending on the specific circumstances of a case, including an accused's experiences, actions, and background. *Id.* at 482 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Faretta v. California, 422 U.S. 806, 835 (1975); Brewer v. Williams, 430 U.S. 387, 404 (1977); Fare v. Michael C., 442 U.S. 707, 725 (1979)). It also requires that the accused know the nature of the right he or she is giving up and the potential consequences of his or her decision to give up the right. *Bernasco*, 562 N.E. at 962-63 (citing Patterson v. Illinois, 487 U.S. 285, 282 (1988). A waiver of the right is voluntary depending on whether the waiver of the right was a result of coercion, deception, or intimidation or a result of a deliberate choice. Colorado v. Connelly, 479 U.S. 157, 170 (1986) (citing Moran v. Burbine, 475 U.S. 412, 421 (1986).

43. *See id.* (holding that the determination of whether the confession was made as a result of coercion or improper inducement requires examining all attendant circumstances).

44. *See Hoffman*, 341 U.S. at 486 (explaining the Fifth Amendment's Self-Incrimination Clause); B. Todd Jones, *Know Your Rights; A Guide to the United States Constitution*, U.S. ATTY'S OFF. DIST. OF MINN., 10, www.justice.gov/sites/default/files/usao-mn/legacy/2011/09/16/MN%20Civil%20Rights%20FINAL.pdf [perma.cc/XP94-4NJ3] (last visited Aug. 25, 2020) (explaining that a person cannot be forced to testify against himself or herself).

45. *See* Lefkowitz v. Turley, 414 U.S. 70, 77 (1973) (noting that the Fifth Amendment of the Constitution of the United States prohibits the prosecution from calling the criminal defendant as a witness involuntarily); *Malloy*, 378 U.S. at 8 (requiring that the Constitution mandates that the prosecution establish an accused's guilt with evidence freely and independently secured without coercively proving a charge against him or her with evidence spoken from him or her); *How Courts Work: Steps in a Trial*, AM. B. ASS'N (Sept. 9, 2019), www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/defense/ [perma.cc/L8P9-F7GM]

the Self-Incrimination Clause because if a prosecutor was able to call a defendant as a witness at a criminal proceeding that occurs before trial and elicits testimony regarding the alleged crime, such testimony could be used against the defendant at a trial.[46] It should be generally noted that, when one takes the stand to testify, he or she will have to answer the questions posed or be held in contempt of court, and that a witness on the stand may claim the privilege.[47]

As for incrimination, when determining whether the Clause's protection applies, a court will consider when an answer to a question itself would support a conviction or when the answer would provide a link in the chain of evidence that is necessary to help prosecute the person who claims the privilege.[48] The presiding judge determines whether claiming the privilege the Clause provides is appropriate, considering whether, from the question's implications and the setting in which the question is asked, the answer to the question could be dangerous as a disclosure may result.[49]

(explaining that the Fifth Amendment of the Constitution of the United States, through the protection against self-incrimination, does not allow the prosecution to call the criminal defendant as a witness and explain his or her story in a *criminal* proceeding); JONES, *supra* note 44, at 10 (declaring that the Fifth Amendment of the Constitution of the United States protects a person from being forced to provide testimony against himself or herself).

46. *See, e.g.*, ILL. R. EVID. 801(d)(1)-(2) ("A statement is not hearsay if [i]n a criminal case, the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony at the trial or hearing, and—was made under oath at a trial, hearing, or other proceeding, or in a deposition, or narrates, describes, or explains an event or condition of which the declarant had personal knowledge, and the statement is proved to have been written or signed by the declarant, or the declarant acknowledged under oath the making of the statement either in the declarant's testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought or at a trial, hearing, or other proceeding, or in a deposition, or the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording . . . . The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity.").

47. *See* People v. Geiger, 978 N.E.2d 1061, 1062 (Ill. 2012) (noting that the defendant was held in contempt for refusing to testify); *Lefkowitz*, 414 U.S at 78 (citing Kastigar v. United States, 407 U.S. 441 (1972)) (stating that a person testifying and whom the privilege protects can permissible deny to answer questions); Jason Meisner, *Witness Held in Contempt for Refusing to Testify Against Violent Hobos Gang*, CHI. TRIB. (Nov. 29, 2016), www.chicagotribune.com/news/breaking/ct-hobos-gang-trial-criminal-contempt-met-20161129-story.html [perma.cc/6MX7-SR8L] (explaining that a person was found in contempt of court and sentenced to a sixty-day jail sentence for refusing to testify at a trial of gang members).

48. *See Hoffman*, 341 U.S. at 486 ("[The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a . . . crime").

49. *See id.* at 486-87 (citing Rogers v. United States, 340 U.S. 367 (1951))

The element of testimony arises from the language "to be a witness against himself."[50] Testimony is defined as "[e]vidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition."[51] However, for one to be able to invoke the privilege under the Clause, any statement made must be testimonial or communicative.[52] A statement is testimonial when the communication itself discloses information or makes a factual assertion.[53]

The Clause prohibits the prosecution in a criminal case from commenting on the defendant's choice not to testify, suggesting that such choice not to testify is evidence of the defendant's guilt, or arguing or establishing that a negative inference is to be drawn from a criminal defendant's choice not to testify.[54] To allow such would penalize the criminal defendant for exercising a constitutional right.[55] The prohibition on commenting on or drawing a negative inference from a criminal defendant's refusal to testify is important to protect the defendant's right not to be compelled to be a witness against himself or herself in a criminal case, as "[s]ilence is often evidence of the most persuasive character."[56] Although the

(explaining that courts decide whether someone's silence is justified and that, for the privilege to be properly invoked, the implications of the question and the circumstances and setting in which the question was asked must indicate answering the question or explaining why it must not be answered is dangerous with the potential for an injurious disclosure).

50. U.S. CONST. amend. V; *see also* Schmerber v. California, 384 U.S. 757, 761 (1966) (holding that the Fifth Amendment's privilege only applies when a witness is being compelled to testify against himself or herself or compelled to give the State evidence that is "testimonial or communicative" in nature).

51. *Testimony*, BLACK'S LAW DICTIONARY (11th ed. 2019).

52. *See Schmerber*, 384 U.S. at 761 (holding that the Fifth Amendment's privilege only applies when a witness is being compelled to testify against himself or herself or compelled to give the State evidence that is "testimonial or communicative" in nature).

53. Doe v. United States, 487 U.S. 201, 210 (1988) (holding that a statement is testimonial if the communication "explicitly or implicitly relate[s] a factual assertion or disclose[s] information").

54. *See* Griffin v. California, 380 U.S. 609, 614-15 (1965) (putting in no uncertain terms that the prosecution or a court may not comment on a defendant's choice not to testify or infer that such is evidence of guilt).

55. *See id.* at 614 (indicating that allowing comment regarding a defendant's choice not to testify or permitting inference of guilt from such imposes a penalty for invoking a constitutional privilege).

56. United States *ex rel.* Bilokumski v. Tod, 263 U.S. 149, 153-54 (1923); *see also* U.S. CONST. amend. V ("[N]or shall be compelled in any criminal case to be a witness against himself[.]"); ILL. CONST. art. I, § 10 ("No person shall be

Clause makes express reference to criminal cases, the Clause applies in civil proceedings as well, and thus one can invoke the clause in a civil proceeding.[57] However, in civil proceedings, if a witness invokes the Clause or chooses not to testify, it is permissible to draw an adverse inference and use the witness's silence or invocation against him or her.[58]

2. The Guarantee of Due Process

Under the Constitution of the United States and the Constitution of the State of Illinois, before a state may deny a person of his or her life, liberty, or property, he or she is owed due process of law.[59] In Illinois, the right to due process requires that a person have an "opportunity to be heard at a meaningful time and in a meaningful manner."[60] What process is due is determined on a case-by-case basis.[61]

A key piece of the criminal justice system and due process is that all criminal defendants are presumed innocent until proven guilty.[62] Another vital piece is that, in order to overcome that presumption, under the Due Process Clauses of the Constitution of the United States and the Constitution of the State of Illinois, the prosecution must prove the criminal defendant guilty beyond a reasonable doubt at a trial or the defendant must plead guilty so

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compelled in a criminal case to give evidence against himself [.]").

57. *See* McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) (holding that the Fifth Amendment right against self-incrimination applies in civil proceedings and that the application of the privilege does not depend upon the type of proceeding in which the privilege is claimed); United States v. Balsys, 524 U.S. 666, 672 (1998) (explaining that the Fifth Amendment Privielge against self-incrimination can be asserted at any type of proceeding when the witness reasonably believes that his or her testimony could be used against him or her in a later criminal proceeding).

58. Baxter v. Palmigiano, 425 U.S. 308, 316 (1976) (holding that the Fifth Amendment privilege against self-incrimination does not prohibit a negative inference against a party to a civil proceeding when refusing to testify).

59. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"); ILL. CONST. art. I, § 2 ("No person shall be deprived of life, liberty or property without due process of law.").

60. People v. Rucker, 127 N.E.3d 93, 96 (Ill. App. Ct. 2d. Dist 2018) (quoting *In re* D.W., 827 N.E.2d 466, 484 (Ill. 2005)).

61. *See* Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)) (noting that due process is flexible and the procedural protections to be put in place depend on the particular circumstances); *Rucker,* 127 N.E.3d at 97 (quoting People *ex rel.* Birkett v. Konetski, 233 Ill.2d 185, 201 (2009)) (explaining that due process is flexible and different circumstances call for different procedures).

62. *See* Coffin v. United States, 156 U.S. 432, 453 (1895) (holding that the presumption of innocence for those accused is "the undoubted law, axiomatic and elementary" with the enforcement of such providing the foundation of criminal law).

that the innocent are not condemned and unjust loss of life, liberty, or property does not occur.[63] The criminal defendant is not required to put on a defense or disprove the prosecution's case.[64]

Presumptions can violate these basic tenets.[65] Presumptions, which, after certain facts have been established, allow the factfinder to assume that a fact is in existence, are a permissible part of the justice system.[66] Presumptions can be mandatory, and they are mandatory when the finder of fact is required to accept the presumption.[67] Mandatory presumptions can be broken down into two types: conclusive and rebuttable.[68] Conclusive mandatory presumptions take the presumed element out of the case once the State is able to establish the predicate facts and do not allow the other party to rebut the connection that exists between the presumed and proven facts.[69] Mandatory conclusive presumptions are unconstitutional given that they conflict with the presumption of innocence and relieve the prosecution of its duty to prove the criminal defendant guilty beyond a reasonable doubt.[70] Meanwhile,

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63. *See In re* Winship, 397 U.S. at 363-64 (noting that, to be found guilty of a crime, a person must be proven guilty beyond a reasonable doubt, the "reasonable-doubt standard plays a vital role in the American scheme of criminal procedure," provides a foundation for the presumption of innocence, is necessary to "command the respect and confidence of the community in applications of the criminal law," so that the criminal law not be weakened to the point that the "standard of proof that leaves people in doubt whether innocent men are being condemned"); Brinegar v. United States, 338 U.S. 160, 174 (1949) (holding that, in a criminal case, the accused must be proven guilty beyond a reasonable doubt to prevent unjust convictions that result in "forfeitures of life, liberty, and property"). U.S. CONST. amends. V, XIV, § 1 (explaining the right to due process from the federal government and the States, respectively).

64. *See How Courts Work: Steps in a Trial*, *supra* note 45 (explaining that a defendant can choose not to present evidence in his or her own defense, believing that the prosecution did not meet its burden of proof).

65. *See, e.g.,* People v. Pomykala, 784 N.E.2d 784, 788 (Ill. 2003) (holding that all mandatory presumptions are *per se* unconstitutional in Illinois).

66. *See id.* at 787 (citing People v. Watts, 692 N.E.2d 315, 320 (Ill. 1998) (explaining what a presumption is).

67. *See id.* (citing *Watts*, 692 N.E.2d at 320) (explaining what a mandatory presumption is).

68. *See id.* at 787-88 (explaining the two types of mandatory presumptions); *Watts,* 692 N.E.2d at 320 (explaining the two types of mandatory presumptions).

69. *See Watts*, 692 N.E.2d at 320 (explaining conclusory mandatory presumptions).

70. *See* Sandstrom v. Montana, 442 U.S. 510, 523 (1979) (explaining how a mandatory conclusive presumption deprived a criminal defendant of his right to have each element of the crime for which he was charged guilty beyond a

rebuttable presumptions shift the burden of proof — either the burden of production or the burden of persuasion — to the opposing party.[71] When the burden of production is shifted to the opposing party, the finder of fact must find that a certain fact exists if the opposing party does not offer evidence that rebuts that fact.[72] If the burden of persuasion is shifted, the fact finder must find the fact unless the opposing party persuades the factfinder to not find the fact.[73] In a criminal case, a mandatory rebuttable presumption that shifts the burden of persuasion from the prosecutor to the defendant is unconstitutional, as such a burden shift relieves the state of its duty to prove the criminal defendant guilty beyond a reasonable doubt.[74]

In Illinois, mandatory rebuttable presumptions shifting the burden of production are unconstitutional, too, making all rebuttable presumptions unconstitutional in Illinois.[75] In *People v. Watts*, the Illinois Supreme Court found that shifting the burden of production to the defendant in a criminal case is unconstitutional because it requires the criminal defendant to present evidence in order to overcome the presumption.[76] If the defendant does not do so, the judge would be required to give a directed verdict against the defendant on the specific element for which the presumption was used.[77] Such would be unconstitutional, as a directed verdict cannot be entered against a criminal defendant.[78] Therefore, the court

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reasonable doubt).

71. *See Watts*, 692 N.E.2d at 320 (explaining mandatory rebuttable presumptions).

72. *See id.* at 320-21 (explaining mandatory rebuttable presumptions and the burden of production).

73. *See id.* at 321 (citing Ulster Cty. v. Allen, 442 U.S. 140, 157 n.16 (1979)) (explaining mandatory rebuttable presumptions and the burden of persuasion).

74. *See Pomykala*, 784 N.E.2d at 788 (citing *Sandstrom*, 442 U.S. at 524) (noting that the Supreme Court of the United States has found mandatory rebuttable presumptions that shift the burden of persuasion to the criminal defendant as *per se* unconstitutional because they then do not require the prosecution to prove each element of the charged offense beyond a reasonable doubt); *Watts*, 692 N.E.2d at 321 (citing *Sandstrom*, 442 U.S. at 524) (explaining that the Supreme Court of the United States has found mandatory rebuttable presumptions that shift the burden of persuasion as *per se* unconstitutional).

75. *See Pomykala*, 784 N.E.2d at 788 (citing *Watts*, 692 N.E.2d 315 at 322-23) (explaining that, in *Watts*, mandatory rebuttable presumptions that shift the burden of production from the prosecution to the defendant were deemed unconstitutional, making all mandatory presumptions *per se* unconstitutional).

76. *See Watts*, 692 N.E.2d at 322-23 (holding mandatory rebuttable presumptions that shift the burden of production to a criminal defendant unconstitutional because shifting the burden of production requires the criminal defendant to present evidence to overcome the presumption).

77. *See id.* at 323 (explaining that, if a criminal defendant fails to satisfy the burden, in practice, the judge must enter a directed verdict against the defendant on the element that the presumption proves).

78. *See id.* (citing *Sandstrom*, 442 U.S. at 516 n.5; United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977)) (noting that such a result is

concluded that mandatory production-shifting presumptions violate the Due Process Clause of the Constitution of the United States and the same Clause of the Constitution of the State of Illinois.[79]

3. A Person's Appellate Rights in Illinois

The Constitution of the United States does not guarantee someone a right to appeal.[80] However, under the Constitution of the State of Illinois, a criminal defendant has a right to an appeal following a finding of guilt at a trial.[81] In civil litigation, a person has a right to appeal a final judgment, with a final judgment being a court's decision that terminates the litigation of the issue's merits.[82]

It is no secret that litigation can be an expensive endeavor, especially for one who hires an attorney to litigate on his or her behalf. There are certainly those in this country and in the State of Illinois who cannot afford to hire an attorney. Meanwhile, the government may be aiming the machinery of prosecution at someone who is indigent, leaving that person vulnerable because they do not have access to an attorney. That is exactly why indigent criminal defendants are entitled to counsel under the Constitution of the United States and the Constitution of the State of Illinois.[83]

Similarly, the lack of the ability to appeal, namely for those who

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contrary to the rule that it is unconstitutional to enter a directed verdict against the accused in a criminal case).

79. *See id.* (holding that a mandatory presumption that shifts the burden of production violates the Due Process Clause of the Constitution of the United States and Due Process Clause of the State of Illinois).

80. *See* Griffin v. Illinois, 351 U.S. 12, 18 (1956) (citing McKane v. Durston, 153 U.S. 684, 687-88 (1894)) (noting that the Constitution of the United States does not require States to provide appellate courts or the right to appeal).

81. *See* ILL. CONST. art. VI, § 6 ("Appeals from final judgments of a Circuit Court are a matter of right to the Appellate Court in the Judicial District in which the Circuit Court is located except in cases appealable directly to the Supreme Court and except that after a trial on the merits in a criminal case, there shall be no appeal from a judgment of acquittal.").

82. *Id.*; ILL. SUP. CT. R. 301 ("Every final judgment of a circuit court in a civil case is appealable as of right."); *Final-Judgment Rule*, BLACK'S LAW DICTIONARY (11th ed. 2019).

83. *See* U.S. CONST. amend. VI; ILL. CONST. art. I., § 8 ("In criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel[.]"). *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963) (requiring that indigent criminal defendants be provided trial counsel); Argersinger v. Hamlin, 407 U.S. 25 (1972) (holding that a criminal defendant is entitled to counsel if he or she is going to be imprisoned even for one day).

cannot afford it, may raise certain due process concerns as well as issues under the Equal Protection Clause of the Constitution of the United States and Constitution of the State of Illinois, which prohibits states from denying a person the equal protection of its laws.[84] In *Griffin v. Illinois*, the two criminal defendants were convicted of armed robbery and filed a motion seeking a certified copy of the record in the case for free for appellate purposes.[85] In their motion, the defendants stated that they were indigent and thus were unable to pay the fees to acquire the record.[86] Prior to this case, in every criminal case in which a defendant sought a transcript, outside of capital cases, the defendant was required to purchase it.[87] The defendants challenged this framework, stating that it violated the Due Process Clause and Equal Protection Clause of the Constitution of the United States.[88] The Court noted that the concepts of due process and equal protection require that, in criminal cases, there be no discrimination between defendants; everyone charged with a crime is equal before the bench in every court.[89] The Court held that a state cannot discriminate on the basis of poverty just like it cannot discriminate on the basis of race or religion and that one's inability to pay cannot be used to deny someone access to justice.[90] The Court noted that a state that allows

84. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); ILL CONST. art. I, § 2 ("No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."); *see generally* Griffin v. Illinois, 351 U.S. 12 (1956) (holding that denying indigent criminal defendants a free copy of court transcripts for appellate purposes violated the Equal Protection Clause of the Constitution of the United States).

85. *See Griffin*, 351 U.S. at 13 (explaining how the petitioners were convicted of armed robbery after being tried together, thereafter filing a motion asking for a certified copy of the record be provided for free).

86. *See id.* (noting how the petitioners alleged they were poor and could not pay the fees to acquire the transcript and court records for appellate purposes).

87. *See id.* at 14 (explaining that those defendants who were indigent and sentenced to death were given free transcripts, but, in all other cases where a criminal defendant needed a transcript, he or she was required to purchase it, indigent or not).

88. *See id.* at 14-15 (describing that the petitioners argued that the failure to given them the transcript for free violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States).

89. *See id.* at 17 (quoting Chambers v. Florida, 309 U.S. 227, 241 (1940)) (explaining that the Due Process Clause and the Equal Protection Clause of the Constitution of the United States require procedures in criminal trials that do not discriminate between people and different types of people, with all "stand[ing] on equality before the bar of justice in every American court").

90. *See id.* at 17-18 (holding that it is just as impermissible for a court to discriminate on the basis of poverty compared to religion, race, or color and that the inability to pay cannot be used to deprive a criminal defendant of a fair trial).

appeals as of right cannot allow a system to be in effect that discriminates against someone simply because he or she is indigent given that appellate review has become an important part of the justice system.[91] "[T]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[92] Therefore, those who are indigent must be given the opportunity to have the same and adequate appellate review process that someone who is not indigent has.[93]

In *Douglas v. California*, the defendants were convicted of thirteen felonies.[94] The defendants sought assistance of counsel for their appeal given that they were indigent, but their request was denied.[95] The Court noted that a California Rule of Criminal Procedure provided that, when an indigent defendant seeks appointed counsel for the purposes of the appeal, the appellate court should make an investigation of the record to determine whether it would be useful for the defendant to have counsel on appeal, appoint counsel if it would be helpful, and deny appointment of counsel if the appointment would not provide any value to the appellate court or the indigent defendant.[96] The Court found that denying counsel

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91. *See id.* at 18 (citing Cole v. Arkansas, 333 U.S. 196, 201 (1948); Dowd v. United States *ex rel.* Cook, 340 U.S. 206, 208 (1951); Cochran v. Kansas, 316 U.S. 255, 257 (1942); Frank v. Mangum, 237 U.S. 309, 327 (1915); McKane v. Durston, 153 U.S. 684, 687-88 (1894)) (explaining that even though a State is not constitutionally mandated to create appellate courts or provide a right to appeal, when a state goes grant appellate review, it cannot discriminate against a convicted a criminal defendant on the basis of his or her poverty, especially when appellate review is an important part of the criminal just system in Illinois).

92. *Griffin*, 351 U.S. at 19.

93. *See id.* (requiring that indigent criminal defendants be afforded the same appellate process as those who can afford to buy transcripts).

94. *See* Douglas v. California, 372 U.S. 353, 353-54 (1963) (stating how the petitioners were together tried and convicted in California of thirteen felonies).

95. *See id.* at 354 (explaining how the appellate record reflected that the petitioners asked for, and were denied, access to counsel on appeal despite being indigent).

96. *See id.* at 355 (noting how the District Court of Appeal was acting pursuant to the applicable criminal rules of procedures, which permitted appellate courts in California, when an indigent defendant requests counsel, to conduct an investigation of the applicable record and make a determination of whether it would be to the defendant's advantage or helpful to the appellate court to appoint counsel and to appoint counsel after the investigation if the appellate court decided it would be beneficial to the defendant or the court and should deny counsel to the defendant if counsel would be of no value to the court or to the defendant).

to indigent defendants is the type of invidious discrimination on the basis of poverty that *Griffin v. Illinois* prohibited.[97] Again, "there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'"[98] The Court thus held that an indigent criminal defendant is entitled to counsel when he or she has the right to appeal.[99] The Court reasoned that if a person can afford counsel for appeal, such person will have the benefit of the court determining the merits of the appeal after counsel has had the opportunity to write and file briefs and make an oral argument, whereas an indigent person would not benefit from such and the appellate court would determine the merits of the appeal only on the basis of what is in the record from the trial court, as he or she does not have counsel as a result of not being able to afford counsel.[100] The Court noted that where there is hidden merit in the appeal or the record is not clear, the indigent person has a meaningless ritual while the one who can afford counsel has a meaningful appeal.[101] The Court stressed that when the merits of an appeal for an indigent person who has the right to appeal are determined without said person having the benefit of counsel, an unconstitutional distinction exists between the wealthy and the indigent.[102]

In Illinois, the State Appellate Defender's Office is charged with representing an indigent person when he or she seeks an appeal.[103]

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97. *See id.* (holding that denying counsel to an indigent criminal defendant on appeal would be equal to the invidious discrimination the Supreme Court of the United States sought to combat in *Griffin v. Illinois*, where it was held that a State could not grant and deny appellate review in a manner that discriminates on the basis of poverty).

98. *Id.* (quoting *Griffin*, 351 U.S. at 19).

99. *See id.* at 357 (holding that, when the merits of an appeal are determined without counsel, an unconstitutional distinction exists between the rich and the poor).

100. *See id.* at 355-56 (noting how the practice at issue the type of appeal a criminal defendant received depended on whether or not he or she could pay counsel, and if he or she could the appellate court made a ruling on the merits of the case after the benefit of a written brief and counsel's oral argument, and if he or she could not pay for counsel, the appellate court, under the practice, is required to prejudge the merits of the case prior to it determining whether counsel is to be provided, with only the barren record providing assistance to the indigent at this point and forcing the indigent to go forward without counsel unless the record shows a patent injustice).

101. *See id.* at 358 (theorizing that, when the record has no clear errors or hidden errors, the indigent criminal defendant only "has the right to a meaningful ritual, while the rich man has a meaningful appeal").

102. *See id.* at 357 (holding that when the merits of an indigent criminal defendant's appeal are decided without counsel,

an unconstitutional distinction exists between the rich and the poor).

103. *See* 725 ILL. COMP. STAT. § 105/3 (2020) (creating the State Appellate Defender's Office); 725 ILL. COMP. STAT. § 105/10 (2020) (stating that the State Appellate Defender's Office is to represent the indigent on cases on appeal); *About Us,* ST. APP. DEFENDER, www2.illinois.gov/osad/AboutUs/Pages/default

However, the State Appellate Defender's Office only represents the indigent in criminal and delinquent minor appeals.[104] Therefore, they will not represent those seeking to challenge an entry of a final domestic violence order of protection given that the domestic violence order of protection statute deems such proceedings as civil proceedings.[105]

B. The Framework of Illinois' Domestic Violence Order of Protection Statute

In Illinois, it is a crime to commit a domestic battery.[106] There are typically two ways domestic battery is charged in Illinois: making physical contact of an insulting or provoking nature and causing bodily harm.[107] The key distinction in Illinois between a simple battery and a domestic battery is that a domestic battery is committed against someone who is a family or household member.[108] For domestic battery purposes, a family or household

.aspx [perma.cc/752Y-6R79] (last visited July 5, 2020) (explaining that the Office of the State Appellate Defender was created by statute and represents indigent people on appeal when the Illinois Supreme Court, an appellate court, or a circuit court appoints it to do so).

104. *See* § 105/3 (emphasis added) ("The State Appellate Defender shall represent indigent persons on appeal in *criminal and delinquent minor proceedings*[.]"); *About Us, supra* note 103 (noting that the Office of the State Appellate Defender "represent[s] indigent persons on appeal in *criminal* cases" (emphasis added)).

105. *See* 725 ILL. COMP. STAT. § 5/112A-6.1(a) (2020) ("Any proceeding to obtain, modify, re-open, or appeal a protective order and service of pleadings and notices shall be governed by the rules of civil procedure of this State. The Code of Civil Procedure and Supreme Court and local court rules applicable to civil proceedings shall apply, except as otherwise provided by law.").

106. *See* 720 ILL. COMP. STAT. § 5/12-3.2(a)-(b) (2020) (defining the crime of domestic battery and the circumstances under which the crime of domestic battery is classified as a Class A misdemeanor or a felony).

107. *See* § 5/12-3.2(a)(1)-(2) ("A person commits domestic battery if he or she knowingly without legal justification by any means: causes bodily harm to any family or household member; makes physical contact of an insulting or provoking nature with any family or household member."). A person can also be charged with aggravated domestic battery if he or she, while committing a domestic battery, causes great bodily harm or disability or disfigurement of a permanent nature to the complaining witness or strangles the complaining witness. *See* 720 ILL. COMP. STAT. §§ 5/12-3.3(a)-(a-5) (2020) (defining the crime of aggravated domestic battery).

108. *See* § 5/12-3.2(a)(1)-(2) (including in the elements of domestic battery "family or household member"); 720 ILL. COMP. STAT. § 5/12-3(a) (2020)

member includes

> [s]pouses, former spouses, parents, children, stepchildren, and other persons related by blood or by present or prior marriage, persons who share or formerly shared a common dwelling, persons who have or allegedly have a child in common, persons who share or allegedly share a blood relationship through a child, persons who have or have had a dating or engagement relationship, persons with disabilities and their personal assistants, and caregivers . . . .[109]

The domestic violence order of protection statute defines a family or household member the same way.[110]

Domestic battery can be charged as a Class A misdemeanor in Illinois.[111] When domestic battery is charged as a Class A misdemeanor, it is punishable by up to one year in jail, up to two years of probation, and a maximum fine of $2,500.[112] If a criminal defendant is found guilty of domestic battery, the court may also order the defendant to undergo substance abuse treatment or domestic violence counseling in addition to staying away from the complaining witness.[113] Additionally, a person convicted of domestic

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(defining the offense of simple battery in Illinois, leaving out any mention of "family or household member").

109. 720 ILL. COMP. STAT. § 5/12-0.1 (2020).

110. *See* 725 ILL. COMP. STAT. § 5/112A-3(b)(3) (2020) ("'Family or household members' includes spouses, former spouses, parents, children, stepchildren, and other persons related by blood or by present or prior marriage, persons who share or formerly shared a common dwelling, persons who have or allegedly have a child in common, persons who share or allegedly share a blood relationship through a child, persons who have or have had a dating or engagement relationship, persons with disabilities and their personal assistants, and caregivers.").

111. *See* § 5/12-3.2(b) ("Domestic Battery is a Class A Misdemeanor."). Domestic Battery can also be charged as a felony if certain circumstances are present. *See id.* (listing all the circumstances that make Domestic Battery a felony).

112. *See* 730 ILL. COMP. STAT §§ 5/5-4.5-55(a), (d), (e) (2020) (listing the maximum penalties for a Class A misdemeanor).

113. People v. Holman, 20 N.E.3d 450, 463 (Ill. App. Ct. 3d. Dist. 2014) (noting that the defendant had previously been convicted of domestic battery and was ordered to complete a drug and alcohol evaluation and domestic violence counseling); People v. Gemeny, 731 N.E.2d 844, 846 (Ill. App. Ct. 2d Dist. 2000) (noting that the defendant was sentenced to complete domestic violence counseling as part of a sentence for domestic battery); *Abuse Intervention Program*, GRETCHEN S. VAPNAR COMMUNITY CRISIS CENT., www.crisiscenter.org/abuse-intervention.html [perma.cc/V8YF-PXNU] (last visited July 7, 2020) (discussing how people who attend domestic violence counseling may be court ordered to do so); *Partner Abuse Prevention Program*, HEALTHCARE ALTERNATIVE SYS., www.hascares.org/program/partner-abuse-prevention-program-paip/ [perma.cc/V9FR-RBDM] (last visited July 7, 2020); *Violence Intervention Services*, FAM. COUNSELING SERV., www.aurorafcs.org/counseling-services-in-aurora-illinois/violence-

battery is not eligible to possess a firearm or ammunition.[114]

The domestic violence order of protection statute seeks to protect anyone who has been abused by a family or household member and any minor in the care of such a family or household member.[115] Therefore, any person who a family or household member abused can file a petition for a domestic violence order of protection.[116] If a criminal domestic battery case has arisen out of a family or household member's abuse, the person who files the petition for a domestic violence order of protection may be — and likely is — the complaining witness in the criminal case. A prosecutor of a criminal domestic battery case may also file a petition for an order of protection on behalf of a complaining witness who for one reason or another cannot file the petition.[117] A prosecutor can also file the

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intervention-services/ [perma.cc/8GE3-3RQS] (last visited July 7, 2020); *Illinois Domestic Violence Laws*, FINDLAW, www.statelaws.findlaw.com/illinois-law/illinois-domestic-violence-laws.html [perma.cc/TN73-T7CB] (last updated Mar. 21, 2018) (discussing how domestic violence counseling may be a part of a sentence for domestic battery); *Domestic Battery*, L. OFF. DAVID OLSHANSKY, www.domesticviolence.law/domestic-battery.html [perma.cc/7LJE-7CM3] (last visited July 7, 2020) (stating how terms of a sentence for domestic battery include domestic violence counseling and a stay away order from the complaining witness); *About Domestic Battery – What You Need to Know!*, L. OFF. DAVID LEE, www.davidleelegal.com/practice-areas/criminal-defense/domestic-battery/ [perma.cc/C9CP-GJ52] (last visited July 7, 2020) (explaining that a potential penalty for domestic battery is domestic violence counseling and substance abuse counseling).

114. *See* § 5/12-3.2(d) ("Upon conviction of domestic battery, the court shall advise the defendant orally or in writing, substantially as follows: 'an individual convicted of domestic battery may be subject to federal criminal penalties for possessing, transporting, shipping, or receiving any firearm or ammunition in violation of the federal Gun Control Act of 1968 (18 U.S.C. 922(g)(8) and (9)).").

115. *See* 725 ILL. COMP. STAT. §§ 5/112A-4(a)(1)-(2) (2020) ("The following persons are protected by this Article in cases involving domestic violence: any person abused by a family or household member [and] any minor child or dependent adult in the care of such person[.]"). The statute also seeks to protect "any person residing or employed at a private home or public shelter which is housing an abused family or household member" in addition to others if a family or household member of a child abuses them, including a foster parent of a child if the child was put in a foster home by the Department of Children and Family Services or a similar agency of another state, a guardian or custodian of a child who is legally appointed, the parents of an adopted child, or a prospective adoptive parent of a child so long as the child was placed in the home of the prospective adoptive parent under statute. §§ 5/112A-4(a)(3)-(4).

116. *See id.* § 112A-4.5(a)(1) (listing who can file a petition for a domestic violence order of protection).

117. *See id.* § 112A-4.5(a)(2) (listing who can file a petition for a domestic violence order of protection).

petition on behalf of a minor or dependent adult who is in the care of a complaining witness of a criminal domestic battery case if the complaining witness fails to file a petition himself or herself or asks that the prosecutor file the petition.[118] As a result, the domestic violence order of protection statute allows domestic violence order of protections to be issued as a part of a criminal prosecution for domestic battery.[119] In fact, the statute requires such when there is a criminal domestic battery case ongoing and the petition for a domestic violence order of protection names the complaining witness.[120] The petition is permitted to be filed once criminal charges are brought but before the charge is dismissed, the respondent, or the defendant in the criminal case, is acquitted, or the respondent-defendant finishes serving his or her sentence.[121]

The petition can seek an *ex parte* domestic violence order of protection, a final domestic violence order of protection, or both.[122] The petition for the domestic violence order of protection must allege — with an affidavit verifying or accompanying the petition — that the respondent-defendant abused the petitioner, who is the complaining witness in the criminal case, and that the respondent-defendant is a family or household member.[123] If a final domestic violence order of protection is sought, the request for such may be considered at any court proceeding that is a part of the criminal case,[124] and the *ex parte* domestic violence order of protection will remain in effect until hearing on petition for the final domestic

118. *See id.* § 112A-4.5(a)(3) (listing who can file a petition for a domestic violence order of protection).

119. *See* 725 ILL. COMP. STAT. § 5/112A-2.5(1) (2020) ("The following protective orders may be entered in conjunction with . . . a criminal prosecution: a domestic violence order of protection in cases of domestic violence[.]").

120. *See id.* § 112A-5(a) (emphasis added) ("A petition for a protective order *shall* be filed in conjunction with a . . . criminal prosecution . . . provided the petition names a victim of the alleged crime."). The domestic violence order of protection statute includes a domestic violence order of protection in the definition of "protective order." *See id.* § 5/112A-3(a) ("'Protective order' means a domestic violence order of protection, a civil no contact order, or a stalking no contact order.").

121. *See id.* § 112A-5.5(a) (2020) ("A petition for a protective order may be filed at any time after a criminal charge . . . is filed and before the charge . . . is dismissed, the defendant . . . is acquitted, or the defendant . . . completes service of his or her sentence.").

122. *See id.* § 112A-5(a) ("The petition may include a request for an ex parte protect order, a final protective order, or both."); *id.* §§ 112A-17.5(a)-(b) (listing the procedures for ex parte domestic violence orders of protection).

123. *See id.* § 112A-5(a)(1) ("The petition shall be in writing and verified or accompanied by affidavit and shall alleged that[] petitioner has been abused by respondent, who is a family or household member[.]").

124. *See id.* § 112A-5.5(f) ("The request for a final protective order can be considered at any court proceeding in the . . . criminal case after service of the petition.").

violence order of protection.[125]

If the criminal domestic battery case is dismissed or the respondent-defendant is found not guilty of domestic battery at the criminal trial, neither the petitioner-complaining witness nor the prosecutor, if the prosecutor filed the petition on behalf of the complaining witness, is required to seek dismissal or vacation of the domestic violence order of protection or the petition if the petition has not yet been ruled upon.[126] Instead, at the petitioner-complaining witness's or prosecutor's request, the petition or domestic violence order of protection may proceed as an independent action or be transferred to another court or division.[127] The dismissal of a criminal domestic battery case also does not affect the validity of a domestic violence order of protection that was issued previously.[128]

In terms of procedure, the petition for a domestic violence order of protection is to be an expedited proceeding.[129] Additionally, the court is not allowed to transfer or determine that it is not going to decide parts of or the entire petition except pursuant to statute.[130] If a court finds prima facie evidence that a crime of domestic battery has occurred, it must grant the petition for the domestic violence order of protection and enter the order of protection.[131] The domestic

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125. *See id.* § 112A-17.5(i) ("An ex parte order shall remain in effect until the court considers the request for a final protective order after notice has been served on the respondent or a default final protective order is entered, whichever occurs first.").

126. *See* 725 ILL. COMP. STAT. § 5/112A-22.3(a) (2020) ("Voluntary dismissal or withdrawal of any . . . criminal prosecution or a finding of not guilty shall not require dismissal or vacation of the protective order[.])".

127. *See id.* ("[A]t the request of the petitioner, petitioner's counsel, or the State's Attorney on behalf of the petitioner, [the domestic violence order of protection proceedings] may be treated as an independent action and, if necessary and appropriate, transferred to a different court or division.").

128. *See id.* ("Dismissal of any . . . criminal prosecution shall not affect the validity of any previously issued protective order.").

129. *See id.* § 112A-12(a-5) (2020) ("A petition for a domestic violence order of protection shall be treated as an expedited proceeding."); § 5/112A-17.5(a) ("The petitioner may request expedited consideration of the petition for an ex parte protective order. The court shall consider the request on an expedited basis without requiring the respondent's presence or requiring notice to the respondent.").

130. *See id.* § 112A-12(a-5) ("[N]o court shall transfer or otherwise decline to decide all or part of the petition, except as otherwise provided in this Section.").

131. *See* 725 ILL. COMP. STAT. § 5/112A-11.5(a) (2020) (emphasis added) ("The court *shall* grant the petition and enter a protective order if the court finds prima facie evidence that a crime involving domestic violence . . . has been

violence order of protection statute specifically states that prima facie evidence of the crime includes the information, complaint, or indictment that charges domestic battery.[132] Prima facie evidence also includes a plea of guilty or a finding of guilt after a domestic battery trial.[133] This portion of the statute has been found unconstitutional before as a violation of due process because it allowed the entry of the final domestic violence order of protection without giving the respondent-defendant an opportunity to be heard.[134] Therefore, the Illinois legislature amended the statute so that once a prima facie showing of a crime of domestic violence has been shown, the respondent-defendant can request a hearing and challenge the potential entry of the final domestic violence order of protection through introducing into evidence of what is called a "meritorious defense," allowing the respondent-defendant to rebut the prima facie evidence of the crime.[135] To even be allowed to present evidence of a meritorious defense, however, the respondent-defendant must file a notice in writing with the court that alleges a meritorious defense and that an affidavit supports and verifies.[136] The notice must explain the evidence that would be introduced at hearing.[137] In practice, if the prosecutor who is prosecuting the underlying criminal domestic battery case filed the petition for the

committed.").

132. *See id.* § 112A-11.5(a)(1) ("The following shall be considered prima facie evidence of the crime: an information, complaint, [or] indictment . . . charging a crime of domestic violence.").

133. *See id.* § 112A-11.5(a)(2) ("The following shall be considered prima facie evidence of the crime: . . . a finding of guilt based upon a plea, or a finding of guilt after a trial for a crime of domestic battery.").

134. *See id.* § 112A-11.5 (Jan. 1, 2018), *amended by* § 5/112A-11.5 (June 29, 2018) (allowing the domestic violence order of protection to issue simply upon a showing of prima facie evidence of a crime of domestic violence); People v. Brzuskiewicz, No. 17CM2444 (Ill. Cir. Ct. 16th Cir. 2018) (finding the previous procedure to obtain a domestic violence order of protection statute unconstitutional). The legislature presumably amended the statute in response to the finding in *Brzuskiewicz*.

135. *See* 725 ILL. COMP. STAT. § 5/112A-11.5(a-5) ("The respondent may rebut prima facie evidence of the crime . . . by presenting evidence of a meritorious defense."); § 725 ILL. COMP. STAT. § 5/112A-17.5(g) (2020) ("[A] respondent subject to an ex parte protective order may appear and petition the court to re-hear the petition. Any petition to re-hear shall be verified and shall allege the following: (1) that respondent did not receive prior notice of the initial hearing in which the ex parte protective order was entered . . . ; and (2) that respondent had a meritorious defense to the order or any of its remedies or that the order or any of its remedies was not authorized under this Article. The verified petition and affidavit shall set forth the evidence of the meritorious defense that will be presented at a hearing.").

136. *See id.* § 112A-11.5(a-5) ("The respondent shall file a written notice alleging a meritorious defense which shall be verified and supported by affidavit.").

137. *See id.* ("The verified notice and affidavit shall set forth the evidence that will be presented at a hearing.").

domestic violence order of protection, the prosecutor often conducts the hearing on behalf of the petitioner-complaining witness, calling witnesses — including the petitioner complaining witness himself or herself if he or she chooses, as the prosecutor is not required to call witnesses as he or she can simply meet his or her burden by introducing the criminal complaint into evidence[138] — and examining them. The prosecutor will also cross-examine the witnesses the respondent-defendant calls. Additionally, the prosecutor often seeks to introduce the very same evidence he or she would introduce at the respondent-defendant's criminal domestic battery trial, should the case reach trial. Finally, when the evidence stage of the proceeding is closed, the prosecutor will argue that the petition for the domestic violence order of protection be granted and that the order of protection issues. Following the hearing, if the court determines that, by a preponderance of the evidence, the respondent-defendant puts forth evidence establishing a meritorious defense, the court may, but is not required to, choose to not enter the domestic violence order of protection and may choose to vacate the *ex parte* domestic violence order of protection or modify its remedies.[139] The judge who is presiding over the criminal case is typically the judge who presides over the hearing for the domestic violence order of protection, with said hearing occurring in the criminal courtroom and the domestic violence order of protection sought under the criminal case number.[140]

If a court enters the final domestic violence order of protection, it may remain in effect for varying lengths of time.[141] If the final domestic violence order of protection is entered while the

138. *Id.* § 112A-11.5(a)(1) ("The court shall grant the petition and enter a protective order if the court finds prima facie evidence that a crime involving domestic violence . . . has been committed. The following shall be considered prima facie evidence of the crime: an information, complaint, [or] indictment . . . charging a crime of domestic violence.").

139. *See* § 112A-11.5(a-5) (emphasis added) ("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."); *id.* § 112A-17.5(g) ("If the court finds that the evidence presented at the hearing on the petition establishes a meritorious defense by a preponderance of the evidence, the court may decide to vacate the [*ex parte*] protective order or modify the remedies.").

140. *See, e.g.*, 725 ILL. COMP. STAT. § 5/112A-5.5(f) (2020) ("The request for a final protective order can be considered at any court proceeding in the . . . criminal case after service of the petition.").

141. *See id.*§ 112A-20(b) (2020) (listing the varying lengths of time a domestic violence order of protection may be in effect for).

respondent-defendant is released from custody on bail for the criminal domestic battery case, the domestic violence order of protection will remain in effect until the criminal case is disposed of or the criminal charges are withdrawn or dismissed.[142] However, if the criminal case is severed from the petition for the domestic violence order of protection, the final domestic violence order of protection may remain in effect for no more than two years.[143] Otherwise, the final domestic violence order of protection may remain in effect until the criminal domestic battery case is disposed of or up to an additional two years if it is issued with a bond forfeiture warrant; until two years after the respondent-defendant completes his or her term of court supervision, conditional discharge, probation, imprisonment, or parole as a part of the criminal domestic battery case; or, until two years after a date the court chooses for the expiration of the respondent-defendant's sentence for the criminal domestic battery case.[144] In these cases, however, the final domestic violence order of protection may be extended multiple times, with the prosecutor of the criminal domestic battery case himself or herself seeking the extension.[145]

There are many remedies that a petitioner-complaining witness or prosecutor can seek in the petition for the domestic violence order of protection.[146] Specifically, the petition for the final domestic violence order of protection can request — and the court can grant — as remedies the prohibition of abuse of the petitioner-complaining witness and others not involved with the criminal case; the grant of exclusive possession of the residence to the petitioner-respondent; that the respondent-defendant stay away from the petitioner-complaining witness and others that the domestic violence order of protection protects; that the respondent-defendant stay away from the petitioner-complaining witness's place of work, school, or other specific locations; that the respondent-defendant undergo counseling, including psychological, substance abuse or alcohol abuse counseling, and domestic violence counseling; custody

142. *See* § 112A-20(b)(1) ("A final protective order shall remain in effect as follows: if entered during pre-trial release, until disposition, withdrawal, or dismissal of the underlying charge[.]").

143. *See id.* ("[I]f, however, the case is continued as an independent cause of action, the order's duration may be for a fixed period of time not to exceed 2 years[.]").

144. *See id.* §§ 112A-20(b)(2)-(4) (listing the varying length of time a domestic violence order of protection may remain in effect).

145. *See id.* § 112A-20(e) ("Any domestic violence order of protection . . . that expires 2 years after the expiration of the defendant's sentence . . . may be extended one or more times, as required. The petitioner, petitioner's counsel, or the State's Attorney on the petitioner's behalf shall file the motion for an extension of the final protective order in the criminal case.").

146. *See id.* 112A-14(b) (2020) (listing the numerous remedies that can be included in a domestic violence order of protection).

of any children to the petitioner-complaining witness; exclusive possession of property or animals to the petitioner-complaining witness; and that the respondent-defendant refrain from possessing firearms.[147]

A domestic violence order of protection may also be modified.[148] A complaining witness in a criminal domestic battery case or a prosecutor on behalf of a complaining witness can seek modification of the domestic violence order of protection.[149] When a complaining witness — or a prosecutor on behalf of the complaining witness — seeks to have an existing domestic violence order of protection modified, the court can add any remedy authorized in the remedies section of the statute that was not requested to be a part of the already-existing domestic violence order of protection or was denied for procedural reasons but not on the merits.[150] Once thirty days have elapsed following the entry of the original domestic violence order of protection, a court is only authorized to modify the order when there are changes in the applicable facts that warrant modification of the domestic violence order of protection.[151]

The domestic violence order of protection statute has the laudable goal of seeking to protect those who are victims of domestic violence and ensure the safety of their families in addition to minimizing a victim of domestic violence's inconvenience and trauma of having to go to multiple and separate proceedings in order to get an order of protection.[152] The Illinois legislature has

147. *See id.* §§ 112A-14(b)(1)-(6), (8), (10)-(11.5), (14.5) (listing all of the remedies that can be obtained as a part of a domestic violence order of protection).

148. *See* 725 ILL. COMP. STAT. § 5/112A-24 (2020) (discussing modification of an existing domestic violence order of protection).

149. *See id.* § 112A-24(a) ("[U]pon motion by petitioner . . . or the State's Attorney on behalf of the petition, the court may modify a protective order[.]").

150. *See id.* §§ 112A-24(a)(2)(ii)-(iii) ("[U]pon motion by the petitioner . . . or the State's Attorney on behalf of the petition, the court may modify a protective order: by adding any remedy authorized by Section 112A-14 . . . which was: not requested for inclusion in that protective order; or denied on procedural grounds, but not on the merits."). Section 112A-14 lists all the remedies available when seeking a domestic violence order of protection.

151. *See id.* § 112A-24(c) ("After 30 days following the entry of a protective order, a court may modify that order only when changes in the applicable law or facts since that final order was entered warrant a modification of its terms.").

152. *See* 725 ILL. COMP. STAT. § 5/112A-1.5 (2020) ("The purpose of this Article is to protect the safety of victims of domestic violence . . . and the safety of their family and household members; and to minimize the trauma and inconvenience associated with attending separate and multiple civil court

determined that the domestic violence order of protection statute must be interpreted in favor of a victim's constitutional rights under the Illinois Constitution.[153] One such right of crime victims under the Constitution of the State of Illinois is to be treated fairly and with respect for their privacy and dignity and to not be intimidated, harassed, and abused as the case moves through the criminal justice system.[154] Meanwhile, the Illinois legislature has also designated domestic violence order of protection proceedings as civil, save for a few exceptions.[155] One such exception is that the criminal law rules of discovery apply.[156] Furthermore, it is impermissible to obtain discovery as part of the domestic violence order of protection proceedings that would not be able to be obtained as part of the criminal proceedings.[157] In the legal sense of turning over evidence to the opposing party, discovery is defined as a "compulsory disclosure, at a party's request, of information that relates to the litigation" or "[t]he facts or documents disclosed."[158]

When it comes to interpreting statutes, the goal is to give the meaning to the statute that the legislature intended.[159] The strongest evidence of legislative intent is the language used in the statute.[160] Language in the statute must be given its plain meaning.[161]

In the end, the domestic violence order of protection statute, along with the purposes of the statute, how the statute is to be

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proceedings to obtain protective orders.").

153. *See id.*; ILL. CONST. art. I, § 8.1 (describing the rights of crime victims).

154. *See* ILL. CONST Art. I, § 8.1(a)(1) ("Crime victims, as defined by law, shall have the following rights: The right to be treated with fairness and respect for their dignity and privacy and to be free from harassment, intimidation, and abuse throughout the criminal justice process.").

155. *See* 725 ILL. COMP STAT. § 5/112A-6.1(a) (2020) ("Any proceeding to obtain, modify, re-open, or appeal a protective order and service of pleadings and notices shall be governed by the rules of civil procedure of this State. The Code of Civil Procedure and Supreme Court and local court rules applicable to civil proceedings shall apply, except as otherwise provided by law.").

156. *See id.* § 112A-6.1(b) ("Criminal law on discovery . . . appl[ies] to protective order proceedings under this article."). Other exceptions include venue and penalties for false statements. *See id* (explaining when criminal law applies under the domestic violence order of protection statute).

157. *See id.* § 112A-6.1(c) ("Court proceedings related to the entry of a protective order and the determination of remedies shall not be used to obtain discovery that would not otherwise be available in a criminal prosecution.").

158. *Discovery*, BLACK'S LAW DICTIONARY (11th ed. 2019).

159. *See* Paris v. Feder, 688 N.E.2d 137, 139 (Ill. 1997) (citing Solich v. George & Anna Portes Cancer Prevention Ctr. of Chicago, Inc., 630 N.E.2d 820, 822 (Ill. 1994)) (explaining that the cardinal rule when interpreting statute is to determine the intent of the legislature and apply that intent).

160. *See id.* (noting that the strongest evidence of the legislature's intent is the language in the statute).

161. *See id.* (stating that a statute's language must be given its "plain and ordinary meaning").

interpreted, and the civil designation, create a perfect storm to violate the constitutional rights of criminal defendants charged with domestic battery in Illinois when prosecutors seek a domestic violence order of protection on behalf of the complaining witness in the criminal domestic battery case.

III. VIOLATING THE CONSTITUTIONAL RIGHTS OF THOSE CHARGED WITH DOMESTIC BATTERY IN OBTAINING THE DOMESTIC VIOLENCE ORDER OF PROTECTION

Despite the Illinois legislature designating the domestic violence order of protection proceedings as civil, it truly is a criminal proceeding.[162] After all, the hearing for the final domestic violence order of protection takes place in a criminal courtroom under the criminal case number in front of the judge who presides over the criminal case often with the State's Attorney prosecuting the criminal domestic battery case seeking to obtain the domestic violence order of protection on behalf of the complaining witness in the criminal case and presenting the same evidence in the same manner he or she would present in order to obtain a finding of guilty at a trial and examining witnesses he or opposing counsel may call to the stand.[163] In fact, the petition for the final domestic violence order of protection is required to be filed as a part of the criminal prosecution when the petition for the domestic violence order of protection names the complaining witness in the criminal domestic battery case as the petitioner.[164] If it looks like a duck, swims like a duck, and quacks like a duck, it must be a duck. With this premise in mind, this Part explores how the domestic violence order of protection statutory framework violates the Constitution of the

162. *See* § 5/112A-6.1(a) ("Any proceeding to obtain, modify, re-open, or appeal a protective order and service of pleadings and notices shall be governed by the rules of civil procedure of this State. The Code of Civil Procedure and Supreme Court and local court rules applicable to civil proceedings shall apply, except as otherwise provided by law."); *DeLeon*, 2020 IL 124744 at ¶ 9 (noting that the domestic violence order of protection statute operates in criminal proceedings).

163. *See, e.g.*, 725 ILL. COMP. STAT. § 5/112A-5.5(f) (2018) ("The request for a final protective order can be considered at any court proceeding in the . . . criminal case after service of the petition.").

164. *See* 725 ILL. COMP. STAT. § 5/112A-5(a) (2020) ("A petition for a protective order *shall* be filed in conjunction with a . . . criminal prosecution . . . provided the petition names a victim of the alleged crime." (emphasis added)).

United States and the Constitution of the State of Illinois.

A. The Double Jeopardy Clause

The statutory scheme creates a loophole that allows prosecutors to violate the Double Jeopardy Clause of the Constitution of the United States and the Constitution of the State of Illinois.[165] Consider the following plausible scenario. A respondent-defendant is on trial for domestic battery. The jury has been sworn in, so jeopardy has attached.[166] At trial, the prosecution calls the complaining witness to testify and introduces the photos the police officers took on the scene on the alleged date of incident and the 911 call the complaining witness made that the police responded to.[167] In the middle of the trial, but before the jury returned a verdict, the prosecution, as permissible under the statute, seeks to obtain a domestic violence order of protection on behalf of the complaining witness and files a petition for the domestic violence order of protection and serves it upon the respondent-defendant.[168] The prosecutor seeks to have the domestic violence order of protection be issued as part of a criminal prosecution for domestic battery.[169] The prosecution includes in its petition for the domestic violence order of protection the criminal complaint for domestic battery for which the respondent-defendant is currently on trial; again, the statutory scheme permits that practice.[170] The court grants an *ex*

165. *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life, liberty, or property[.]"); ILL. CONST. art. I, § 10 ("No person shall . . . be twice put in jeopardy for the same offense.").

166. *See Martinez*, 572 U.S. at 840 (noting that jeopardy attaches in a jury trial when the jury is sworn).

167. In Illinois, the introduction of a 911 call into evidence is permissible under certain circumstances, but, for purposes of this Article, that is neither here nor there. *See generally* People v. Dominguez, 888 N.E.2d 1205 (Ill. App. Ct. 2d Dist. 2008); People v. Chmura, 930 N.E.2d 431 (Ill. App. Ct. 2d Dist. 2010).

168. *See* § 5/112A-5.5(a) ("A petition for a protective order may be filed at any time after a criminal charge . . . is filed and before the charge . . . is dismissed, the defendant . . . is acquitted, or the defendant . . . completes service of his or her sentence.").

169. *See* 725 ILL. COMP. STAT. § 5/112A-2.5(1) (2020) ("The following protective orders may be entered in conjunction with . . . a criminal prosecution: a domestic violence order of protection in cases involving domestic violence[.]"); § 5/112A-5(a) ("A petition for a protective order *shall* be filed in conjunction with a . . . criminal prosecution . . . provided the petition names a victim of the alleged crime." (emphasis added)). The domestic violence order of protection statute includes a domestic violence order of protection in the definition of "protective order." *See* 725 ILL. COMP. STAT. § 5/112A-3 (2020) ("'Protective order' means a domestic violence order of protection, a civil no contact order, or a stalking no contact order.").

170. *See id.* § 112A-11.5(a)(1) (2020) ("The following shall be considered

parte domestic violence order of protection at this time. At the conclusion of the trial, the jury finds the respondent-defendant not guilty of the domestic battery charges contained in the complaint that the prosecutor seeks to use to obtain the domestic violence order of protection. Before the court enters judgment on the finding of not guilty, the prosecution seeks to request a final domestic violence order of protection, which is permissible under the statute, as the trial is still technically in progress and thus a court proceeding that is a part of the criminal case is underway.[171] Even though the respondent-defendant was found not guilty of the domestic battery charges, the prosecutor is not required to dismiss or vacate the petition for the final domestic violence order of protection, so the prosecutor chooses not to do so.[172] Instead, the prosecutor exercises his or her discretion in choosing to proceed with the petition as an independent action and proceeds with the attempt to obtain the domestic violence order of protection in the criminal court.[173] If successful, the final domestic violence order of protection may remain in effect for up to two years.[174] Meanwhile, the *ex parte* order of protection previously entered remains in effect.[175] The respondent-defendant, pursuant to statute, exercises his or her right to a hearing and files a meritorious defense, and the petition for the domestic violence order of protection proceeds to hearing.[176]

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prima facie evidence of the crime: an information, complaint, [or] indictment . . . charging a crime of domestic violence.").

171. *See id.* § 112A-5.5(f) ("The request for a final protective order can be considered at any court proceeding in the . . . criminal case after service of the petition.").

172. *See id.* § 112A-22.3(a) (2020) ("Voluntary dismissal or withdrawal of any . . . criminal prosecution or a finding of not guilty shall not require dismissal or vacation of the protective order[.]").

173. *See id.* ("[A]t the request of the petitioner, petitioner's counsel, or the State's Attorney on behalf of the petitioner, [the domestic violence order of protection proceedings] *may* be treated as an independent action and, if necessary and appropriate, transferred to a different court or division.") (emphasis added).

174. *See* § 725 ILL. COMP. STAT. 5/122A-20(b)(1) (2020) ("[I]f, however, the case is continued as an independent cause of action, the order's duration may be for a fixed period of time not to exceed 2 years[.]").

175. *See id.* § 112A-22.3(a) ("Dismissal of any . . . criminal prosecution shall not affect the validity of any previously issued protective order.").

176. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"); ILL. CONST. art. I, § 2 ("No person shall be deprived of life, liberty or property without due process of law."); 725 ILL. COMP. STAT. § 5/112A-11.5(a-5) (2020) ("The respondent may rebut prima facie evidence of the crime . . . by presenting

At hearing, the prosecutor once again calls the complaining witness to testify and introduces the photos the police took at the scene of the alleged crime and the 911 call that the complaining witness made. The judge grants the petition and issues a final domestic violence order of protection. As for remedies, pursuant to the statute, the judge orders that the respondent-defendant stay away from the complaining witness and his or her place of work, the petitioner-complaining witness is to have exclusive possession of the residence, the respondent-defendant undergo substance abuse treatment and domestic violence counseling, and the respondent-defendant cannot possess firearms.[177]

Such a scenario violates the Double Jeopardy Clause of the Constitution of the United States and the same Clause of the Constitution of the State of Illinois.[178] For one, it is unconstitutionally providing a punishment in judicial proceedings featuring the same crime, as remedies are being imposed after the respondent-defendant was found not guilty of the crime of domestic battery and the petition for the domestic violence order of protection features the criminal complaint charging the domestic battery as a basis to issue the order of protection.[179] Furthermore, it violates one of the interests of the Double Jeopardy Clause in preserving the finality of judgments, as — despite the not guilty verdict — the prosecution is seeking to obtain the final domestic violence order of protection using the criminal complaint.[180] Additionally, in attempting to obtain the final domestic violence order of protection, and in arguing for the petition for the final domestic violence order of protection at the hearing, the prosecution is impermissibly litigating issues that a jury decided in acquitting the respondent-

evidence of a meritorious defense."); 725 ILL. COMP. STAT. § 5/112A-17.5(g) (2020) ("[A] respondent subject to an ex parte protective order may appear and petition the court to re-hear the petition. Any petition to re-hear shall be verified and shall allege the following: (1) that respondent did not receive prior notice of the initial hearing in which the ex parte protective order was entered . . . ; and (2) that respondent had a meritorious defense to the order or any of its remedies or that the order or any of its remedies was not authorized under this Article. The verified petition and affidavit shall set forth the evidence of the meritorious defense that will be presented at a hearing.").

177. *See* 725 ILL. COMP. STAT. § 5/112A-14(b) (2020) (listing the numerous remedies that can be included in a domestic violence order of protection).

178. *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life, liberty, or property[.]"); ILL. CONST. art. I, § 10 ("No person shall . . . be twice put in jeopardy for the same offense.").

179. *See Yeager*, 557 U.S. at 117 ("[I]t is very clearly the *spirit* of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection." (quoting *Ex parte Lange*, 85 U.S. at 170)).

180. *See id.* at 118 (holding that one of the two interests the Double Jeopardy Clause serves is to preserve final judgments (quoting *Crist*, 437 U.S. at 33)).

defendant.[181] Despite being found not guilty at trial of domestic battery, the respondent-defendant is essentially impermissibly facing retrial for the same charges, given that the criminal complaint is attached to the petition for the domestic violence order of protection; the proceedings are taking place in a criminal courtroom under the criminal case number with the same judge who presided over the criminal trial presiding over the petition for the domestic violence order of protection; the prosecutor who prosecuted the criminal domestic battery charge is seeking the domestic violence order of protection on behalf of the complaining witness; the prosecutor is presenting the same evidence in the same manner he or she did at trial; the judge is essentially determining whether, by a preponderance of the evidence, the allegations in the criminal complaint occurred; and the judge is imposing remedies he or she could have imposed as a sentence had the respondent-defendant been found guilty at trial, as the judge could have ordered the respondent-defendant to have no contact with the complaining witness, undergo substance abuse treatment and domestic violence counseling, and not to possess firearms, had that occurred.[182]

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181. *See id.* at 119 (citing *Ashe*, 397 U.S. at 443) (holding that, under the Double Jeopardy Clause, the prosecution is prohibited from relitigating any issue that a jury necessarily decided when acquitting a defendant in a prior trial).

182. *See Bravo-Fernandez*, 137 S. Ct. at 357 (holding that the Double Jeopardy Clause of the Constitution of the United States bars prosecution of the same defendant for the same offense after both a conviction and an acquittal); *Holman*, 20 N.E.3d at 463 (noting that the defendant had previously been convicted of domestic battery and was ordered to complete a drug and alcohol evaluation and domestic violence counseling); *Gemeny*, 731 N.E.2d at 846 (noting that the defendant was sentenced to complete domestic violence counseling as part of a sentence for domestic battery); *DeLeon*, 2020 IL 124744 at ¶ 9 (noting that the domestic violence order of protection statute operates in criminal proceedings); 725 ILL. COMP. STAT. §§ 5/112A-11.5(a)-(a-5) (2020) ("The court shall grant the petition and enter a protective order if the court finds prima facie evidence that a crime involving domestic violence . . . has been committed. . . . The respondent may rebut prima facie evidence of the crime . . . by presenting evidence of a meritorious defense. . . . 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. "); 720 ILL. COMP. STAT § 5/12-3.2(d) ("Upon conviction of domestic battery, the court shall advise the defendant orally or in writing, substantially as follows: 'an individual convicted of domestic battery may be subject to federal criminal penalties for possessing, transporting, shipping, or receiving any firearm or ammunition in violation of the federal Gun Control Act of 1968 (18 U.S.C. 922(g)(8) and (9)).."); § 5/112A-14(b) (listing the numerous remedies that

B. The Self-Incrimination Clause

The statutory framework also violates a criminal defendant's right not to be compelled to be a witness against himself or herself under the Constitution of the United States and the Constitution of the State of Illinois.[183] Consider the following scenario: A prosecutor files a petition for a domestic violence order of protection on behalf of the complaining witness in the criminal domestic battery case.[184] The prosecutor seeks to have the domestic violence order of protection be issued as part of a criminal prosecution for domestic battery, as he or she is required to do so.[185] The prosecutor has attached the criminal complaint to the petition to help in meeting its burden and shifting it to the respondent-defendant.[186] The respondent-defendant files a notice in writing with the court alleging a meritorious defense that an affidavit supports and verifies and explains the evidence that would be introduced at a hearing.[187] At the domestic violence order of protection hearing, the

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can be included in a domestic violence order of protection); *Abuse Intervention Program*, *supra* note 113 (discussing how people who attend domestic violence counseling may be court ordered to do so); *Partner Abuse Prevention Program*, *supra* note 113; *Violence Intervention Services*, *supra* note 113; *Illinois Domestic Violence Laws*, *supra* note 113 (discussing how domestic violence counseling may be a part of a sentence for domestic battery); *Domestic Battery*, *supra* note 113 (stating how terms of a sentence for domestic battery include domestic violence counseling and a stay away order from the complaining witness); *About Domestic Battery – What You Need to Know!*, *supra* note 113 (explaining that a potential penalty for domestic battery is domestic violence counseling and substance abuse counseling).

183. *See* U.S. CONST. amend. V ("[N]or shall be compelled in any criminal case to be a witness against himself . . . ."); ILL. CONST. ART. I, § 10 ("No person shall be compelled in a criminal case to give evidence against himself.").

184. *See* 725 ILL. COMP. STAT. § 5/112A-4.5(a)(2) (2020) (listing who can file a petition for a domestic violence order of protection).

185. *See id.* § 112A-2.5(1) ("The following protective orders may be entered in conjunction with . . . a criminal prosecution: a domestic violence order of protection in cases involving domestic violence[.]"); 725 ILL. COMP. STAT. § 5/112A-5(a) (2020) (emphasis added) ("A petition for a protective order *shall* be filed in conjunction with a . . . criminal prosecution . . . provided the petition names a victim of the alleged crime.").

186. *See id.* § 112A-11.5(a)(1) ("The court shall grant the petition and enter a protective order if the court finds prima facie evidence that a crime involving domestic violence . . . has been committed. The following shall be considered prima facie evidence of the crime: an information, complaint, [or] indictment . . . charging a crime of domestic violence.").

187. *See id.* § 112A-11.5(a-5) ("The respondent may rebut prima facie evidence of the crime . . . by presenting evidence of a meritorious defense."); 725 ILL. COMP. STAT. § 5/112A-17.5(g) (2020) ("[A] respondent subject to an ex parte protective order may appear and petition the court to re-hear the petition. Any petition to re-hear shall be verified and shall allege the following: (1) that respondent did not receive prior notice of the initial hearing in which the ex

prosecution calls the respondent-defendant as a witness to testify as to the allegations in the complaint, even though the respondent-defendant had no plans of testifying — even when trying to prove his or her meritorious defense. Such would be permissible because the statute claims the proceedings are civil.[188] However, this meets the coercion element of the Self-Incrimination Clause because the scenario describes events that amount to the prosecution trying to prove the allegations in the criminal complaint through compulsion and using the respondent-defendant's own words; the respondent-defendant is being involuntarily called to testify by the prosecution against himself or herself in what otherwise should be considered a criminal proceeding for reasons previously discussed.[189] Therefore, simply calling the respondent-defendant is impermissible in the proceeding in and of itself.[190] Even so, compulsion would apply if the respondent-defendant did not wish to testify, as with the prosecutor

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parte protective order was entered . . . ; and (2) that respondent had a meritorious defense to the order or any of its remedies or that the order or any of its remedies was not authorized under this Article. The verified petition and affidavit shall set forth the evidence of the meritorious defense that will be presented at a hearing.").

188. *See* 725 ILL. COMP. STAT. § 5/112A-6.1(a) (2020) ("Any proceeding to obtain, modify, re-open, or appeal a protective order and service of pleadings and notices shall be governed by the rules of civil procedure of this State. The Code of Civil Procedure and Supreme Court and local court rules applicable to civil proceedings shall apply, except as otherwise provided by law."); *How Courts Work: Steps in a Trial*, *supra* note 45 (explaining that the Fifth Amendment of the Constitution of the United States, through the protection against self-incrimination, does not allow the prosecution to call the criminal defendant as a witness and explain his or her story in a *criminal* proceeding).

189. *Lefkowitz*, 414 U.S. at 77 (stating that the Double Jeopardy Clause prevents the prosecution from calling a criminal defendant involuntarily as a witness against himself); *Malloy*, 378 U.S. at 8; *Hoffman*, 341 U.S. at 486 (explaining the Fifth Amendment's Self-Incrimination Clause and testimonial compulsion); *How Courts Work: Steps in a Trial*, *supra* note 45; Jones, *supra* note 44, at 10 (declaring that the Fifth Amendment of the Constitution of the United States protects a person from being forced to provide testimony against himself or herself).

190. *See Malloy*, 378 U.S. at 8 (requiring that the Constitution mandates that the prosecution establish an accused's guilt with evidence freely and independently secured without coercively proving a charge against him or her with evidence spoken from him or her); *Lefkowitz*, 414 U.S. at 77 (stating that the Double Jeopardy Clause prevents the prosecution from calling a criminal defendant involuntarily as a witness against himself); *How Courts Work: Steps in a Trial*, *supra* note 45 (noting that the Fifth Amendment of the Constitution of the United States prohibits the prosecution from calling the criminal defendant as a witness involuntarily in a *criminal* proceeding).

calling the respondent-defendant as a witness, the respondent-defendant would not be exercising his or her free will to speak, his or her will will be overborne, and he or she will not be making statements freely and voluntarily when testifying because he or she will have to answer questions posed or be held in contempt of court.[191] It amounts to impermissible testimonial compulsion.[192]

In this scenario, the incrimination element is also likely to be established. At the hearing, the prosecutor seeks to ask questions of the respondent-defendant regarding the criminal complaint, and therefore the court will likely determine that the answer to those questions could support a conviction or provide a link in the chain of evidence that would be necessary to help prosecute the respondent-defendant.[193] Furthermore, given the implications of the question and the setting in which it is asked, the answer to questions regarding the allegations in the criminal complaint are likely to be dangerous.[194] The testimonial element is also likely to be present because, in answering the questions regarding the allegations in the criminal complaint the prosecutor asks, the statement the respondent-defendant makes on the stand is likely to disclose information or make a factual assertion.[195]

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191. *See Malloy*, 378 U.S. at 8 (holding that the Fifth Amendment of the Constitution of the United States, as applied through the Fourteenth Amendment to the States, requires that a person has the right to remain silent, to speak if he or she chooses, and not to be punished for choosing to remain silent); *Haynes*, 373 U.S. at 513 (noting that the primary inquiry is determining whether the accused had his or her will overborne when confessing and whether a confession is admissible depends on whether the confession was made without compulsion or inducement, voluntarily, and freely (quoting *Lynumn*, 372 U.S. at 534; *Wilson*, 168 U.S. at 623)); *Geiger*, 978 N.E.2d at 1062 (noting that the defendant was held in contempt for refusing to testify); Meisner, *supra* note 47 (explaining that a person was found in contempt of court and sentenced to a sixty-day jail sentence for refusing to testify at a trial of gang members).

192. *See Hoffman*, 341 U.S. at 486 (explaining the Fifth Amendment's Self-Incrimination Clause); *see also* Jones, *supra* note 44, at 10 (explaining that a person cannot be forced to testify against himself or herself).

193. *Hoffman*, 341 U.S. at 486 ("The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a . . . crime").

194. *See id* at 486-87. (citing Rogers v. United States, 340 U.S. 367 (1951)) (explaining that courts decide whether someone's silence is justified and that, for the privilege to be properly invoked, the implications of the question and the circumstances and setting in which the question was asked must indicate answering the question or explaining why it must not be answered is dangerous with the potential for an injurious disclosure).

195. *See Schmerber*, 384 U.S. at 761 (holding that the Fifth Amendment's privilege only applies when a witness is being compelled to testify against himself or herself or compelled to give the State evidence that is "testimonial or communicative" in nature); *Doe*, 487 U.S. at 210 (holding that a statement is testimonial if the communication "explicitly or implicitly relate[s] a factual assertion or disclose[s] information").

Given that there is compulsion, incrimination, and testimony in this example, the respondent-defendant would be able to invoke the Self-Incrimination Clause.[196] The respondent-defendant would be able to invoke the privilege even though the statute considers the domestic violence order of protection proceedings as civil.[197] Where the issue comes in, however, is that, if the respondent-defendant chooses to invoke the privilege, because the statute considers the proceedings as civil, the prosecutor can argue to the judge to draw an adverse inference and use the respondent-defendant's invocation of the Self-Incrimination Clause's privilege against him or her to obtain the domestic violence order of protection.[198] Such would be impermissible in criminal proceedings.[199] Again, for reasons already discussed, the domestic violence order of protection proceedings are in practice criminal proceedings, and thus the prosecutor would be violating the respondent-defendant's constitutional right if the prosecutor were to comment on the respondent-defendant's invocation of the privilege that the Self-Incrimination Clause provides or seeks the negative inference in obtaining the domestic violence order of protection.[200]

Ironically, the adverse inference in and of itself could serve as a basis for compulsion. For example, a respondent-defendant may recognize that if he or she invokes his or her right under the Clause if the prosecutor calls him or her to testify at the domestic violence order of protection hearing about the underlying allegations in the

196. *See* U.S. CONST. amend. V ("[N]or shall be compelled in any criminal case to be a witness against himself."); ILL. CONST. art. I, § 10 ("No person shall be compelled in a criminal case to give evidence against himself.").

197. *See Arndstein*, 266 U.S. at 40 (holding that the Fifth Amendment right against self-incrimination applies in civil proceedings and that the application of the privilege does not depend upon the type of proceeding in which the privilege is claimed); *Balsys*, 524 U.S. at 672 (explaining that the Fifth Amendment Privilege against self-incrimination can be asserted at any type of proceeding when the witness reasonably believes that his or her testimony could be used against him or her in a later criminal proceeding).

198. *See Baxter*, 425 U.S. at 316 (holding that the Fifth Amendment privilege against self-incrimination does not prohibit a negative inference against a party to a civil proceeding when refusing to testify).

199. *See* Griffin v. California, 380 U.S. 609, 614-15 (1965) (putting in no uncertain terms that the prosecution or a court may not comment on a defendant's choice not to testify or infer that such is evidence of guilt).

200. *See id.* (putting in no uncertain terms that the prosecution or a court may not comment on a defendant's choice not to testify or infer that such is evidence of guilt); *DeLeon*, 2020 IL 124744 at ¶ 9 (noting that the domestic violence order of protection statute operates in criminal proceedings).

criminal complaint that is a part of the petition for the domestic violence order of protection,[201] the prosecutor may seek the negative inference given the civil designation in the domestic violence order of protection statute.[202] Not wanting to have the adverse interest used against him or her, the respondent-defendant may feel there is no choice but to testify. This would amount to compulsion to testify, as the looming possibility of the adverse inference would induce the respondent-defendant to testify, overbearing his or her will.[203] Again, the incrimination and testimony elements would be present because the prosecutor looks to ask questions of the respondent-defendant about the criminal complaint, ensuring that the answers to the questions could support a later conviction for domestic battery or provide a link in the chain of evidence that would be necessary to prosecute the respondent-defendant, and answering the questions would disclose information or make factual assertions.[204] Given that there is compulsion, incrimination, and testimony, the respondent-defendant can invoke the Clause's privilege.[205] However, the respondent-defendant wants to avoid the negative inference, and the prosecution may argue for it if the

201. *See* 725 ILL. COMP. STAT. § 5/112A-11.5(a)(1) (2020) ("The court shall grant the petition and enter a protective order if the court finds prima facie evidence that a crime involving domestic violence . . . has been committed. The following shall be considered prima facie evidence of the crime: an information, complaint, [or] indictment . . . charging a crime of domestic violence").

202. *See Baxter,* 425 U.S. at 316 (holding that the Fifth Amendment privilege against self-incrimination does not prohibit a negative inference against a party to a civil proceeding when refusing to testify); 725 ILL. COMP. STAT. § 5/112A-6.1(a) (2020) ("Any proceeding to obtain, modify, re-open, or appeal a protective order and service of pleadings and notices shall be governed by the rules of civil procedure of this State. The Code of Civil Procedure and Supreme Court and local court rules applicable to civil proceedings shall apply, except as otherwise provided by law.").

203. *Malloy*, 378 U.S. at 8; *Haynes*, 373 U.S. at 513 (noting that the primary inquiry is determining whether the accused had his or her will overborne when confessing and whether a confession is admissible depends on whether the confession was made without compulsion or inducement, voluntarily, and freely (quoting *Lynumn*, 372 U.S. at 534; *Wilson*, 168 U.S. at 623)).

204. *See Hoffman*, 341 U.S. at 486 ("The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a . . . crime"); *Schmerber*, 384 U.S. at 761 (holding that the Fifth Amendment's privilege only applies when a witness is being compelled to testify against himself or herself or compelled to give the State evidence that is "testimonial or communicative" in nature); *Doe*, 487 U.S. at 210 (holding that a statement is testimonial if the communication "explicitly or implicitly relate[s] a factual assertion or disclose[s] information").

205. *See* U.S. CONST. amend. V ("[N]or shall be compelled in any criminal case to be a witness against himself."); *See* ILL. CONST. art. I, § 10 ("No person shall be compelled in a criminal case to give evidence against himself.").

respondent-defendant invokes the privilege.[206] So, the respondent-defendant again feels compelled to testify, and the analysis recycles. At the end of the day, the respondent-defendant may end up testifying simply to avoid the negative inference, completely reading out of the Constitution of the United States and the Constitution of the State of Illinois the privilege the respective Clauses of each creates.

Therefore, regardless of whether the domestic violence order of protection proceeding is criminal or civil, it should be impermissible to hold the invocation of the Clause against the respondent-defendant in domestic violence order of protection proceedings. Such should especially be the case given that "[s]ilence is often of the most persuasive character," and that is why it is impermissible for a prosecutor to argue that a court or a jury draw negative inferences from a refusal to testify in criminal proceedings in the first place; it would deprive the Self-Incrimination Clause of meaning if one were able to draw a negative inference from an invocation of the Clause in criminal proceedings, and the same can be said if one invokes the clause in a domestic violence order of protection hearing no matter whether it is considered a civil or criminal proceeding.[207] A negative inference against the respondent-defendant in the domestic violence order of protection hearing for invoking the protections of the Self-Incrimination Clause amounts to an impermissible penalty against the respondent-defendant for exercising his or her right under the Clause.[208] Given that the Self-Incrimination Clause has been extended to apply to civil proceedings, the rule that one cannot use an adverse inference against someone in a criminal proceeding for

206. *See Baxter,* 425 U.S. at 316 (holding that the Fifth Amendment privilege against self-incrimination does not prohibit a negative inference against a party to a civil proceeding when refusing to testify); § 5/112A-6.1(a) ("Any proceeding to obtain, modify, re-open, or appeal a protective order and service of pleadings and notices shall be governed by the rules of civil procedure of this State. The Code of Civil Procedure and Supreme Court and local court rules applicable to civil proceedings shall apply, except as otherwise provided by law.").

207. *Bilokumski*, 263 U.S. at 153-54. The same can be said for invoking the protection in any criminal or civil proceeding.

208. *See* Griffin v. California, 380 U.S. at 614 (putting in no uncertain terms that the prosecution or a court may not comment on a defendant's choice not to testify or infer that such is evidence of guilt). Again, the same can be said for invoking the protection of the Clause in any criminal or civil proceeding. At the end of the day, the negative inference should be held unconstitutional in both criminal and civil proceedings.

invoking should also be extended to civil proceedings to ensure that the Clause is not deprived of its meaning and to avoid impermissible penalties for invoking the clause, especially in domestic violence order of protection hearings, where a criminal complaint is being used as a part of a civil proceeding with the very prosecutor prosecuting the criminal domestic battery case seeking to ask a respondent-defendant questions about the allegations in the criminal complaint charging the domestic battery in front of the very judge presiding over the criminal domestic battery case in a criminal court room and the prosecutor would not be permitted to argue to the court to draw a negative inference under any other circumstances given that all other proceedings related to the criminal complaint charging domestic battery in which the prosecutor participates are or would likely be considered criminal proceedings.[209]

Furthermore, the prosecutor can use that he or she can obtain an adverse inference against the respondent-defendant if the respondent-defendant invokes his or her privilege under the Clause in combination with other portions of the domestic violence order of protection statute to obtain an unfair advantage at either the domestic violence order of protection hearing or in the criminal domestic battery case.[210] It would essentially corner the respondent-defendant to make a losing choice in a lose-lose situation. For example, the prosecutor can admit the criminal complaint that charges domestic battery into evidence to meet his or her burden[211]

209. *See id.* (putting in no uncertain terms that the prosecution or a court may not comment on a defendant's choice not to testify or infer that such is evidence of guilt); *Arndstein*, 266 U.S. at 40 (holding that the Fifth Amendment right against self-incrimination applies in civil proceedings and that the application of the privilege does not depend upon the type of proceeding in which the privilege is claimed); Balsys, 524 U.S. at 672 (explaining that the Fifth Amendment Privilege against self-incrimination can be asserted at any type of proceeding when the witness reasonably believes that his or her testimony could be used against him or her in a later criminal proceeding); *DeLeon*, 2020 IL 124744 at ¶ 9 (noting that the domestic violence order of protection statute operates in criminal proceedings); 725 ILL. COMP. STAT. § 5/112A-5(a) (2020) ("A petition for a protective order *shall* be filed in conjunction with a . . . criminal prosecution . . . provided the petition names a victim of the alleged crime." (emphasis added)); 725 ILL. COMP. STAT. § 5/112A-5.5(f) (2020) ("The request for a final protective order can be considered at any court proceeding in the . . . criminal case after service of the petition."); 725 ILL. COMP. STAT. § 5/112A-11.5(a)(1) (2020) ("The court shall grant the petition and enter a protective order if the court finds prima facie evidence that a crime involving domestic violence . . . has been committed. The following shall be considered prima facie evidence of the crime: an information, complaint, [or] indictment . . . charging a crime of domestic violence.").

210. *See Baxter*, 425 U.S. at 316 (holding that the Fifth Amendment privilege against self-incrimination does not prohibit a negative inference against a party to a civil proceeding when refusing to testify).

211. § 5/112A-11.5(a)(1) ("The court shall grant the petition and enter a

but may also choose to call the respondent-defendant as a witness simply because the prosecutor knows that if the respondent-defendant invokes his or her right under the Clause, the prosecutor can argue for the adverse interest and have the judge use the respondent-defendant's failure to testify about the allegations in the criminal complaint against him or her and therefore help the prosecutor in obtaining the final domestic violence order of protection.[212] But, in the alternative, the prosecutor knows that, if the respondent-defendant testifies and does not invoke his or her right under the Clause, the prosecutor may obtain testimony that can potentially be used against the respondent-defendant at a trial on the underlying charge for domestic battery.[213] For example, the prosecutor may file the petition for the domestic violence order of protection on behalf of the complaining witness at the outset of the case, well before discovery is complete on the criminal domestic battery case.[214] Given that the hearing for a domestic violence order of protection is to be an expedited proceeding, the hearing on the petition may also occur well before discovery on the criminal

protective order if the court finds prima facie evidence that a crime involving domestic violence . . . has been committed. The following shall be considered prima facie evidence of the crime: an information, complaint, [or] indictment . . . charging a crime of domestic violence.").

212. *See Baxter,* 425 U.S. at 316 (holding that the Fifth Amendment privilege against self-incrimination does not prohibit a negative inference against a party to a civil proceeding when refusing to testify).

213. *See, e.g.*, ILL. R. EVID. 801(d)(1)-(2) ("A statement is not hearsay if [i]n a criminal case, the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony at the trial or hearing, and — was made under oath at a trial, hearing, or other proceeding, or in a deposition, or narrates, describes, or explains an event or condition of which the declarant had personal knowledge, and the statement is proved to have been written or signed by the declarant, or the declarant acknowledged under oath the making of the statement either in the declarant's testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought or at a trial, hearing, or other proceeding, or in a deposition, or the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording . . . . The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity.").

214. *See* § 725/112A-5.5(a) ("A petition for a protective order may be filed at any time after a criminal charge . . . is filed and before the charge . . . is dismissed, the defendant . . . is acquitted, or the defendant . . . completes service of his or her sentence.").

domestic battery charge is complete.[215] If the respondent-defendant chooses to testify at the domestic violence order of protection hearing with discovery incomplete to avoid the adverse inference, the respondent-defendant may corner himself or herself into a defense that later discovery may indicate is not a viable defense, and if the respondent-defendant chooses to proceed at trial on a separate defense that the discovery obtained after the domestic violence order of protection hearing indicates is viable, the prosecutor will be able to impeach the respondent-defendant should he or she choose to testify at trial and he or she testifies inconsistently compared to the testimony he or she gave at the domestic violence order of protection hearing given the new defense or otherwise undermine the new defense based on the respondent-defendant's testimony at the domestic violence order of protection hearing.[216] In essence, the choice to testify at the domestic violence order of protection hearing could be particularly and irreparably damaging to the respondent-defendant in the underlying criminal domestic battery case, and at that point, the respondent-defendant will be facing up to one year in jail, two years of probation, and a $2,500 fine as a potential penalty.[217]

Some may argue that the three previously analyzed scenarios cannot possibly occur given that the domestic violence order of protection statute states that it is impermissible to obtain discovery as part of the domestic violence order of protection proceedings that would not be able to be obtained as part of the criminal proceedings and that criminal rules of discovery apply,[218] so a prosecutor cannot call a respondent-defendant as a witness at the domestic violence order of protection hearing.[219] However, the statute is clear in using

215. *See* 725 ILL. COMP. STAT. § 5/112A-12(a-5) (2020) ("A petition for a domestic violence order of protection shall be treated as an expedited proceeding.").

216. *See, e.g.*, ILL. R. EVID. 801(d)(1)(A) ("A statement is not hearsay if [i]n a criminal case, the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony at the trial or hearing, and—was made under oath at a trial, hearing, or other proceeding, or in a deposition.").

217. *See* 730 ILL. COMP. STAT. §§ 5/5-4.5-55(a), (d), (e) (2020) (listing the maximum penalties for a Class A misdemeanor). The respondent-defendant will be facing up to one year in jail, two years of probation, and a $2,500 fine as a potential fine assuming the crime is charged as a Class A misdemeanor. The penalties could be greater if charged as a felony.

218. *See* 725 ILL. COMP. STAT. §§ 5/112A-6.1(b)-(c) (2020) (listing when criminal rules apply under the domestic violence order of protection statute).

219. *See Lefkowitz*, 414 U.S. at 77 (explaining that the Self-Incrimination Clause prevents a criminal defendant from being called as a witness involuntarily against himself or herself during the prosecution); *Malloy*, 378 U.S. at 8 (requiring that the Constitution mandates that the prosecution establish an accused's guilt with evidence freely and independently secured without coercively proving a charge against him or her with evidence spoken from him or her); *How Courts Work: Steps in a Trial*, *supra* note 45 (explaining

the word "discovery," not "testimony," and it is unclear in the statute whether testimony qualifies as discovery.[220] A court could give the statute the meaning the legislature intended, and when doing that, it will look to the language to the statute and give the language its plain meaning.[221] Therefore, a court will look to the definitions of "discovery" and "testimony" and may determine that "testimony" may not fall into the definition of "discovery" given the definitions of both.[222] If the statute sought to prevent the prosecution from obtaining the respondent-defendant's testimony that it could use at trial, the legislature could have made that clear by using the word "testimony" instead of or in addition to "discovery," and a court would then interpret the statute to reflect the legislature's intent and determine that the prosecution cannot call the respondent-defendant as a witness.[223] But that simply is not how the statute reads as it stands.[224]

Finally, the Illinois Supreme Court has stated that the respondent-defendant is not required to put forth evidence to establish a meritorious defense and in fact may choose not to attempt put on evidence of a meritorious defense forward once the state has introduced prima facie evidence of a crime of domestic

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that the Fifth Amendment of the Constitution of the United States, through the protection against self-incrimination, does not allow the prosecution to call the criminal defendant as a witness and explain his or her story in a *criminal* proceeding).

220. *See* § 5/112A-6.1(c) (emphasis added) ("Court proceedings related to the entry of a protective order and the determination of remedies shall not be used to obtain *discovery* that would not otherwise be available in a criminal prosecution.").

221. *See Paris*, 688 N.E.2d at 139 (citations omitted) (explaining that the cardinal rule when interpreting statute is to determine the intent of the legislature and apply that intent, the strongest evidence of the legislature's intent is the language in the statute, and a statute's language must be given its "plain and ordinary meaning").

222. "Testimony" is defined as "[e]vidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition." *Testimony*, BLACK'S LAW DICTIONARY (11th ed. 2019). "Discovery" is defined as a "compulsory disclosure, at a party's request, of information that relates to the litigation" or "[t]he facts or documents disclosed." *Discovery*, BLACK'S LAW DICTIONARY (11th ed. 2019).

223. *See Paris*, 688 N.E.2d at 139 (citations omitted) (explaining that the cardinal rule when interpreting statute is to determine the intent of the legislature and apply that intent and the strongest evidence of the legislature's intent is the language in the statute).

224. *See* §§ 5/112A-6.1(b)-(c) (explaining when criminal rules apply under the domestic violence order of protection statute).

violence.[225] The Court notes that this alleviates any concerns regarding the Self-Incrimination Clause.[226] However, although the Court is correct in its analysis of the domestic violence order of protection hearing procedure, the Court ignores that a prosecutor, if he or she chooses to, can call the respondent-defendant to the stand to testify given that the proceeding is deemed under the statute a civil proceeding, thus reviving the Self-Incrimination Clause concerns.[227]

C. Due Process

The domestic violence order of protection statute's most egregious constitutional violations are found when considering its impacts on the right to due process, as the domestic violence order of protection statute violates some of the most basic tenets of the criminal justice system.[228] The Illinois legislature amended the statute after it was determined that it violated a respondent-defendant's due process rights given that the previous version of the statute did not allow for a hearing upon a showing of prima facie evidence of a crime of domestic violence, but the amendment created other serious due process concerns.[229] Assuming that the

225. *DeLeon*, 2020 IL 124744 at ¶ 39 (noting that the domestic violence order of protection statute's burden-shifting provision does not require that the respondent-defendant put forth evidence to rebut the prima facie evidence of a crime of domestic violence and establish a meritorious defense); §§ 5/112A-11.5(a)-(a-5) ("The court shall grant the petition and enter a protective order if the court finds prima facie evidence that a crime involving domestic violence . . . has been committed. . . . The respondent *may* rebut prima facie evidence of the crime . . . by presenting evidence of a meritorious defense. . . . 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. " (emphasis added)).

226. *See id.*

227. *See* § 5/112A-6.1(a) (2020) ("Any proceeding to obtain, modify, re-open, or appeal a protective order and service of pleadings and notices shall be governed by the rules of civil procedure of this State. The Code of Civil Procedure and Supreme Court and local court rules applicable to civil proceedings shall apply, except as otherwise provided by law."); *How Courts Work: Steps in a Trial*, *supra* note 45 (explaining that the Fifth Amendment of the Constitution of the United States, through the protection against self-incrimination, does not allow the prosecution to call the criminal defendant as a witness and explain his or her story in a *criminal* proceeding).

228. *See, e.g.*, U.S. CONST. amends. IV-VI, VIII (addressing the right against unreasonable searches and seizures the right not to be subject to penalty for the same crime twice, the right against self-incrimination, and rights in a criminal trial).

229. *See* 725 ILL. COMP. STAT. § 5/112A-11.5 (Jan. 1, 2018), *amended by* § 5/112A-11.5 (June 29, 2018) (allowing the domestic violence order of protection to issue simply upon a showing of prima facie evidence of a crime of domestic violence); *Brzuskiewicz*, No. 17CM2444 (Ill. Cir. Ct. 16th Cir. 2018) (finding the previous procedure to obtain a domestic violence order of protection statute

prosecution, under the domestic violence order of protection statute, is seeking to obtain the domestic violence order of protection on behalf of the complaining witness in the criminal case and introduces the criminal complaint into evidence at a hearing,[230] when the statute mandates that a court enter the final domestic violence order of protection upon a prosecutor's showing of prima facie evidence of a crime of domestic violence — with a prosecutor introducing the underlying criminal complaint charging domestic battery being sufficient enough to establish prima facie evidence — unless the respondent-defendant establishes a meritorious defense that rebuts the prima facie evidence and the court chooses to not enter the domestic violence order of protection in its discretion, it creates an impermissible and unconstitutional presumption, namely a mandatory rebuttable presumption that shifts the burden of persuasion and the burden of production.[231]

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unconstitutional).

230. *See* 725 ILL. COMP. STAT. § 5/112A-11.5.(a)(1) (2020) ("[T]he court shall grant the petition and enter a protective order if the court finds prima facie evidence that a crime involving domestic violence . . . has been committed. The following shall be considered prima facie evidence of the crime: an information, complaint, [or] indictment . . . charging a crime of domestic violence . . . .").

231. *See Pomykala*, 784 N.E.2d at 788 (holding that all mandatory presumptions are *per se* unconstitutional in Illinois); §§ 5/112A-11.5(a)(1), (a-5) (explaining the procedure for a petitioner-complaining witness to obtain a domestic violence order of protection in presenting prima facie evidence of a crime of domestic violence and a respondent-defendant to rebut prima facie evidence of a crime of domestic violence). A key distinction must be drawn here with the Illinois Supreme Court's holding in *People v. DeLeon*. In *Deleon*, at issue was the issuance of a civil no contact order, which the domestic violence order of protection statute also allows issuance of using the same procedures as a part of a criminal case as if one were seeking to obtain a domestic violence order of protection under the statute as a part of a criminal case. *DeLeon*, 2020 IL 124744 at ¶ 3; §§ 5/112A-2.5(2)-(3)*;* §§ 5/112A-4.5(b)-(c). The Court noted that the trial-level court struck down 725 ILCS § 5/112A-11.5 — the section of the domestic violence order of protection statute that requires the prosecutor or the petitioner-complaining witness to put forth prima facie evidence of a crime of domestic violence, including using the complaint charging domestic violence, with the respondent-defendant then needing to put forth evidence of a meritorious defense in order to persuade the court to not issue the final domestic violence order of protection if the respondent-defendant does not want the final domestic violence order of protection to issue — because it shifted the burden to the respondent-defendant, in conflict with the Illinois Civil No Contact Order Act's mandate that the petitioner-complaining witness bring forth the necessary evidence to have the no contact order issued, essentially putting the burden on the petitioner. *Id.* at ¶¶4, 44. The Court noted that, although the domestic violence order of protection statute and the Civil No Contact Order Act governed

Taking it step-by-step, the domestic violence order of protection statute creates a presumption because it requires the court to enter a domestic violence order of protection upon the introduction of prima facie evidence of a crime of domestic violence, mandating the court to assume that a fact — that a crime of domestic violence occurred — is in existence.[232] The presumption is mandatory, as the court is required to accept the presumption given the conditional language in the statute and that simply introducing the criminal complaint is enough to establish prima facie evidence; if the complaint is introduced into evidence, prima facie evidence has been established, and the court is required to enter the domestic violence order of protection.[233] The mandatory presumption is not conclusive because the presumed element is not taken out of the case once the prosecution is able to establish the predicate facts given that the domestic violence order of protection statute does allow the respondent-defendant to rebut the connection that exists between the presumed and proven facts.[234] Instead, the domestic violence

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overlapping areas in the issuance of civil no contact order, the purpose of both statues was clear in to provide protection to petitioners. *Id.* at ¶48. The Court held there was no conflict between the two statutes, as the domestic violence order of protection act only applies to proceedings that are a part of criminal cases and the Civil No Contact Order Act applies to civil proceedings that are not a part of a criminal case and where the respondent is not criminally charged, the burden that would apply depended upon under which statute the proceeding was brought under to cover, and the legislature created two different statutes to cover different scenarios when petitioners may seek a civil no contact order — those brought with prosecutions and those where there was no prosecution ongoing as a result of a petitioner not reporting a crime or the local prosecuting agency chose not to prosecute the crime. *Id.*at ¶¶48-52. Therefore, the burden-shifting scheme in the domestic violence order of protection statute was held permissible. *Id.* at ¶ 52. The distinction lies in that, in *DeLeon*, the Illinois Supreme Court upheld the burden-shifting procedure in the domestic violence order of protection statute when it conflicted with another *statute*, whereas this Article argues that the burden-shifting procedure in the domestic violence order of protection statute is impermissible because it conflicts with the *Constitution.*

232. *See Pomykala*, 784 N.E.2d at 787 (citing *Watts*, 692 N.E.2d at 320) (explaining what a presumption is); § 5/112A-11.5(a) ("[T]he court shall grant the petition and enter a protective order if the court finds prima facie evidence that a crime involving domestic violence . . . has been committed.").

233. *See Pomykala*, 784 N.E.2d at 787 (citing *Watts*, 692 N.E.2d at 320) (stating that a mandatory presumption mandates that the finder of fact accept the presumption as true and explaining the two types of mandatory presumptions); § 5/112A-11.5(a)(1) ("[T]he court shall grant the petition and enter a protective order *if* the court finds prima facie evidence that a crime involving domestic violence . . . has been committed. The following shall be considered prima facie evidence of the crime: an information, complaint, indictment, or delinquency petition, charging a crime of domestic violence." (emphasis added)).

234. *See Watts*, 692 N.E.2d at 320 (explaining that a mandatory conclusive presumption is one that relieves the prosecution of its burden of persuasion through "removing the presumed element from the case entirely if the State proves the predicate facts" (citations omitted) (internal quotation marks

order of protection statute shifts the burden of proof, creating a rebuttable presumption because the respondent-defendant is allowed to attempt to establish a meritorious defense and rebut the prima facie evidence.[235] The domestic violence order of protection arguably shifts both the burden of production and the burden of persuasion, the former shifting because the court must find that a crime of domestic violence occurred if the respondent-defendant simply does not establish a meritorious defense establishing that fact by a preponderance of the evidence, and the latter shifting to the respondent-defendant because once the court accepts that a crime of domestic violence occurred after the prosecution establishes such by prima facie evidence, the respondent-defendant must persuade the court not to find the fact that a crime of domestic violence occurred because of the permissive language allowing the court to still enter the domestic violence order of protection even if the respondent-defendant establishes a meritorious defense.[236]

The domestic violence order of protection statute is unconstitutional simply because it shifts the burden of persuasion from the prosecution to the defense; the prosecution is relieved of its duty to prove the criminal defendant guilty beyond a reasonable doubt.[237] Indeed, the prosecutor is using the criminal complaint to

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omitted)).

235. *See id*. (explaining mandatory rebuttable presumptions); § 5/112-A11.5(a-5) ("The respondent may rebut prima facie evidence of the crime . . . by presenting evidence of a meritorious defense.").

236. *See id*. at 320-21 (explaining mandatory rebuttable presumptions and the burden of production and the burden of persuasion). § 5/112A-11.5(a-5) ("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." (emphasis added)).

237. *See In re* Winship, 397 U.S. at 363-64 (noting that, to be found guilty of a crime, a person must be proven guilty beyond a reasonable doubt, the "reasonable-doubt standard plays a vital role in the American scheme of criminal procedure," provides a foundation for the presumption of innocence, is necessary to "command the respect and confidence of the community in applications of the criminal law," so that the criminal law not be weakened to the point that the "standard of proof that leaves people in doubt whether innocent men are being condemned); *Brinegar*, 338 U.S. at 174 (holding that, in a criminal case, the accused must be proven guilty beyond a reasonable doubt to prevent unjust convictions that result in "forfeitures of life, liberty, and property"); U.S. CONST. amends. V, XIV, § 1 (providing the Due Process Clauses of the Constitution of the United States); *Pomykala*, 784 N.E.2d at 788 (citing *Sandstrom*, 442 U.S. at 524) (noting that the Supreme Court of the United States has found mandatory rebuttable presumptions that shift the burden of persuasion to the criminal defendant as *per se* unconstitutional because they

obtain the domestic battery order of protection against a respondent-defendant and attempting to prove the allegations in the criminal complaint in a criminal courtroom likely in front of the judge who presides over the criminal case under a criminal court number.[238] Instead, the respondent-defendant is required to put forth evidence in his or her defense that the crime charged in the complaint did not occur and establish it by a preponderance of the evidence simply in what may be a vain attempt to prevent the domestic violence order of protection from entering given the permissive language in the statute.[239] Additionally, it establishes that a criminal defendant charged with domestic battery is presumed guilty until proven innocent instead of the other way around, which the Constitution of the United States requires; again, the respondent-defendant must prove that the allegations in the complaint did not occur by a preponderance of the evidence in putting forth its meritorious defense in an attempt to rebut the prima facie evidence.[240]

The domestic violence order of protection statute is unconstitutional under the Constitution of the United States and the Constitution of the State of Illinois because it also shifts the burden of production.[241] The domestic violence order of protection

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then do not require the prosecution to prove each element of the charged offense beyond a reasonable doubt); *Watts*, 692 N.E.2d at 321 (citing *Sandstrom*, 442 U.S. at 524) (explaining that the Supreme Court of the United States has found mandatory rebuttable presumptions that shift the burden of persuasion as *per se* unconstitutional).

238. *See* 725 ILL. COMP. STAT. § 5/112A-5.5(f) (2020) ("The request for a final protective order can be considered at any court proceeding in the . . . criminal case after service of the petition."); 725 ILL. COMP. STAT. § 5/112A-5(a) (2020) (emphasis added) ("A petition for a protective order *shall* be filed in conjunction with a . . . criminal prosecution . . . provided the petition names a victim of the alleged crime."); § 5/112A-11.5(a)(1) ("[T]he court shall grant the petition and enter a protective order if the court finds prima facie evidence that a crime involving domestic violence . . . has been committed. The following shall be considered prima facie evidence of the crime: an information, complaint [or] indictment . . . charging a crime of domestic violence.").

239. *See* § 5/112A-11.5(a-5) ("The respondent may rebut prima facie evidence of the crime . . . by presenting evidence of a meritorious defense. . . . 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.").

240. *See Coffin*, 156 U.S. at 453 (holding that the presumption of innocence for those accused is "the undoubted law, axiomatic and elementary" with the enforcement of such providing the foundation of criminal law); § 5/112A-11.5(a-5) ("The respondent may rebut prima facie evidence of the crime . . . by presenting evidence of a meritorious defense. . . . 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.").

241. *See Pomykala*, 784 N.E.2d at 788 (citing *Watts*, 692 N.E.2d 315 at 322-23) (explaining that, in *Watts*, mandatory rebuttable presumptions that shift

statute unconstitutionally requires that the respondent-defendant present evidence that the crime of domestic violence as alleged in the criminal complaint did not occur to overcome the presumption and unconstitutionally requires the judge to otherwise grant a directed verdict against the respondent-defendant if he or she does not do so through granting the petition and entering the final domestic violence order of protection.[242]

The domestic violence order of protection statute violates the presumption of innocence and the tenet that a criminal defendant must be proven guilty beyond a reasonable doubt under the Due Process Clauses of the Constitution of the United States and the Constitution of the State of Illinois in another sense.[243] Consider the following example: A prosecutor who is prosecuting a domestic battery case seeks to obtain a final domestic violence order of protection on behalf of a complaining witness against the defendant in a criminal case.[244] The criminal case has not yet gone to trial, and

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the burden of production from the prosecution to the defendant were deemed unconstitutional, making all mandatory presumptions *per se* unconstitutional); *see also Watts*, 682 N.E.2d at 323 (holding that a mandatory presumption that shifts the burden of production violates the Due Process Clause of the Constitution of the United States and Due Process Clause of the State of Illinois).

242. *See Watts*, 682 N.E.2d at 323-23 (citing *Sandstrom*, 442 U.S. at 516 n.5; *Martin Linen Supply Co.*, 430 U.S. at 572-73 (1977)) (holding mandatory rebuttable presumptions that shift the burden of production to a criminal defendant unconstitutional because shifting the burden of production requires the criminal defendant to present evidence to overcome the presumption and if a criminal defendant fails to satisfy the burden, the judge must enter a directed verdict against the accused that the presumption proves, contrary to the rule that it is unconstitutional to enter a directed verdict against the accused in a criminal case); *How Courts Work: Steps in a Trial*, *supra* note 45 (explaining that a defendant can choose not to present evidence in his or her own defense, believing that the prosecution did not meet its burden of proof).

243. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"); ILL. CONST. art. I, § 2 ("No person shall be deprived of life, liberty or property without due process of law."); *Coffin*, 156 U.S. at 453 (holding that the presumption of innocence for those accused is "the undoubted law, axiomatic and elementary" with the enforcement of such providing the foundation of criminal law).

244. *See* 725 ILL. COMP. STAT. § 5/112A-4.5(a)(2) (2020) (listing who can file a petition for a domestic violence order of protection); 725 ILL. COMP. STAT. § 5/112A-2.5(1) (2020) ("The following protective orders may be entered in conjunction with . . . a criminal prosecution: a domestic violence order of protection in cases of domestic violence[.]"); 725 ILL. COMP. STAT. § 5/112A-5(a) (2020) ("A petition for a protective order *shall* be filed in conjunction with a . . . criminal prosecution . . . provided the petition names a victim of the alleged

the respondent-defendant has not pled guilty to the criminal charges. The court finds prima facie evidence that a crime of domestic battery occurred, as the complaint for the criminal domestic battery charge is introduced into evidence.[245] The respondent-defendant seeks a hearing, but at the hearing, the respondent-defendant is unable to establish a meritorious defense.[246] As a result, the court enters the final domestic violence order of protection.[247] The court grants as remedies in the final domestic violence order of protection that the petitioner-complaining witness be granted exclusive possession of the residence, the respondent-defendant stay away from the petitioner-complaining witness, and the respondent-defendant undergo substance abuse and domestic violence counseling. Under this scenario, in essence, the prosecution has been able to punish and sentence the respondent-defendant using the criminal complaint charging domestic battery without having to prove the respondent-defendant guilty at a trial beyond a reasonable doubt or without the respondent-defendant pleading guilty to the domestic battery as charged in the criminal complaint, a violation of the Constitution of the United States and the Constitution of the State of Illinois; potentially innocent people are being condemned and a potential unjust loss of life, liberty, or property is occurring.[248]

Permissive language in the domestic violence order of protection statute also can lead to violations of the Due Process Clauses when certain circumstances are present.[249] Under the domestic violence

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crime." (emphasis added)).

245. *See id.* § 112A-11.5(a)(1) ("[T]he court shall grant the petition and enter a protective order if the court finds prima facie evidence that a crime involving domestic violence . . . has been committed. The following shall be considered prima facie evidence of the crime: an information, complaint [or] indictment . . . charging a crime of domestic violence.").

246. *See id.* § 112A-11.5(a-5) ("The respondent may rebut prima facie evidence of the crime . . . by presenting evidence of a meritorious defense.").

247. *See id.* §§ 112A-11.5(a)(1), (a-5) (explaining the procedure for the issuance of a domestic violence order of protection and fighting the issuance of a domestic violence order of protection).

248. *See In re* Winship, 397 U.S. at 363-64 (noting that, to be found guilty of a crime, a person must be proven guilty beyond a reasonable doubt, the "reasonable-doubt standard plays a vital role in the American scheme of criminal procedure," provides a foundation for the presumption of innocence, is necessary to "command the respect and confidence of the community in applications of the criminal law," so that the criminal law not be weakened to the point that the "standard of proof that leaves people in doubt whether innocent men are being condemned." *Brinegar*, 338 U.S. at 174 (holding that, in a criminal case, the accused must be proven guilty beyond a reasonable doubt to prevent unjust convictions that result in "forfeitures of life, liberty, and property"). U.S. CONST. amends. V, XIV, § 1 (explaining the right to due process from the federal government and the States, respectively).

249. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"); ILL. CONST.

order of protection statute, if the prosecutor establishes prima facie evidence of a crime of domestic violence through entering the complaint charging domestic battery into evidence, the court *must* grant the final domestic violence order of protection.[250] Meanwhile, if the respondent-defendant attempts to establish a meritorious defense at a hearing and the court finds that the respondent-defendant has introduced evidence that establishes a meritorious defense by a preponderance of the evidence, the court *may* decide that it is not going to enter the final domestic violence order of protection.[251] This procedure calls into doubt whether a respondent-defendant is going to receive the "opportunity to be heard at a meaningful time and in a meaningful manner" he or she is entitled to in Illinois before he or she can be deprived of life, liberty, or property in Illinois.[252] For example, after the prosecution introduces the criminal complaint charging domestic battery, the judge at a hearing may have already decided that, for one reason or another — such as, for example, making sure the parties are separate and not talking about the criminal case while it is ongoing — he or she is going to issue the domestic violence order of protection no matter what kind and how much evidence the respondent-defendant puts on because the statute does not require him or her to not issue the domestic violence order of protection if the respondent-defendant meets his or her burden.[253] Even if a judge is going to consider all of the evidence the respondent-defendant puts forth, the respondent-defendant may always have doubt whether the evidence was in fact considered. Although extreme, the judge could take a nap on the bench while the respondent-defendant puts on his or her case, wake

art. I, § 2 ("No person shall be deprived of life, liberty or property without due process of law.").

250. *See* § 112A-11.5(a)(1) ("[T]he court *shall* grant the petition and enter a protective order if the court finds prima facie evidence that a crime involving domestic violence . . . has been committed. The following shall be considered prima facie evidence of the crime: an information, complaint, [or] indictment . . . charging a crime of domestic violence." (emphasis added)).

251. *See id.* § 112A-11.5(a-5) ("The respondent may rebut prima facie evidence of the crime . . . by presenting evidence of a meritorious defense. . . . 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." (emphasis added)).

252. *Rucker*, 127 N.E.3d at 96 (quoting *In re D.W.*, 827 N.E.2d at 484).

253. *See* § 5/112A-11.5(a-5) ("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." (emphasis added)).

up to grant the petition for the final domestic violence order of protection, and find a safe haven in the statute despite the respondent-defendant meeting his or her burden.[254] The permissive nature of the statute may also deter a respondent-defendant from exercising his or her right to the "opportunity to be heard at a meaningful time and in a meaningful manner;" if the judge may not grant the petition for the final domestic violence order of protection even if the respondent-defendant meets her burden, what is the point of going to the hearing in the first place, where the respondent-defendant may hurt himself or herself in the underlying criminal case?[255] This original section of the statute was found unconstitutional for not providing the "opportunity to be heard at a meaningful time and in a meaningful manner" to the respondent-defendant, and this amendment to the statute, under some circumstances, did not correct the constitutional violation.[256]

There is another set of circumstances in which the respondent-defendant is deprived of the "opportunity to be heard at a meaningful time and in a meaningful manner" and where the statute certainly does not provide a remedy compared to the version of the statute that was found unconstitutional.[257] Consider the following: A respondent-defendant is charged with the Class A misdemeanor of domestic battery against the complaining witness and only the complaining witness. He or she enters a plea of guilty, and he or she is sentenced to two years of probation, $500 in fines and costs, and to complete domestic violence counseling.[258] One year after the respondent-defendant enters the plea of guilty, under the statute, the prosecutor of the criminal domestic battery case files a petition for a domestic violence order of protection on behalf of the

254. *See id.* ("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." (emphasis added)).

255. *Rucker*, 127 N.E.3d at 96 (quoting *In re D.W.*, 827 N.E.2d at 484); *supra* § II.B.

256. *Rucker*, 127 N.E.3d at 96 (quoting *In re D.W.*, 827 N.E.2d at 484); *see also* 725 ILL. COMP. STAT. § 5/112A-11.5 (Jan. 1, 2018), *amended by* § 5/112A-11.5 (June 29, 2018) (allowing the domestic violence order of protection to issue simply upon a showing of prima facie evidence of a crime of domestic violence); *Brzuskiewicz*, No. 17CM2444 (Ill. Cir. Ct. 16th Cir. 2018) (finding the previous procedure to obtain a domestic violence order of protection statute unconstitutional).

257. *Rucker*, 127 N.E.3d at 96 (quoting *In re D.W.*, 827 N.E.2d at 484).

258. *See* 730 ILL. COMP. STAT. §§ 5/5-4.5-55(a), (d), (e) (2020) (listing the maximum penalties for a Class A misdemeanor); *Holman*, 20 N.E.3d at 463 (noting that the defendant had previously been convicted of domestic battery and was ordered to complete a drug and alcohol evaluation and domestic violence counseling); *Gemeny*, 731 N.E.2d at 846 (noting that the defendant was sentenced to complete domestic violence counseling as part of a sentence for domestic battery); *Illinois Domestic Violence Laws*, *supra* note 113 (discussing how domestic violence counseling may be a part of a sentence for domestic battery).

complaining witness against the respondent-defendant.[259] The prosecutor uses the criminal complaint charging the domestic battery the respondent-defendant pled guilty to and the plea of guilty itself to establish prima facie evidence of the crime.[260] The respondent-defendant attempts to rebut the prima facie evidence of the crime through presenting a meritorious defense, but the judge at the hearing finds that the respondent-defendant failed to meet his or her burden, and the judge enters the final domestic violence order of protection.[261] In terms of remedies, the petition only sought, and the judge only granted, that the petitioner-complaining witness have exclusive possession of the residence, the prohibition of the respondent-defendant from entering or remaining at that residence, and that the respondent-defendant stay away from the petitioner-complaining witness.[262] As for the duration of the final domestic violence order of protection, the judge orders that the final domestic violence order of protection remain in effect until two years after the end of the respondent-defendant's term of probation.[263] Three months later, the respondent-defendant allegedly intentionally

259. *See* 725 ILL. COMP. STAT. § 5/112A-4.5(a)(2) (2020) (listing who can file a petition for a domestic violence order of protection); 725 ILL. COMP. STAT. § 5/112A-2.5(1) (2020) ("The following protective orders may be entered in conjunction with . . . a criminal prosecution: a domestic violence order of protection in cases of domestic violence[.]"); 725 ILL. COMP. STAT. § 5/112A-5.5(a) (2020) ("A petition for a protective order may be filed at any time after a criminal charge . . . is filed and before the charge . . . is dismissed, the defendant . . . is acquitted, or the defendant . . . completes service of his or her sentence.").

260. *See id.* §§ 112A-11.5(a)(1)-(2) ("[T]he court shall grant the petition and enter a protective order if the court finds prima facie evidence that a crime involving domestic violence . . . has been committed. The following shall be considered prima facie evidence of the crime: an information, complaint, [or] indictment charging a crime of domestic violence . . . ; a finding of guilt based upon a plea.").

261. *See* §§ 5/112A-11.5 (a-5) ("The respondent may rebut prima facie evidence of the crime . . . by presenting evidence of a meritorious defense.").

262. *See* 725 ILL. COMP. STAT. §§ 5/112A-14(b)(2)-(3) (2020) (listing as permissible remedies as a part of a domestic violence order of protection as exclusive possession of the residence for the petitioner-complaining witness, the prohibition of the respondent-defendant from entering or remaining of the premises of the residence, and that the respondent-defendant must stay away from the petitioner-complaining witness).

263. *See id.* § 112A-20(b)(3) ("A final protective order shall remain in effect as follows: until 2 years after the expiration of any supervision, conditional discharge, probation, periodic imprisonment, parole, aftercare release, or mandatory supervised release for domestic violence orders of protection and civil no contact orders.").

damages the car of the complaining witness's brother. The respondent-defendant faces charges for damaging the car. The respondent-defendant has never lived with the complaining witness's brother, nor is he otherwise considered a family or household member under the domestic violence order of protection statute.[264] The prosecutor now seeks to modify the final domestic violence order of protection and wants to include as a remedy that the respondent-defendant must stay away from the petitioner-complaining witness's brother, as the statute allows for such given that the prosecutor seeks a remedy that was not requested to be included in the original domestic violence order of protection and a permissible remedy is to stay away from any person who is a protected person.[265] More than thirty days have elapsed since the original domestic violence order of protection was entered, but there has been a change in the applicable facts that the court determines warrant a modification given that that the respondent-defendant allegedly damaged the car of the complaining witness's brother.[266]

This scenario presents an issue at each stage. Starting with the original final domestic violence order of protection, the respondent-defendant would be hard pressed to believe that he or she had the "opportunity to be heard at a meaningful time and in a meaningful manner."[267] Given that the respondent-defendant already pled guilty to domestic battery, prima facie evidence of a crime of domestic battery has been established.[268] Because the respondent-defendant admitted to the crime and was found guilty, it is highly likely that the judge would enter the domestic violence order of protection and find that the respondent-defendant did not meet his or her burden through presenting a meritorious defense, as was the

264. *See id.* § 112A-3(b)(3) ("'Family or household members' include spouses, former spouses, parents, children, stepchildren, and other persons related by blood or by present or prior marriage, persons who share or formerly shared a common dwelling, persons who have or allegedly have a child in common, persons who share or allegedly share a blood relationship through a child, persons who have or have had a dating or engagement relationship, persons with disabilities and their personal assistants, and caregivers.").

265. *See id.* § 112A-24(a)(2)(ii) (2020) ("[U]pon motion by . . . the State's Attorney on behalf of the petitioner, the court may modify a protective order: . . . by adding any remedy authorized by Section 112A-14 . . . which was not requested for inclusion in that protective order."); § 5/112A-14(b)(3) ("The court may order . . . respondent to stay away from petitioner or any other person protected by the domestic violence order of protection.").

266. *See id.* § 112A-24(c) ("After 30 days following the entry of a protective order, a court may modify that order only when changes in the applicable law or facts since that final order was entered warrant a modification of its terms.").

267. *Rucker*, 127 N.E.3d at 96 (quoting *In re* D.W., 827 N.E.2d at 484).

268. *See* 725 ILL. COMP. STAT. § 5/112A-11.5(a)(2) (2020) ("[T]he court shall grant the petition and enter a protective order if the court finds prima facie evidence that a crime involving domestic violence . . . has been committed. The following shall be considered prima facie evidence of the crime: . . . a finding of guilt based upon a plea.").

case in this scenario.[269] Therefore, any hearing is not likely to be meaningful, as the result will already be written in stone. As a result, the Constitution of the State of Illinois and the Constitution of the United States are violated.[270]

A more egregious issue arises with the attempt to modify the final domestic violence order of protection. The statute does not necessarily require a hearing before the modified remedies are put into place, either. The modification section of the statute makes no mention of a hearing before modified remedies are put into place, and the section of the statute that discusses hearings makes no mention of a hearing for modification of a domestic violence order of protection and seems only to be concerned with the initial issuance of a domestic violence order of protection, especially given the title of the section, "Issuance of protective order."[271] As a result, the prosecutor in this scenario can argue that a hearing is not necessary for a modification, and therefore, if a judge agrees, the respondent-defendant would be deprived of his or her liberty in that he or she will not be able to have contact with the complaining witness's brother despite not having the "opportunity to be heard at a meaningful time and in a meaningful manner" regarding the allegations and remedies, again, the very reason the original version of the statute was found unconstitutional in the first place.[272]

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269. *See id.* § 112A-11.5(a-5) ("The respondent may rebut prima facie evidence of the crime . . . by presenting evidence of a meritorious defense. . . . 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.").

270. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"); ILL. CONST. art. I, § 2 ("No person shall be deprived of life, liberty or property without due process of law."); *Rucker*, 127 N.E.3d at 96 (quoting *In re D.W.*, 827 N.E.2d at 448) (noting that the right to due process includes the right to "the opportunity to be heard at a meaningful time and in a meaningful manner").

271. *See* § 5/112A-24 (discussing the procedure for when and how to modify a domestic violence order of protection); § 5/112A-11.5 (discussing the procedures for the issuance of a domestic violence order of protection).

272. *Rucker*, 127 N.E.3d at 96 (quoting *In re D.W.*, 827 N.E.2d at 448); 725 ILL. COMP. STAT. § 5/112A-11.5 (Jan. 1, 2018), *amended by* § 5/112A-11.5 (June 29, 2018) (allowing the domestic violence order of protection to issue simply upon a showing of prima facie evidence of a crime of domestic violence); *Brzuskiewicz*, No. 17CM2444 (Ill. Cir. Ct. 16th Cir. 2018) (finding the previous procedure to obtain a domestic violence order of protection statute unconstitutional).

Furthermore, if there is a hearing, it is not likely to be the meaningful hearing constitutionally required.[273] The prosecution used the criminal plea of guilty to domestic battery and the criminal complaint alleging domestic battery against the complaining witness and only the complaining witness — and not the complaining witness's brother — to obtain the original domestic violence order of protection. Damaging the complaining witness's car is not a crime of domestic violence, nor is the brother a family or household member.[274] As a result, the complaining witness or a prosecutor cannot obtain a domestic violence order of protection under the case that charges a crime for the damage to the car.[275] So, they sought the modification of the domestic violence order of protection that was issued in conjunction with the criminal case that features a crime of domestic violence. The brother has nothing to do with the criminal domestic battery case or the allegations. Yet, the prosecution seeks to protect him, as the statute permits.[276] The prosecution could use the plea of guilty to the criminal domestic battery charge to establish prima facie evidence of a crime of domestic battery to obtain the modification, which, again, that case has nothing to do with the brother, and if the respondent-defendant wishes to challenge the modification, he or she would have to provide a meritorious defense to rebut the prima facie evidence of a crime of domestic violence by a preponderance of the evidence assuming he or she is entitled to the hearing in the first place under the statute.[277] At this point in the proceedings, the same due process issues already discussed, including the improper burden-shifting and the issue with the permissive language of the statute, would

273. *See Rucker*, 127 N.E.3d at 96 (quoting *In re D.W.*, 827 N.E.2d at 448) (noting that the right to due process includes the right to "the opportunity to be heard at a meaningful time and in a meaningful manner").

274. *See* 725 ILL. COMP. STAT. § 5/112A-3(b)(3) (2020) ("'Family or household members' include spouses, former spouses, parents, children, stepchildren, and other persons related by blood or by present or prior marriage, persons who share or formerly shared a common dwelling, persons who have or allegedly have a child in common, persons who share or allegedly share a blood relationship through a child, persons who have or have had a dating or engagement relationship, persons with disabilities and their personal assistants, and caregivers.").

275. *See id.* § 112A-4.5(a) (listing who can file a petition for a domestic violence order of protection); 725 ILL. COMP. STAT. § 5/112A-2.5(1) (2020) ("The following protective orders may be entered in conjunction with a . . . criminal prosecution: a domestic violence order of protection in cases involving domestic violence[.]").

276. *See id.* § 112A-14(b)(3) (allowing a domestic violence order of protection to have a remedy that the respondent-defendant stay away from any person).

277. *See id.* §§ 112A-11.5(a)(2), (a-5) (describing the procedure for obtaining a domestic violence order of protection and the respondent-defendant's only recourse—proving a meritorious defense—to prevent the domestic violence order of protection from issuing once prima facie evidence of a crime of domestic violence is established).

arise once more.

It makes no sense to challenge whether the complaining witness's brother needs an order of protection against the respondent-defendant for what the respondent-defendant allegedly did to the brother's car by trying to establish that a crime of domestic battery did not occur against the complaining witness, as the statute could potentially require.[278] If the complaining witness's brother really needs an order of protection, he could obtain one using civil processes. The purposes of the statute, to keep complaining witnesses and their families safe and to keep the trauma and inconvenience of attending multiple and different civil court proceedings to get an order of protection to a minimum, do not even apply to the brother given that he was not involved in the domestic battery case.[279] However, the domestic violence order of protection statute allows the prosecution to take advantage of the domestic battery criminal case and protect those who need protection through an order of protection, though not through a domestic violence order of protection, let alone those who do not need protection at all.

The domestic violence order of protection statute allows prosecutors to violate the Constitution of the State of Illinois in many ways, from the Self-Incrimination Clauses to the Double Jeopardy Clauses to the Due Process Clauses simply from the designation that the domestic violence order of protection proceedings are civil proceedings.[280] Although some constitutional violations occur only when certain circumstances arise,[281] others

278. *See id.* § 112A-11.5(a-5) ("The respondent may rebut prima facie evidence of the crime . . . by presenting evidence of a meritorious defense.").

279. *See* 725 ILL. COMP. STAT. § 5/112A-1.5 (2020) (explaining the purpose of the domestic violence order of protection statute).

280. *See* U.S. CONST. amends. V, XIV (explaining the prohibition against double jeopardy, that a witness cannot be compelled to be a witness against himself, and the right to due process); 725 ILL. COMP. STAT. § 5/112A-6.1(a) (2020) ("Any proceeding to obtain, modify, re-open, or appeal a protective order and service of pleadings and notices shall be governed by the rules of civil procedure of this State. The Code of Civil Procedure and Supreme Court and local court rules applicable to civil proceedings shall apply, except as otherwise provided by law.").

281. *See, e.g.*, *supra* Section II.C (providing an example that the Constitution of the United Stated and Constitution of the State of Illinois are violated if a judge has his or her mind made up that he or she is going to enter the domestic violence order of protection before a hearing even commences given the permissive language in the statute).

arise in all cases.[282] The Illinois legislature wants the domestic violence order of protection statute to be interpreted in favor of a victim's constitutional rights under the Constitution of the State of Illinois, including the right to be treated fairly and with respect for his or her privacy and dignity and to not be intimidated, harassed, and abused as the case moves through the criminal justice system.[283] However, when doing such, it is the respondent-defendants — the ones charged with the crime of domestic battery and who are also entitled to constitutional rights under the Constitution of the United States and the Constitution of the State of Illinois — who are unacceptably intimidated, harassed, and abused as the case moves through the criminal justice system.[284] If a court grants a final domestic violence order of protection and the procedure leading up to the entry or the entry itself violates the Constitution of the United States and the Constitution of the State of Illinois, given that there is a final judgment as a result of a court's decision that terminates the litigation on the issue of whether to issue a domestic violence order of protection, the respondent-defendant can appeal the entry of the domestic violence order of protection pursuant to his or her right to appeal under the Constitution of the State of Illinois regardless of whether the respondent-defendant is recognized as a civil litigant or a criminal litigant.[285] However, what if the respondent-defendant cannot afford to appeal the entry of the domestic violence order of protection?

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282. *See, e.g.*, *supra* Section II.C (discussing how the burden shifting violates the Constitution of the United States and the Constitution of the State of Illinois); *supra* Section II.A (explaining that allowing prosecutors to use a criminal complaint to obtain a domestic violence order of protection for a complaining witness in a domestic battery case violates the Double Jeopardy Clauses of the Constitution of the United States and the Constitution of the State of Illinois).

283. *See* § 5/112A-1.5 ("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."); ILL. CONST. art. I, § 8.1 (describing the constitutional rights of crime victims).

284. *See id.* § 112A-1.5 (describing the purpose of the domestic violence order of protection statute).

285. *See* ILL. CONST. art. VI, § 6 ("Appeals from final judgments of a Circuit Court are a matter of right to the Appellate Court in the Judicial District in which the Circuit Court is located except in cases appealable directly to the Supreme Court and except that after a trial on the merits in a criminal case, there shall be no appeal from a judgment of acquittal."); ILL. SUP. CT. R. 301 ("Every final judgment of a Circuit Court in a civil case is appealable as of right."); *Final-Judgment Rule*, BLACK'S LAW DICTIONARY (11th ed. 2019).

IV. THE ISSUE OF CHALLENGING THE DOMESTIC BATTERY ORDER OF PROTECTION STATUTORY FRAMEWORK ON APPEAL

The courts must recognize the proceedings as criminal and hold the Illinois legislature in check pursuant to its role in the system of checks and balances in declaring several sections of the domestic violence order of protection statutory scheme unconstitutional.[286] However, there are potential roadblocks to a constitutional challenge of the domestic violence order of protection statute. One such roadblock is the indigency of the respondent-defendant.

A person who is charged with domestic battery in Illinois is entitled to counsel.[287] Given that there is a right to appeal in Illinois, if a criminal defendant is found guilty of domestic battery and he or she wishes to appeal an issue that arose during the course of the criminal case, he or she would be entitled to counsel on appeal.[288] If the criminal defendant is indigent, the State Appellate Defender's Office would be appointed to represent the criminal defendant on appeal.[289] However, the State Appellate Defender's Office will not represent someone who is indigent and who seeks to challenge the

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286. *See Marbury*, 5 U.S. at 177-80 (holding that laws contrary to the Constitution of the United States are void, the judiciary determines what the law says, the judicial power of federal courts extends to cases that arise under the Constitution of the United States, and the Constitution of the United States binds courts in making decisions).

287. *See generally Gideon*, 372 U.S. 335 (requiring that indigent criminal defendants be provided trial counsel); *Argersinger*, 407 U.S. 25 (1972) (holding that a criminal defendant is entitled to counsel if he or she is going to be imprisoned even for one day); 720 ILL. COMP. STAT. § 5/12-3.2(b) (2020) ("Domestic Battery is a Class A Misdemeanor."); 730 ILL. COMP. STAT. §§ 5/5-4.5-55(a), (d), (e) (2020) (listing the penalties for Class A misdemeanors, including up to one year in jail).

288. *Douglas*, 372 U.S. at 357 (holding that when the merits of an appeal are determined without counsel, "an unconstitutional distinction exists between the rich and the poor); ILL. CONST. art. VI, § 6 ("Appeals from final judgments of a Circuit Court are a matter of right to the Appellate Court in the Judicial District in which the Circuit Court is located except in cases appealable directly to the Supreme Court and except that after a trial on the merits in a criminal case, there shall be no appeal from a judgment of acquittal.").

289. *See* 725 ILL. COMP. STAT. § 105/10 (2020) (emphasis added) ("The State Appellate Defender shall represent indigent persons on appeal in *criminal and delinquent minor proceedings*."); *About Us*, *supra* note 103 (noting that the Office of the State Appellate Defender "represent[s] indigent persons on appeal in *criminal* cases").

entry of or the procedure leading up to the entry of the domestic violence order of protection — including challenging the civil designation that provides a shield to let prosecutors violate his or her constitutional rights in what truly is a criminal proceeding given the basis for the domestic violence order of protection is the criminal complaint charging domestic battery and the proceedings take place in a criminal courtroom in front of the judge presiding over the criminal case with the prosecutor presenting the same evidence he or she would to obtain a guilty verdict at a trial — simply because the legislature has designated the domestic violence order of protection proceedings as civil proceedings.[290] Thus, an indigent respondent-defendant finds himself or herself in a proverbial catch twenty-two: the indigent respondent-defendant wants to challenge the civil designation that allows prosecutors to violate his or her rights but cannot do so because of that very civil designation.

What this means in practice is that there will be fewer respondent-defendants who challenge the statutory framework given that some of them will be unable to do so as a result of a cost barrier. The lack of resources will in effect deny the indigent respondent-defendant of an opportunity to appeal because few will try, and if they do, they will likely be unsuccessful given they are not experienced and trained lawyers;[291] the appellate court will likely affirm the entry of the domestic violence order of protection, which will serve as a ringing endorsement of the violation of constitutional rights with the civil designation providing the shield to do so. Only those who can afford to hire experienced and trained attorneys on appeal will likely challenge the constitutionality of the statutory framework if they so choose and have a better chance of

290. *See id.* § 112A-6.1(a) ("Any proceeding to obtain, modify, re-open, or appeal a protective order and service of pleadings and notices shall be governed by the rules of civil procedure of this State. The Code of Civil Procedure and Supreme Court and local court rules applicable to civil proceedings shall apply, except as otherwise provided by law."); § 105/3 ("The State Appellate Defender shall represent indigent persons on appeal in *criminal and delinquent minor proceedings*." (emphasis added)).

291. *See Douglas*, 372 U.S. at 355-56, 358 (noting how the practice at issue the type of appeal a criminal defendant received depended on whether or not he or she could pay counsel, and if he or she could the appellate court made a ruling on the merits of the case after the benefit of a written brief and counsel's oral argument, and if he or she could not pay for counsel, the appellate court, under the practice, is required to prejudge the merits of the case prior to it determining whether counsel is to be provided, with only the barren record providing assistance to the indigent at this point and forcing the indigent to go forward without counsel unless the record shows a patent injustice, creating a situation where if someone is indigent, "where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.").

success.[292] In turn, it means that it is less likely that an appellate court will deem the statutory framework unconstitutional. The end result is that more people will potentially find themselves subject to a domestic violence order of protection and can potentially have prosecutors take advantage of them to benefit the government in the criminal case and violate their constitutional rights. Such a result is purely asinine, and as a society, it cannot be tolerated. With the criminal complaint serving as the basis for obtaining a domestic violence order of protection and with a prosecutor seeking to obtain the domestic violence order of protection on behalf of a complaining witness in the criminal domestic battery case presenting evidence that would be introduced in a criminal domestic battery trial in front of the very judge who presides over the criminal case in the criminal courtroom under the criminal case number, the proceeding is criminal, and the respondent-defendant should be entitled to counsel on appeal.[293]

Not to mention that effectively denying the indigent the opportunity to appeal the statutory framework because they are indigent while those who can afford counsel to appeal the entry of or the process leading up to the entry of the domestic violence order of protection can more effectively appeal the entry or the process creates due process and equal protection concerns under the Constitution of the United States and the Constitution of the State of Illinois.[294] Denying counsel to the indigent to appeal the constitutionality of the statutory framework while those who can afford attorneys can more effectively challenge the statutory framework is akin to denying the defendants in *Griffin* free transcripts.[295] As the *Griffin* Court stated, the concepts of due

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292. *See id.* at 358 (theorizing that, when the record has no clear errors or hidden errors, the indigent criminal defendant only "has the right to a meaningful ritual, while the rich man has a meaningful appeal").

293. *See* 725 ILL. COMP. STAT. § 5/112A-5(a) (2020) (emphasis added) ("A petition for a protective order *shall* be filed in conjunction with a . . . criminal prosecution, provided the petition names a victim of the alleged crime."); 725 ILL. COMP. STAT. § 5/112A-5.5(f) (2020) ("The request for a final protective order can be considered at any court proceeding in the . . . criminal case after service of the petition.").

294. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); ILL CONST. art. I, § 2 ("No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.").

295. *Griffin*, 351 U.S. at 13-14 (explaining how the petitioners, alleging that they were poor and could not pay the fees to acquire the transcript and court

process and equal protection require that there be no discrimination between defendants; everyone is equal before the bench in every court.[296] As the *Griffin* Court explained, it violates the Equal Protection Clauses for a court to use poverty as a basis to discriminate, just like it violates the Equal Protection Clauses for courts to discriminate on the basis of race or religion.[297] A person's inability to pay cannot be a basis to deny someone access to justice, especially when someone's constitutional rights are at stake, like they are with domestic violence orders of protection statutory framework.[298] A state that allows appeals as of right, like Illinois does,[299] cannot permit a system to exist that discriminates against a person simply because he or she is indigent given that appellate review is an essential component of the justice system.[300] "[T]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." [301] As a result, those who seek to challenge the domestic violence order of protection statutory framework must be given the opportunity to have the same and adequate appellate review process that someone who seeks to challenge the statutory framework but who is not indigent has.[302] Designating the domestic violence order of protection proceedings as civil, which in effect denies the indigent respondent-defendant counsel on appeal, violates these tenets and premises of Griffin.

The Supreme Court of the United States in *Douglas* has already

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records for appellate purpose, were convicted of armed robbery after being tried together, thereafter filing a motion asking for a certified copy of the records be provided for free, with only those who were indigent and sentenced to death given free transcripts with all other defendants required to purchase it).

296. *See id.* at 17 (quoting *Chambers*, 309 U.S. at 241) (explaining that the Due Process Clause and the Equal Protection Clause of the Constitution of the United States require procedures in criminal trials that do not discriminate between people and different types of people, with all "stand[ing] on equality before the bar of justice in every American court").

297. *See id.* holding that it is just as impermissible for a court to discriminate on the basis of poverty compared to religion, race, or color).

298. *See id.* at 17-18. (holding that the inability to pay cannot be used to deprive a criminal defendant of a fair trial).

299. ILL. CONST. art. VI, § 6 ("Appeals from final judgments of a Circuit Court are a matter of right to the Appellate Court in the Judicial District in which the Circuit Court is located except in cases appealable directly to the Supreme Court and except that after a trial on the merits in a criminal case, there shall be no appeal from a judgment of acquittal.").

300. *See Griffin,* 352 U.S. at 18 (citations omitted) (explaining that even though a State is not constitutionally mandated to create appellate courts or provide a right to appeal, when a state goes grant appellate review, it cannot discriminate against a convicted a criminal defendant on the basis of his or her poverty, especially when appellate review is an important part of the criminal just system in Illinois).

301. *Id.* at 19.

302. *See id.* (requiring that indigent criminal defendants be afforded the same appellate process as those who can afford to buy transcripts).

found that denying counsel to those who are indigent is the type of improper discrimination that *Griffin* sought to prohibit.[303] As a result, a person who is indigent is entitled to counsel when he or she has a right to appeal like he or she has in Illinois.[304] If a person can afford an attorney to challenge the domestic violence order of protection statutory framework, such a person will have the benefit of the appellate court deciding the merits of the appeal after his or her lawyer filed a brief and made an oral argument.[305] Meanwhile, an indigent person who cannot afford counsel and who is not given counsel would not receive such benefits, and the appellate court would only decide the merits of the appeal and determine whether the statutory framework violates the Constitution of the United States and the Constitution of the State of Illinois on the basis of what the record contained at the trial court level.[306] If there is hidden merit in challenging the statutory framework, or if the record at the trial court level is not clear, the indigent respondent-defendant would have a meaningless ritual, and the respondent-defendant who could afford counsel would have a meaningful appeal.[307] Simply put, an unconstitutional distinction exists when

303. *See Douglas*, 372 U.S. at 355 (holding that denying counsel to an indigent criminal defendant on appeal would be equal to the invidious discrimination the Supreme Court of the United States sought to combat in *Griffin v. Illinois*, where it was held that a State could not grant and deny appellate review in a manner that discriminates on the basis of poverty).

304. *See id.* at 357 (holding that when the merits of an appeal are determined without counsel, an unconstitutional distinction exists between the rich and the poor); *see also* ILL. CONST. art. VI, § 6 ("Appeals from final judgments of a Circuit Court are a matter of right to the Appellate Court in the Judicial District in which the Circuit Court is located except in cases appealable directly to the Supreme Court and except that after a trial on the merits in a criminal case, there shall be no appeal from a judgment of acquittal.").

305. *See Douglas*, 472 U.S. at 355-56 (noting how the practice at issue the type of appeal a criminal defendant received depended on whether or not he or she could pay counsel, and if he or she could the appellate court made a ruling on the merits of the case after the benefit of a written brief and counsel's oral argument).

306. *See id.* at 356 (explaining how if a criminal defendant could not pay for counsel, the appellate court, under the practice, is required to prejudge the merits of the case prior to it determining whether counsel is to be provided, with only the barren record providing assistance to the indigent at this point and forcing the indigent to go forward without counsel unless the record shows a patent injustice).

307. *See id.* at 358 (theorizing that, when the record has no clear errors or hidden errors, the indigent criminal defendant only "has the right to a meaningful ritual, while the rich man has a meaningful appeal").

the merits of an appeal for an indigent respondent-defendant who is seeking to challenge the domestic violence order of protection statutory framework are determined without the respondent-defendant having the benefit of counsel.[308]

Sure, the *Douglas* and *Griffin* courts may have ruled the way they did because in criminal cases the consequences can be severe.[309] However, consequences can also be severe when constitutional rights are violated — as the domestic violence order of protection statute does and enables prosecutors to do — and it is unacceptable to allow basic tenets of the Constitution of the United States and Constitution of the State of Illinois to be violated simply because someone cannot afford counsel.[310] Regardless, a criminal versus civil distinction cannot be an acceptable justification for discriminating on the basis of poverty and denying access to the courts; to do so would deprive meaning to the Equal Protection Clause of the Constitution of the United States and the Constitution of the State of Illinois.[311] Furthermore, the domestic violence order of protection proceedings are truly criminal despite the civil designation.[312] The bottom line is the Illinois legislature has done indigent respondent-defendants and society as a whole a disservice as a result of indigent respondent-defendants being denied counsel to appeal the domestic violence order of protection statutory framework on constitutional grounds given that the domestic

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308. *See id.* at 357 (holding that when the merits of an indigent criminal defendant's appeal are decided without counsel, an unconstitutional distinction exists between the rich and the poor).

309. *See, e.g.*, *Griffin*, 351 U.S. at 17 (quoting *Chambers*, 309 U.S. at 241 (explaining that the Due Process Clause and the Equal Protection Clause of the Constitution of the United States require procedures in criminal trials that do not discriminate between people and different types of people, with all "stand[ing] on equality before the bar of justice in every American court").

310. *See, e.g.*, U.S. CONST. amends. IV-VI, VIII addressing the right against unreasonable searches and seizures the right not to be subject to penalty for the same crime twice, the right against self-incrimination, and rights in a criminal trial).

311. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); ILL CONST. art. I, § 2 ("No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.").

312. *See* 725 ILL. COMP. STAT. § 5/112A-6.1(a) (2020) ("Any proceeding to obtain, modify, re-open, or appeal a protective order and service of pleadings and notices shall be governed by the rules of civil procedure of this State. The Code of Civil Procedure and Supreme Court and local court rules applicable to civil proceedings shall apply, except as otherwise provided by law."); 725 ILL. COMP. STAT. § 5/112A-5(a) (2020) (emphasis added) ("A petition for a protective order *shall* be filed in conjunction with a . . . criminal prosecution, provided the petition names a victim of the alleged crime."); 725 ILL. COMP. STAT. § 5/112A-5.5(f) (2020) ("The request for a final protective order can be considered at any court proceeding in the . . . criminal case after service of the petition.").

violence order of protection proceedings are designated as civil proceedings.[313]

V. CONCLUSION

The domestic violence order of protection statutory framework — specifically, the designation that the domestic violence order of protection proceedings are civil proceedings — provides an unacceptable sword and shield for prosecutors who are seeking to obtain the domestic violence order of protection on behalf of the complaining witness in a criminal domestic battery case and are also prosecuting the criminal domestic battery case to use in obtaining a domestic violence order of protection.[314] It serves as a sword in the first place in the simple sense that the prosecution can use the statute to obtain the domestic violence order of protection.[315] However, the statute serves as a shield because it allows the prosecution to violate the constitutional rights of respondent-defendants and unfairly take advantage of them in ways that do not necessarily violate their constitutional rights when seeking to obtain the domestic violence order of protection when the prosecution would not be able to do so in the criminal domestic battery case itself.[316] This in turn provides another sword, as the prosecution can take advantage of the respondent-defendant to

313. *See id.* § 112A-6.1(a) ("Any proceeding to obtain, modify, re-open, or appeal a protective order and service of pleadings and notices shall be governed by the rules of civil procedure of this State. The Code of Civil Procedure and Supreme Court and local court rules applicable to civil proceedings shall apply, except as otherwise provided by law.").

314. *See id.* ("Any proceeding to obtain, modify, re-open, or appeal a protective order and service of pleadings and notices shall be governed by the rules of civil procedure of this State. The Code of Civil Procedure and Supreme Court and local court rules applicable to civil proceedings shall apply, except as otherwise provided by law."). Again, the purpose of this Article is not to rail against prosecutors. They are doing their jobs and doing what the domestic violence order of protection statute allows them to do. The real gripe is with the legislature that put this statutory framework into law in the first place.

315. *See* 725 ILL. COMP. STAT. §§ 5/112A-4.5(a)(2)-(3) (2020) (stating that prosecutors can file a petition for a domestic violence order of protection on behalf of a complaining witness in a criminal domestic battery case under certain circumstances).

316. *See supra* Part III (exploring the many ways the domestic violence order of protection statute violates the Constitution of the United States and the Constitution of the State of Illinois and allows prosecutors to take advantage of respondent-defendants).

potentially damn him or her in the underlying criminal domestic battery case.[317] Perhaps the most alarming shield is that, as a result of the domestic violence order of protection proceedings being deemed civil proceedings, indigent respondent-defendants are unlikely to appeal an entry of a domestic violence order of protection, making it less likely that the statutory framework is held unconstitutional and ensuring that the framework remains in place, which is unconstitutional in and of itself.[318]

What changes can be made to the domestic violence order of protection statutory framework to ensure that the constitutional rights of respondent-defendants are respected while achieving the purposes of the statute in keeping victims of domestic violence and their families safe and keeping the trauma and inconvenience of going to multiple and separate civil court proceedings to obtain an order of protection at a minimum?[319] Although some changes can be made to strike a fair balance between the two interests, like not allowing the prosecution to argue for a negative inference if the respondent-defendant invokes the Self-Incrimination Clauses of the Constitution of the United States and the Constitution of the State of Illinois in choosing not testify at a domestic violence order of protection hearing or after the prosecution calls him or her to the stand,[320] in some areas where the domestic violence order of protection statute violates the Constitution of the United States and the Constitution of the State of Illinois, it may not be possible to obtain a fair balance between the two interests.[321] It is up to the

317. *See supra* Section II.B (discussing how an overzealous prosecutor can force a respondent-defendant into choosing whether or not to exercise his or her constitutional right against self-incrimination, and if the respondent-defendant chooses not to exercise the right, the prosecutor can use the testimony obtained from the respondent-defendant at the domestic violence order of protection hearing against the respondent-defendant at trial or corner him or her into a defense if discovery is incomplete at the time of the hearing).

318. *See* § 5/112A-6.1(a) ("Any proceeding to obtain, modify, re-open, or appeal a protective order and service of pleadings and notices shall be governed by the rules of civil procedure of this State. The Code of Civil Procedure and Supreme Court and local court rules applicable to civil proceedings shall apply, except as otherwise provided by law."); *supra* Part IV (exploring how it is unconstitutionally difficult for an indigent respondent-defendant to appeal the entry of a domestic violence order of protection or the statutory framework allowing for the issuance of the domestic violence order of protection).

319. *See* 725 ILL. COMP. STAT. § 5/112A-1.5 (2020) ("The purpose of this Article is to protect the safety of victims of domestic violence . . . 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.").

320. *See* U.S. CONST. amend. V ("[N]or shall be compelled in any criminal case to be a witness against himself."); ILL. CONST. art. I, § 10 ("No person shall be compelled in a criminal case to give evidence against himself."); *supra* Part III.B.

321. *See, e.g., supra* Part III.C (discussing the impermissible presumptions

Illinois Legislature to find the fair balance. One thing is for sure, however: The balance in the domestic violence order of protection statutory framework is impermissibly too one sided against respondent-defendants and their constitutional rights as it stands now.

and burden shifting the domestic violence order of protection statute creates). Allowing the prosecution or a complaining witness to present the criminal complaint to establish prima facie evidence of a crime of domestic battery, with at that point the respondent-defendant needing to present evidence of a meritorious defense to potentially avoid the domestic violence order of protection from entering, clearly meets the goals of the statute but clearly creates unconstitutional presumptions and burden shifting. *See* 725 ILL. COMP. STAT. §§ 5/112A-11.5(a)(1), (a-5) (2020) (describing the procedure for a petitioner-complaining witness to obtain a domestic violence order of protection and for a respondent-defendant to try and prevent its issuance); *supra* Part III.C (describing the due process violations, including unconstitutional burden shifting, the domestic violence order of protection statute endorses). However, if the unconstitutional presumptions and burden shifting are removed, it would make it more difficult to protect victims of domestic violence and their families and would make it more inconvenient and tenuous for victims of domestic violence to obtain an order of protection. *See* § 5/112A-1.5 (describing the purposes of the domestic violence order of protection statute).