

Protecting Crime Victims From Discovery Requests in Civil Proceedings During the Pendency of a Related Criminal Case¹

A victim of domestic violence who is participating in the criminal prosecution of her abuser seeks a civil protective order against the defendant. A victim of investment fraud becomes involved in civil forfeiture proceedings initiated by the government to claim an interest in the seized property. As part of these civil proceedings, the defendants serve the victims with subpoenas demanding that they submit to depositions or turn over personal records. The last thing the victims want is to submit to defendants' questions or turn over private records, but they don't know what to do. These victims know they have rights in the criminal case that may prevent defendants from compelling this "discovery" as part of the criminal proceedings,² but what protections exist in the related civil proceedings?

There are a number of protections that victims may seek ranging from a protective order that postpones or limits civil discovery generally or quashes a particular discovery request, to a stay of the civil proceedings or civil discovery until the criminal case is resolved. Depending upon the relationship between the civil and criminal cases and the unique circumstances of the civil matter, including the interests at stake, a crime victim may seek a protective order shielding the victim from defendant's discovery request, or may also seek to stay the civil proceedings or civil discovery during the pendency of the offender's related criminal case. As civil litigants, crime victims have significant rights and interests that weigh in favor of such relief.

I. Staying Civil Proceedings or Discovery

Courts have the inherent authority to stay civil proceedings or civil discovery pending the outcome of a related criminal action when to do so would be in "the interests of justice."³ The power to stay proceedings is part of a court's inherent power to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."⁴

A. Balancing competing interests.

Although in exercising their inherent authority courts have wide discretion to stay proceedings, this power is not unbounded.⁵ When deciding whether to stay civil proceedings in the face of a related criminal action, courts must balance

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the competing interests of litigants, nonparties, the public, and the court.⁶ In balancing these competing interests, courts must focus on the particular facts and circumstances of the case before them.⁷ The party requesting the stay bears the burden of demonstrating that the stay is necessary.⁸

Jurisdictions vary in their articulation of the test used to engage in this fact-bound balancing of interests. Despite this variation, most consider the same core factors: (1) the extent to which the issues presented in the criminal case overlap with those presented in the civil case, including the extent to which the parallel proceedings implicate the defendant's Fifth Amendment rights;⁹ (2) the status of the criminal case, including whether the defendant has been indicted; (3) the interests of any party in staying the civil proceeding; (4) the prejudice to any party from staying the civil proceeding; (5) the interests of nonparties; (6) court convenience; and (7) the interest of the public¹⁰ in the civil and criminal litigation.¹¹ The balance of factors for and against a stay may change over time as the underlying criminal case develops.¹²

B. Victim-parties' interests in staying civil proceedings or discovery.

When balancing competing interests in deciding whether to issue a stay of civil proceedings or discovery, a court should consider the crime victim's significant rights and interests that weigh in favor of granting such a stay, including: (1) the right to refuse a defendant's request for an interview, deposition, or other discovery; (2) the interests in preventing criminal defendants from using civil discovery tools to circumvent the limitations of criminal discovery; (3) the right to be free from intimidation or harassment by the criminal defendant; and (4) the interests in not being subjected to the psychological

and emotional harms of simultaneous civil and criminal trials.

1. Right to refuse a defendant's request for an interview, deposition, or other discovery.

Some states afford crime victims an express right to refuse a defendant's request for a pretrial interview and/or other forms of pretrial discovery.¹³ Allowing a criminal defendant to circumvent such protections through civil discovery conflicts with the plain language of these rights and undermines their purpose.

The Arizona Court of Appeals decision in *State v. Lee*¹⁴ reflects this conclusion. In *Lee*, the defendants in a civil forfeiture action and a parallel criminal action that

stemmed from the same set of fraudulent acts, sought to depose the crime victims in the civil case while the criminal case was pending.¹⁵ The state filed a special action to challenge the trial court's denial of its motions for a protective order to prevent the depositions, arguing that the crime victims have the right to refuse defendant's request for a deposition under Arizona's Victim Bill of Rights.¹⁶ The court agreed with the state, holding "that victims retain their constitutional right to refuse to be deposed by the defense in a civil proceeding where the subject matter of the proposed deposition is the criminal offense committed against those victims."¹⁷ In reaching this decision, the court emphasized the plain language of the state's victims' rights amendment, which guarantees crime victims the right "[t]o refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or the person acting on behalf of the defendant."¹⁸ As the court stated:

This plain language limits the scope of a victim's right only by the identity of the person requesting the interview—the

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defendant or the defendant's representative—and the identity of the person to whom the request is directed—a crime victim. It does not limit the proceedings to which the right extends.¹⁹

The court rejected the defendants' argument that Arizona's victims' rights amendment does not authorize victims to refuse a civil deposition because it provides victims with rights "throughout the criminal justice process."²⁰ The court, instead, found that "even if the right to refuse to be deposed is limited to the duration of the criminal justice process, a victim may assert that right in any venue during that time."²¹

The *Lee* court further found that its holding was necessary to promote the purpose of a victim's constitutional right to refuse discovery requests.²² Noting that the purpose of the right "is to protect the victim's privacy and minimize contact with the defendant prior to trial," the court concluded that

Any deposition about the offense would expose victims to the very harm against which the [Victims' Bill of Rights] protects. . . . [T]he right to refuse to be deposed is immediately and completely defeated if the defendant can compel a victim to submit to a deposition in a separate proceeding.²³

Staying civil discovery completely—or at least that portion addressed to or regarding the victim—to protect a crime victim's constitutional and statutory rights to refuse a defendant's discovery requests similarly promotes the

purpose of a jurisdiction's victims' rights laws. To avoid rendering these rights meaningless, a court should grant a request by the victim—or by the state on the victim's behalf—to stay civil discovery during the pendency of a related criminal case.²⁴

2. Interests in preventing criminal defendants from circumventing the limitations of criminal discovery.

Crime victims have strong interests in preventing a defendant from using civil discovery to circumvent the limitations of the criminal discovery process. The scope of civil discovery is broader than the scope of criminal discovery.²⁵ Civil litigants may typically obtain discovery regarding any matter, not privileged, that is relevant to the party's claim or defense.²⁶ They may obtain discovery through a variety of methods, including depositions.²⁷

A criminal defendant, on the other hand, is subject to narrower discovery rules. To begin with, a criminal defendant has no general constitutional right to discovery.²⁸ The right to compulsory

process only affords a defendant the right to discover exculpatory information that is within the prosecution's possession or control.²⁹ Additionally, criminal depositions are not to be used as discovery devices, but instead are tools to preserve witness testimony.³⁰ The narrow scope of criminal discovery is designed to prevent the harassment and intimidation of potential government witnesses, reduce delays in the criminal justice system, and foster witness and victim participation in a criminal investigation or prosecution.³¹

The differences between the scope of civil and criminal discovery are intentional. They reflect a legislature's determination of what processes best accomplish the different purposes of civil

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and criminal justice.³² A criminal defendant's use of civil discovery tools to circumvent the limitations of criminal discovery undermines this careful legislative determination and should not be allowed.³³

When evaluating whether a stay of the case or of discovery is necessary to prevent a defendant from using civil discovery to circumvent the limitations of criminal discovery, courts typically focus their analysis on the public's interest in the integrity of the civil and criminal justice systems. These courts routinely find that public policy weighs in favor of staying civil discovery under such circumstances.³⁴

A federal district court in Arizona addressed this issue in *Lizarraga v. City of Nogales*,³⁵ a case involving parallel civil and criminal sexual assault proceedings. In *Lizarraga*, the government moved to intervene and stay proceedings in the civil case pending the defendant's criminal trial, and the victim moved for a protective order to restrict the use of civil discovery in the criminal prosecution.³⁶ The court allowed the state to intervene, and stayed the civil case upon finding that a stay was in the interest of justice.³⁷ In reaching this decision, the court recognized the limited nature of a criminal defendant's ability to obtain pretrial discovery and how the defendant circumvented these limitations through civil discovery.³⁸ Specifically, the court took issue with the defendant's use of the victim's medical records—which the defendant had obtained through civil discovery—to challenge the veracity of the victim's testimony in the criminal case.³⁹ As the court pointed out, under Arizona's constitutional victims' rights provisions, the defendant ordinarily would not have been able to force the victim to disclose her medical records as part of the criminal proceedings.⁴⁰ After noting that “[t]he criminal proceeding is of paramount importance to the victim, the Defendant, the public, and the courts,” the court

found that issuing a stay was necessary because

[t]he simultaneous prosecution of the two cases will undermine the public's interest in a fair and efficient prosecution of its criminal law, distract the parties and the court involved in the criminal proceeding from preparing the criminal case and divert the trial courts' attention with burdensome discovery litigation and unnecessary law and motions.⁴¹

Although courts tend to focus on the public's interests when determining whether a civil stay is necessary to prevent the defendant from

circumventing criminal discovery limitations, it is important to note that crime victims have an independent interest in a fair and just criminal justice process.⁴² Allowing a defendant to use civil discovery to circumvent the limitations of criminal

discovery undermines this interest and conflicts with a jurisdiction's commitment to treating victims fairly throughout the criminal justice process.

3. Right to protection and to be free from intimidation or harassment.

Many jurisdictions provide crime victims with the right to be free from intimidation or harassment by their offenders.⁴³ Also, at least nine states provide victims with the right to reasonable protection, which relate to the victim's right to safety from the accused.⁴⁴ This right is generally reflected in constitutional and statutory provisions that address issues of the victim's physical safety and mental and emotional health. These rights all weigh heavily in favor of granting a victim's request for a stay of civil proceedings or civil discovery.⁴⁵

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The need for a civil stay to protect victims from intimidation or harassment is especially great where the victims are the sole witnesses to the criminal conduct and their testimony is key to a determination of the criminal defendants' guilt.⁴⁶ The risk of civil discovery intimidating a victim is also particularly high where the victim is a child, in trauma, or otherwise emotionally or psychologically vulnerable.⁴⁷

4. Emotional and psychological interests in not participating in simultaneous civil and criminal trials.

Courts have also issued stays in a civil case where simultaneous proceedings would put the victim's emotional and psychological health at risk.⁴⁸ When a victim's distress about continuing with a civil action or with civil discovery jeopardizes a criminal investigation or prosecution, a court is likely to grant the stay request.⁴⁹

II. Protective Orders

A victim may also seek a protective order that postpones or otherwise limits civil discovery generally or quashes a particular discovery request. A court's authority to issue a protective order typically comes from the jurisdiction's rules of civil procedure.⁵⁰ In general, such rules authorize courts, upon a showing of "good cause," to issue an order protecting a party or person from annoyance, embarrassment, oppression, or undue burden or expense.⁵¹ Such an order may provide, *inter alia*, that the discovery request be quashed in its entirety; that the discovery be allowed only on specified terms and conditions, or limited to certain matters; or that the discovery may only be taken by a method other than that selected by the party seeking discovery.⁵²

To show "good cause" for the protective order, a party must provide the court with a substantial and concrete reason for the requested protection. An assumed or unsupportable pretense for the order is insufficient.⁵³ The party seeking the protective order must show specific facts that

demonstrate how the challenged discovery will cause that party serious injury.⁵⁴ Additionally, although courts have wide discretion to issue a protective order upon a showing of "good cause," the order must conform to the standards set forth in the rule authorizing the order.⁵⁵ In other words, the court must base its decision on the conclusion that a protective order is necessary to protect a person from annoyance, embarrassment, oppression, or undue burden or expense.⁵⁶ On its own, a court's conclusion that the type or method of discovery at issue is not "necessary" is insufficient to warrant a protective order.⁵⁷ When a protective order is issued to protect a person from intimidation or harassment, the record must contain some factual basis to support the ruling.⁵⁸

To establish "good cause" for a protective order postponing, limiting, or quashing civil discovery, a victim—or the government acting on the victim's behalf—may demonstrate to the court that allowing the defendant to proceed with discovery would violate the victim's rights or enable the defendant to circumvent the limitations of the jurisdiction's criminal discovery process.⁵⁹ "Good cause" also exists for such a protective order where the victim can show that the order is necessary to protect her from harassment or intimidation by the defendant.⁶⁰ Finally, a victim has "good cause" for a protective order where the victim can demonstrate—either through her own testimony or the testimony of an expert—that allowing the defendant to proceed with discovery prior to the resolution of the related criminal case will cause the victim additional psychological or emotional harms.⁶¹

III. Conclusion

Crime victims who find themselves involved in civil proceedings during the pendency of the offender's related criminal case may seek a stay of the civil proceedings or the civil discovery or a protective order that postpones or limits civil discovery or quashes a specific discovery request. As a civil litigant, a crime victim has significant rights and interests that weigh in favor

Practice Pointers

There are a number of grounds upon which a crime victim—or the state on the victim’s behalf—may request a protective order or a stay of civil proceedings or of the civil discovery during the pendency of a related criminal investigation or prosecution. A victim’s request for a protective order or stay should be narrow and specific. It should highlight the rights and interests detailed in this *Bulletin*, and identify for the court the particular burdens that the victim would suffer in the absence of the protective order or stay. Key among the arguments to include:

- In jurisdictions where victims have a constitutional and/or statutory right to refuse discovery, asserting that right should be sufficient to warrant a stay or protective order.
- When requesting a stay on the ground that the defendant is using the civil discovery process to obtain broader pretrial disclosures than he would otherwise be entitled to in a criminal case, identify a specific harm that would result in the absence of a stay or protective order. On its own, a general accusation that the defendant may use civil discovery to circumvent the limitations of the criminal discovery is insufficient to support a request for a stay or protective order.
- When a defendant is using or plans to use civil discovery as a means of harassing or intimidating the victim, provide evidence of the defendant’s intentional misuse of civil discovery tools. The motion should also focus on any reasons why, regardless of the defendant’s intentions, the victim is especially prone to being intimidated or harassed by the discovery requests.
- In addition to focusing on the emotional or psychological harms that a victim might suffer in the absence of a stay or protective order, highlight the negative effect that such harms will have on the pending criminal case.

of the court granting such stays and protective orders, including preventing defendants from circumventing the limitations of the criminal discovery process and intimidating or harassing the victim.

¹ Whether it is in the best interests of a victim to proceed with all aspects of the civil proceedings or to seek to stay either the entirety of the civil proceedings or to stay or quash portions of civil discovery will depend on the particular circumstances of the criminal and civil cases. This *Bulletin* is focused on those instances when a victim seeks to limit, quash, or to stay some aspect of the civil proceedings.

² For information about how to oppose a defendant’s pretrial discovery requests as part of the criminal proceedings, see *Refusing Discovery Requests of Privileged Materials Pretrial in Criminal Cases*, Violence Against Women Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), June 2011, at 3-4 n.3 (discussing strategies to oppose a defendant’s pretrial discovery request for privileged materials, including invoking state constitutional provisions explicitly granting victims in some states the right to refuse pretrial discovery requests). A *Bulletin* focusing on resisting defense subpoenas of non-privileged victim information pretrial in criminal cases is forthcoming.

³ *United States v. Kordel*, 397 U.S. 1, 12 n.27 (1970); *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995); *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980); *Dominguez v. Hartford Fin. Serv’s Grp., Inc.*, 530 F. Supp. 2d 902, 905 (S.D. Tex. 2008); see *Doe v. City of Chicago*, 360 F. Supp. 2d 880, 881 (N.D. Ill. 2005) (“The court has the inherent power to stay civil proceedings, postpone civil discovery, or impose protective orders when the interests of justice so dictate.”). In addition to the court’s inherent authority to issue stays, express statutory provisions may authorize stays. Some of these provisions mandate civil stays, while others simply reinforce the court’s discretion in staying a civil proceeding during the pendency of a related criminal case. Examples of statutes explicitly authorizing civil stays that are particularly relevant to crime victims’ rights and interests, include those allowing for stays of: (1) a civil action brought by a human trafficking victim, see 18 U.S.C. § 1595(b)(1) and *Ara v. Khan*, No. CV 07-1251(ARR)(JO), 2007

WL 1726456, at *1 (E.D.N.Y. June 14, 2007) (mem. and order) (granting the government's request for a stay of the victim's 18 U.S.C. § 1595 action based on the mandatory nature of a stay under the statute); (2) a civil action brought by a child victim of sexual abuse, physical abuse, or exploitation, see 18 U.S.C. § 3509(k) (affording various procedural protections to child victims of sexual abuse, physical abuse, or exploitation, and stating that "[i]f, at any time that a cause of action for recovery of compensation for damage or injury to the person of a child exists, a criminal action is pending which arises out of the same occurrence and in which the child is the victim, the civil action shall be stayed until the end of all phases of the criminal action and any mention of the civil action during the criminal proceeding is prohibited."); (3) a civil action brought by a criminal defendant against a crime victim based on the victim's exercise or intended exercise of her constitutional rights, see Conn. Gen. Stat. § 52-235e and *Morrow v. Ripley*, No. CV044001070S, 2004 WL 2595813, at *4 (Conn. Super. Ct. Oct. 12, 2004) ("In § 52-235e, our Legislature has balanced a plaintiff's right to redress without delay against the right of a crime victim to freely participate in a criminal proceeding without having to deal, at the same time, with a civil action arising from his or her complaint against the plaintiff."); (4) a civil forfeiture action, see, e.g., 18 U.S.C. § 981(g)(1), Haw. Rev. Stat. § 712A-11(8), Or. Rev. Stat. § 131A.265(2); and (5) a civil action against a debtor who has filed for bankruptcy, see 11 U.S.C. § 362 (governing automatic stays upon the filing of a bankruptcy petition). A full discussion of statutes expressly authorizing civil stays is outside the scope of this *Bulletin*.

⁴ *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936).

⁵ *Dominguez*, 530 F. Supp. 2d at 905 (citing *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 545 (5th Cir. 1983)).

⁶ *State v. Deal*, 740 N.W.2d 755, 766 (Minn. 2007).

⁷ *Landis*, 299 U.S. at 254-55; *Keating*, 45 F.3d at 324; *Federal Savings and Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989); *Microfinancial, Inc. v. Premier Holidays Int'l, Inc.*, 385 F.3d 72, 78 (1st Cir. 2004); *Dresser*, 628 F.2d at 1376; *Sterling Nat'l Bank v. A-1 Hotels Int'l Inc.*, 175 F. Supp. 2d 573, 576 (S.D.N.Y. 2001); *Dominguez*, 530 F. Supp. 2d at 905; see *Deal*, 740 N.W.2d at 766-67 (finding that the trial court abused its discretion when it failed to apply a balancing test when determining

whether to stay civil discovery pending the resolution of a related criminal case).

⁸ *Clinton v. Jones*, 520 U.S. 681, 708 (1997).

⁹ In general, the issue of whether parallel civil and criminal cases implicate a criminal defendant's Fifth Amendment rights only arises when the defendant has asserted these rights in support of a motion to stay the civil proceedings. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Under this privilege against self-incrimination, a person may refuse to testify at a criminal trial or to answer official questions asked in any other proceeding, where the answer might tend to incriminate that person in future criminal proceedings. *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984). The Fifth Amendment does not, however, require a stay of civil proceedings pending the outcome of a related criminal matter. *Microfinancial*, 385 F.3d at 77-78 ("[A] defendant has no constitutional right to a stay simply because a parallel criminal proceeding is in the works."). Indeed, "[n]ot only is it permissible to conduct a civil proceeding at the same time as a related criminal proceeding, even if that necessitates invocation of the Fifth Amendment privilege, but it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in a civil proceeding." *Keating*, 45 F.3d at 326 (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)).

¹⁰ The "public interest" in the context of this test takes two forms. *King v. Olympic Pipeline Co.*, 16 P.3d 45, 60 (Wash. Ct. App. 2000). The first form of "public interest" "is not the intensity of public concern, but rather the public welfare; that is, the protection of the public from harm." *Id.* In cases where the government has brought a civil action to enforce laws designed to protect the public, courts have often found the public interest to be "a compelling basis for denying a stay because of a 'tangible threat of immediate and serious harm to the public at large.'" *Id.* (citation omitted). The second "public interest" implicated by stay requests is "the public interest in the integrity of the judicial system." *Id.*

¹¹ See, e.g., *Keating*, 45 F.3d at 324; *Molinaro*, 889 F.2d at 902-03; *Sterling Nat'l Bank*, 175 F. Supp. 2d at 576; *Dominguez*, 530 F. Supp. 2d at 905; *Deal*, 740 N.W.2d at 766; *King*, 16 P.3d at 52-53. In addition to these core considerations, some courts also take into account additional factors, such as the good faith

(or absence of it) of the litigants, *Microfinancial*, 385 F.3d at 78, or whether the government brought the two actions, *Sterling Nat'l Bank*, 175 F. Supp. 2d at 577; *Doe*, 360 F. Supp. 2d at 881.

¹² *Cruz v. City of Chicago*, No. 08 C 2087, 2011 WL 613561, at *2 (N.D. Ill. Feb. 15, 2011) (slip copy) (“[T]he balance of factors for and against a stay may be altered with the passage of time and the continued development of the underlying criminal matter.”).

¹³ For example, three states—Arizona, California, and Oregon—provide victims with an express right to refuse an interview, deposition, or other discovery request by the defendant or another acting on the defendant’s behalf. Ariz. Const. art. II, § 2.1(A)(5); Cal. Const. art. 1, § 28(b)(5); Or. Const. art. I, § 42(1)(c); Ariz. R. Crim. P. 39(b)(11); Or. Rev. Stat. § 135.970(3). Idaho provides victims with a variation of this right; under the Idaho Constitution, victims have the right “[t]o refuse an interview, ex parte contact, or other request by the defendant, or any other person acting on behalf of the defendant, unless such request is authorized by law.” Idaho Const. art. I, § 22(8). Other states provide a variation of the right to refuse pretrial discovery: in these states, a victim has the right to refuse a request for an interview and/or other communication by the defendant or another acting on the defendant’s behalf. See, e.g., La. Const. art. I, § 25; Ala. Code 1975 § 15-23-70; Ga. Code § 17-17-8.1; La. Stat. § 46:1844(C)(3); Mass. Gen. Laws ch. 258B § 3(m); Tenn. Code Ann. § 40-38-117. For assistance in determining the scope of victims’ rights protections from discovery in these jurisdictions or others, please contact NCVLI.

¹⁴ 245 P.3d 919, 924 (Ariz. Ct. App. 2011).

¹⁵ *Id.* at 920.

¹⁶ *Id.* at 921-24. Although the court’s opinion in *Lee* addresses the propriety of granting a protective order to protect the victims from the defendants’ discovery requests, it stands to reason that the crime victims’ rights and interests would similarly have supported a motion to stay. The determination of which procedural mechanism to use to best protect a crime victim’s right to avoid a defendant’s discovery request will depend on the jurisdiction’s laws and the procedural and factual circumstances of the case. Please contact NCVLI directly for additional assistance in opposing a criminal defendant’s request to depose the victim or to gain access to the victim’s personal information, documents, or records, as part of related civil

proceedings.

¹⁷ *Id.* at 920.

¹⁸ Ariz. Const. art. II, § 2.1(A)(5).

¹⁹ *Lee*, 245 P.3d at 923.

²⁰ *Id.* (quoting Ariz. Const. art. II, § 2.1(A)(1)).

²¹ *Id.* at 923-24.

²² *Id.* at 924.

²³ *Id.* (internal citations omitted).

²⁴ See *Lizarraga v. City of Nogales*, No. CV 06-474 TUC DCB, 2008 WL 4079991, at *3 (D. Ariz. Aug. 29, 2008) (granting the state’s request for a stay of a civil sexual assault case pending the resolution of the criminal case against the defendant where the defendant used the civil discovery process to obtain the victim’s medical records, in violation of the victim’s constitutional rights); *Lee*, 245 P.3d at 923-24 (finding that the trial court erred when it denied the state’s requests for a protective order in both criminal and civil cases to prevent the pretrial depositions of crime victims where victims have a constitutional right to refuse discovery requests).

²⁵ See *Dominguez*, 530 F. Supp. 2d at 907 (“The scope of criminal discovery is significantly narrower than the scope of civil discovery.”); *Deal*, 740 N.W.2d at 763 (“In contrast to the civil rules, criminal rules allow only limited discovery. . . .”).

²⁶ See, e.g., Fed. R. Civ. Proc. 26(b)(1); Ill. R. Civ. Proc. 201(b); Or. R. Civ. P. 36(B)(1).

²⁷ See, e.g., Fed. R. Civ. Proc. 30(a); Ill. R. Civ. Proc. 201(a); Or. R. Civ. P. 36(A).

²⁸ *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *People v. Superior Court (Meraz)*, 77 Cal. Rptr. 3d 352, 369 (Cal. Ct. App. 2008) (citing *Weatherford*); *State ex rel. O’Leary v. Lowe*, 769 P.2d 188, 193 (Or. 1989).

²⁹ *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that a defendant is constitutionally entitled to information that is in the prosecution’s possession and material and favorable to guilt or punishment); see also *Meraz*, 77 Cal. Rptr. 3d at 370 (“*Brady* [v. *Maryland*, 373 U.S. 83 (1963)] exculpatory evidence is the only substantive discovery mandated by the United States Constitution.”) (citing *People v. Superior Court (Barrett)*, 96 Cal. Rptr. 2d 264 (Cal. Ct. App. 2000)); *State v. Bassine*, 71 P.3d 72, 75 (Or. Ct. App. 2003) (“As to discovery, a defendant is constitution-

ally entitled to information that is (1) in the possession of the prosecution and (2) material and favorable to a defendant's guilt or punishment.") (citing *State v. Cartwright*, 20 P.3d 223 (Or. Ct. App. 2001) and *Brady*).

³⁰ See, e.g., *Dominguez*, 530 F. Supp. 2d at 907 (noting that federal law does not authorize a criminal defendant to obtain discovery from third parties or to depose a prospective government witness unless the witness is going to be unavailable for trial); *Deal*, 740 N.W.2d at 763 (explaining that depositions are permitted in a criminal case "not for discovery purposes but to preserve testimony"); *State ex rel. O'Leary*, 769 P.2d at 192 (stating that Oregon law does not afford defendants the right to depose a potential state's witness).

³¹ See *SEC v. Nicholas III*, 569 F. Supp. 2d 1065, 1071-72 (C.D. Cal. 2008) (noting that the federal rules regarding criminal discovery are "are purposefully limited so as to prevent perjury and manufactured evidence, to protect potential witness from harassment and intimidation, and to level the playing field between the government and the defendant, who would be shielded from certain discovery by the Fifth Amendment"); *Deal*, 740 N.W.2d at 763 (citation omitted) (recognizing that the purpose behind a rule limiting criminal depositions to instances where there is a reasonable probability that the witness will be unavailable for trial "is to prevent harassment of state's witnesses and law enforcement officers, to reduce delays in the criminal process, and to avoid the possible 'chilling effect on the willingness of witnesses to come forward'").

³² *State v. Bonebrake*, 736 P.2d 1020, 1023 (Or. 1987); see *Deal*, 740 N.W.2d at 764 ("The reasoning supporting [] a stay [of civil proceedings pending the resolution of a criminal case] is based on the distinctly different policies and objectives that support the civil and criminal rules.").

³³ See *Nicholas III*, 569 F. Supp. 2d at 1072 (noting that "a number of courts have rejected a criminal defendant's attempt to use civil discovery mechanisms to obtain disclosures that are otherwise unavailable under the criminal rules" and citing cases); *Deal*, 740 N.W.2d at 765 ("Prohibiting a defendant from taking a discovery deposition in a criminal proceeding, only to allow him to take the same investigatory deposition through a related civil proceeding, would contravene the [] policies behind the criminal discovery rules."). But as described in the Practice

Pointers section of this *Bulletin*, courts require allegations of specific harm that would be suffered in the absence of a stay; general allegations that defendant is misusing civil discovery to circumvent the limitations of criminal discovery are not sufficient. See, e.g., *Ex parte Windom*, 763 So. 2d 946, 950 (Ala. 2000) (emphasis in original) (finding that a discovery stay was not required "based upon the allegation of one party to a civil action that the other party *may* in that civil action use the discovery process to interfere with a pending criminal proceeding"); *Doe v. Lenarz*, No. CV054012970, 2006 WL 2130351, at *2 (Conn. Super. Ct. July 5, 2006) (granting only a limited stay in civil discovery where the state's stay request did not identify any specific harm that the victim or other witnesses would suffer if discovery was not stayed, but only suggested that the defendants "may attempt to utilize liberal civil discovery procedures to obtain broader pre-trial disclosure than would otherwise be available in the criminal case alone").

³⁴ See, e.g., *Nicholas III*, 569 F. Supp. 2d at 1071-72 (concluding that the public interest favors a complete stay of civil discovery to prevent the defendants from impermissibly using civil discovery to their benefit in a related criminal prosecution); *Dominguez*, 530 F. Supp. 2d at 907 (finding that a civil action should be stayed where the criminal defendant brought the action as a means of obtaining discovery because "[a]s a matter of equity and public policy, a criminal defendant may not institute a civil action to obtain discovery relating to the criminal case"); *Lizarraga*, 2008 WL 4079991, at *4 (concluding that the simultaneous prosecution of parallel civil and criminal sexual assault cases would "undermine the public's interest in a fair and efficient prosecution of its criminal laws" where the defendant sought to use civil discovery to circumvent the limitations of the state's criminal discovery rules); *Wilcox v. Webster Insurance*, No. CV075010093S, 2008 WL 253054, at *6 (Conn. Super. Ct. Jan. 11, 2008) (finding that the public's interest in the prosecution of crime weighed in favor of staying civil discovery proceedings pending the outcome of a related criminal trial where, absent a stay, criminal defendants could use the civil discovery process to circumvent criminal discovery rules); *Deal*, 740 N.W.2d at 766 ("We emphasize the strong government and public interest in the integrity of a criminal proceeding that must be part of [the] balancing test [used to determine whether to stay civil proceedings]—integrity that may be compromised by a defendant's access to the broad scope of civil dis-

covery.”).

³⁵ 2008 WL 4079991, at *1.

³⁶ *Id.*

³⁷ *Id.* at *4.

³⁸ *Id.* at *3.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at *4. Upon granting the stay, the court denied the victim’s request for a protective order as moot. *Id.*

⁴² In general, jurisdictions with constitutional and/or statutory victims’ rights provisions expressly recognize the right of crime victims to fair treatment throughout the criminal justice process. *See, e.g.,* Alaska Const. art. 1, § 24; Ariz. Const. art. II, § 2.1(A)(1); Cal. Const. art. I, § 28(b)(1); Conn. Const. art. 1, § 8(b)(1); Idaho Const. art. 1, § 22(1); Ill. Const. art. 1, § 8.1(a)(1); Ind. Const. art. 1, § 13(b); La. Const. art. I, § 25; Md. Const. Decl. of Rights art. 47(a); Mich. Const. art. I, § 24(1); Miss. Const. art. 3, § 26A(1); N.J. Const. art. I, ¶ 22; N.M. Const. art. II, § 24(A)(1); Ohio Const. art. I, § 10a; Okla. Const. art. II, § 34; Or. Const. art. I, § 42(1); R.I. Const. art. 1, § 23; S.C. Const. art. I, § 24(A)(1); Utah Const. art. I, § 28(1)(a); Va. Const. art. I, § 8-A; Wash. Const. art. 1, § 35; Wis. Const. art. I, § 9m; 18 U.S.C. § 3771; Colo. Rev. Stat. § 24-4.1-302.5(1)(a); Haw. Rev. Stat. § 801D-1; Kan. Stat. Ann. § 74-7333(a)(1); N.H. Rev. Stat. Ann. § 21-M:8-k(II)(a); 18 Pa. Cons. Stat. § 11.102(1); Tenn. Code Ann. § 40-38-102(a)(1); Vt. Stat. Ann. tit. 13, § 5303(a).

⁴³ *See, e.g.,* 18 U.S.C. § 3771(a)(1) (guaranteeing crime victims the right to reasonable protection from the accused); Mo. Const. art. 1, § 32(6) (same); N.M. Const. art. II, § 24(A)(1) (same); Or. Const. art. I, § 43(1)(a) (same).

⁴⁴ *See, e.g.,* Alaska Const. art. 2, § 24; Conn. Const. art. 1, § 8(b)(3); Ill. Const. art. 1, § 8.1(a)(7); Mich. Const. art. I, § 24(1); Mo. Const. art. I, § 32(1)(6); N.M. Const. art. II, § 24(A)(3); Ohio Const. art. I, § 10a; S.C. Const. art. I, § 24(a)(6); Wis. Const. art. I, § 9(m).

⁴⁵ *See Lizarraga v. City of Nogales*, No. CV06474, 2007 WL 4218972, at *3 (D. Ariz. Nov. 29, 2007) (order) (“Given the mental fragility of [the victim-plaintiff], the risk of intimidating or harassing her is particularly high. This is a strong reason to stay her

deposition because her distress might jeopardize the criminal trial.”); *Deal*, 740 N.W.2d at 767-68 (finding that the state and public’s interest in preventing the harassment and intimidation of child-victims of sexual abuse weighed in favor of staying civil discovery pending the resolution of a related criminal prosecution).

⁴⁶ *Deal*, 740 N.W.2d at 767-68; *Lizarraga*, 2007 WL 4218972, at *3.

⁴⁷ *See Deal*, 740 N.W.2d at 767 (finding that the risk of a civil deposition intimidating or harassing a crime victim is high where the victim is a minor who was sexually assaulted by the criminal defendant seeking to civilly depose her).

⁴⁸ *See, e.g., Lizarraga*, 2008 WL 4079991, at *1 (noting the court’s conclusion in an earlier proceeding that the mental and emotional harm to the victim-plaintiff from simultaneous civil and criminal trials “would negatively impact the criminal trial” and that these harms “outweighed the disadvantage to the Defendant of not proceeding with the civil case”); *Deal*, 740 N.W.2d at 767 (finding that a civil deposition of a child-victim of sexual abuse prior to a related criminal prosecution could place the victim in “severe distress”); *see also Lizarraga v. Nogales*, No. 06CV00474, 2007 WL 7266361 (D. Ariz. July 24, 2007) (affidavit of Carolyn Crowder, PhD) (detailing the victim’s great difficulty in participating in the civil proceedings related to her sexual assault during the pendency of her offender’s criminal prosecution).

⁴⁹ *See, e.g., Lizarraga*, 2008 WL 4079991, at *1 (describing the court’s conclusion in an earlier proceeding to stay the victim’s civil action based on the victim’s “assertion, supported by her treating psychiatrist, that her mental fragility prevented her from simultaneously participating [in the civil case] and in the criminal trial,” and concluding that forcing the victim to proceed with the civil case would compromise the criminal trial); *Deal*, 740 N.W.2d at 768 (finding that a protective order staying civil discovery was necessary where, *inter alia*, there was a “substantial” risk that a civil deposition of a minor-victim of sexual assault would compromise the victim’s testimony in the related criminal proceeding).

⁵⁰ *See King*, 16 P.3d at 52 n.15 (noting that a stay request that relates only to civil discovery implicates both the court’s inherent authority to issue a stay and the court’s authority under Washington’s civil procedure rules to issue a protective order related

to discovery). A victim might seek a protective order to limit the use of any materials or information obtained through civil discovery to the civil case. *See Nosik v. Singe*, 40 F.3d 592, 596 (2d Cir.1994) (“Although civil and criminal proceedings covering the same ground may sometimes justify deferring civil proceedings until the criminal proceedings are completed, a court may instead enter an appropriate protective order.”). Where a defendant admits his intention to use or has used civil discovery procedures as a discovery tool in a related criminal case, a victim has “good cause” to obtain a protective order that places such limitations on the defendant’s use of civil discovery. *See Lizarraga*, 2007 WL 4218972, at *3 (finding that the victim had shown “good cause” for a protective order that would limit the defendant’s use of civil discovery where the defendant admitted his intention to use civil discovery procedures as a discovery tool in a related criminal case). Yet, as one court has noted, such a protective order “might well be ineffective because [the defendant] ‘may have two different attorneys in two different proceedings, but he is the same person.’” *Id.* (citation omitted). For this reason, an order staying discovery or an order quashing the discovery request altogether may be the best way to protect a victim’s interests during the pendency of a related criminal case against the offender.

⁵¹ *See, e.g.*, Fed. R. Civ. Proc. 26(c)(1); Ala. R. Civ. Proc. 26(c); Ga. Code Ann., § 9-11-26; Md. R. 2-403; Minn. R. Civ. Proc. 26.03; Or. R. Civ. Proc. 36(C); Wash. Super. Ct. Civ. R. 26(c).

⁵² *See, e.g.*, Fed. R. Civ. Proc. 26(c)(1); Ala. R. Civ. Proc. 26(c); Ga. Code Ann., § 9-11-26; Md. R. 2-403; Minn. R. Civ. Proc. 26.03; Or. R. Civ. Proc. 36(C); Wash. Super. Ct. Civ. R. 26(c).

⁵³ *See Black’s Legal Dictionary* (9th ed. 2009) (defining “good cause” as “[a] legally sufficient reason”); *Tolbert–Smith v. Bodman*, 253 F.R.D. 2, 4 (D.D.C. 2008) (“To show good cause for the entry of a protective order, the movant must show specific facts and cannot rely on speculation or conclusory statements.”); *State v. Pettit*, 675 P.2d 183, 185 (Or. Ct. App. 1984) (analyzing the term “good cause” in Oregon’s criminal discovery rules, and concluding that “[i]n the context of the discovery statutes, good cause means a substantial reason—one that affords a legal excuse”); *see also Ex parte Hill*, 674 So. 2d 530, 533 (Ala. 1996) (finding that the state failed to establish “good cause” for granting its motion to stay civil

discovery where the state did not demonstrate that allowing civil discovery would potentially compromise confidential information in the pending criminal case).

⁵⁴ *Tolbert–Smith*, 253 F.R.D. at 4.

⁵⁵ *State ex rel. Anderson v. Miller*, 882 P.2d 1109, 1111 (Or. 1994).

⁵⁶ *Id.* at 1112.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *See, e.g., Lee*, 245 P.3d at 923-24 (concluding that the trial court erred when it denied the state’s requests for a protective order in criminal and civil cases to prevent the pretrial depositions of crime victims where the victims had a constitutional right to refuse a defendant’s deposition request); *Deal*, 740 N.W.2d at 765 (finding that the public policy of “[m]aintaining the integrity of a criminal proceeding by preventing circumvention of the criminal discovery rules” can constitute “‘good cause’ to issue a protective order staying civil discovery”).

⁶⁰ *See State ex rel. Anderson*, 882 P.2d at 1111-12 (recognizing that a protective order might be necessary to protect a civil litigant from intimidation or harassment by the opposing party, but finding that the trial court erred in issuing a protective order where “the record contains no factual basis to support a [protective order] ruling based on intimidation or harassment”).

⁶¹ *See Tolbert–Smith*, 253 F.R.D. at 4 (finding that “good cause” exists for a protective order barring the former employers of a victim of employment discrimination from attending the victim’s deposition where the victim demonstrated that the former employers’ presence at the deposition would cause the victim “severe depressive stress possibly resulting in suicide”).

Publication of this Bulletin was supported by Grant No. 2012-TA-AX-K030, awarded by the Office on Violence Against Women, Office of Justice Programs, U.S. Department of Justice.

The opinions, findings, and conclusions expressed are those of the author(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice.



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