THIS APPEAL INVOLVES A MATTER SUBJECT TO EXPEDITED DISPOSITION UNDER RULE 604(h)

No. 130626

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- KENDALL CECIL MORGAN, Petitioner-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-24-0103. There on appeal from the Circuit Court of the Eleventh Judicial Circuit, McLean County, Illinois, No. 24 CF 3. Honorable Amy McFarland, Judge Presiding.

BRIEF AND ARGUMENT FOR APPELANT

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NATURE OF THE CASE

Following a pretrial detention hearing, the circuit court ordered Kendall Cecil Morgan detained. The appellate court affirmed, holding that the circuit court did not abuse its discretion in ordering Morgan detained. Morgan appealed. No question is raised as to the State's verified petition to detain.

ISSUES PRESENTED FOR REVIEW

I. Whether *de novo* is the proper standard of review for orders appealed from pretrial detention hearings.

II. Whether this Court should apply the public interest exception to the mootness doctrine in order to determine the proper standard of review for orders appealed from pretrial detention hearings.

JURISDICTION

On June 11, 2024, this Court allowed Morgan's petition for leave to appeal. Therefore, jurisdiction lies under Supreme Court Rules 315(a), 604(h) and 612(b)(2).

STATEMENT OF FACTS

On January 2, 2024, the State charged Kendall Cecil Morgan with home invasion and domestic battery. (C. 6-7) According to the verified statement of arrest, officers saw Morgan "on top of [V.W.]" (C. 9) Morgan initially struggled with an officer, but police detained him. (C. 9) V.W. said Morgan came to her home and appeared drunk and upset. (C. 9) Morgan asked to enter but she refused. (C. 9) Morgan responded by breaking a front window and kicking open the front door. (C. 9) He "began hitting [V.W.] in the face." (C. 9) Morgan broke a mirror by throwing V.W. into it. (C. 9) V.W. had bruises and cuts to her head and face along with a bite mark on her left hand. (C. 9) V.W. told police she had sought an order of protection against Morgan. (C. 9) Morgan and V.W. have a child in common. (C. 9) Morgan's public safety assessment report included a new violent criminal activity flag, scored him as a five out of six on the new criminal activity scale. (Sup CI. 4) It added that Morgan is currently on probation. (Sup CI. 5)

The same day, the State moved to deny Morgan pretrial release alleging Morgan was dangerous. (C. 13) Later that day, the circuit court held a detention hearing. The State's proffer largely mirrored the verified statement of arrest, but it added that three minor children were present when Morgan tried to enter the home and two of them ran to a neighbor's home and called 9-1-1. (R. 2:03-4:00) Morgan, who was born in 1992, had a prior armed robbery conviction from 2007. (R. 4:12-4:16; Sup. CI. 4) A court put Morgan on probation for an aggravated battery to a peace officer from 2021. (R. 4:19-4:25, 5:11-5:22) He had a pending DUI charge from 2021 and a pending battery charge, of V.W., from December 2023. (R. 4:56-5:08, 5:42-5:57, 6:05-6:15) In arguing that no condition could mitigate Morgan's safety risk, the State focused on his failure to abide by court orders, noting that he was

on probation and had picked up two new criminal offenses. (R. 14:18-15:25)

Defense counsel stressed Morgan's ties to the community, housing, job, and support of two children. (R. 6:40-7:21, 17:02-17:20) Morgan's attorney emphasized that Morgan suffered from medical issues including bipolar disorder and that he would seek and abide by treatment on release. (7:22-7:50, 17:21-17:28) Counsel asserted Morgan would comply with any conditions, suggesting the court put Morgan on electronic monitoring and order no-contact with V.W. (R. 7:51-8:25, 16:25-17:00) Defense counsel added that: Morgan might assert an affirmative defense of involuntary intoxication because he took a pain pill from a friend and then blacked out before this incident; Morgan vowed to not take any non-prescribed drugs if released. (R. 9:36-12:36)

The court ordered Morgan detained and found he posed a real and present threat to the safety of the community, specifically V.W. (C. 16; R. 18:28-20:45) It found conditions could not "mitigate the foregoing safety threat" because the State accused Morgan of a crime while on probation. (R. 20:50-21:15) The circuit court ordered Morgan to have no-contact with V.W. (C. 17; R. 22:48-23:31)

At the end of the hearing, Morgan stressed that he was 14 years old when he committed the 2007 offense. (R. 24:11-24:16) He also pleaded with the judge saying, "I've never been given any help. I was just diagnosed with bipolar . . . I don't have to be a threat to society. I'm not a threat to society . . . [I] need help, ma'am. I need help, please." (R. 24:21-24:37)

On January 12, Morgan filed a notice of appeal arguing he should not have been detained because he was not dangerous and conditions could mitigate any risk he posed. (C. 20-21) Morgan filed a memorandum arguing that the State failed to establish by clear and convincing evidence that no condition or combination

of conditions would mitigate the danger he posed and that the appellate court should review the circuit court's rulings *de novo*.

On April 12, 2024, the appellate court affirmed Morgan's pretrial detention order and held that the circuit court did not abuse its discretion in detaining Morgan before trial. *People v. Morgan*, 2024 IL App (4th) 240103, ¶ 44. At length, the appellate court addressed the appropriate standard of review for orders from pretrial detention hearings concluding they are "reviewed under the abuse of discretion standard." *People v. Morgan*, 2024 IL App (4th) 240103, ¶¶ 12-35. On April 19, 2024, Morgan petitioned this Court for leave to appeal. On May 1, 2024, before the circuit court, Morgan pled guilty to the home invasion charge and the State moved to nol-prose the domestic battery charge[1]. On June 11, 2024, this Court granted Morgan leave to appeal.

[1] McClean County Public Access Criminal/Traffic Search System, Case Number Search for 2024CF0000003, https//publicaccess.mcleancountyil.gov/PubAC_SearchCriminal.aspx

ARGUMENT

I. This Court should clarify that the standard of review for detention decisions is *de novo*.

For over one hundred years, this Court has reviewed *de novo* "where the circuit court only considered documentary evidence[.]" *Cleeton v. SIU Healthcare, Inc.*, 2023 IL 128651, ¶ 26; see *State Bank of Clinton v. Barnett*, 250 Ill. 312, 315 (1911) (*de novo* review where the lower court had "no better means of judging the relative candor, fairness, and credibility of the respective witnesses than we have"). "[T]he vast majority" of pretrial detention hearings "consist solely of proffers–documents such as police reports and criminal histories and oral presentation by counsel[.]" *People v. Whitaker*, 2024 IL App (1st) 232009, ¶ 116 (Ellis, J., specially concurring). However, the "standard of review is unsettled" for orders granting, denying or setting conditions of pretrial release. *People v. Sorrentino*, 2024 IL App (1st) 232363, ¶ 34.

"The standard of review identifies the degree of deference a reviewing court will give to the decision below." *People v. Radojcic*, 2013 IL 114197, ¶ 33. "The standard is sometimes said to represent a measure of 'how wrong' the lower court's decision must be to warrant reversal." Timothy J. Storm, *The Standard of Review Does Matter: Evidence of Judicial Self-Restraint in the Illinois Appellate Court*, 34 S. Ill. U. L.J. 73, 73 (2009). Accordingly, where both parties proceed by proffer, courts should review pretrial detention orders *de novo* because: 1) the reviewing courts are in the same position as to the circuit court to make factual findings; 2) the gravity of the detention decision and the constitutional right at stake; and 3) to minimize any implicit bias against a non-testifying defendant. *Whitaker*, 2024 IL App (1st) 232009, ¶¶ 110-138 (Ellis, J., specially concurring); Press Release,

Ill. Supreme Court, Supreme Court Releases Statement on Racial Justice, Next Steps for Judicial Branch (June 22, 2020), https://www.illinoiscourts.gov [https://perma.cc/E66J-2ZYX]. Additionally, contrary to the appellate court decision below, review for an abuse of discretion is improper where there is a burden of proof and detention orders have not been historically reviewed for an abuse of discretion. *Whitaker*, 2024 IL App (1st) 232009, ¶¶ 83-109 (Ellis, J., specially concurring); *People v. Morgan*, 2024 IL App (4th) 240103, ¶¶ 31-35, *pet. for leave to appeal allowed*, No. 130626 (Jun. 11, 2024). Therefore, this Court should hold that review of the detention decision is *de novo* but when live testimony is presented the circuit court's findings on those facts are reviewed under the manifest-weight-of-the-evidence standard.

"This debate is not trivial or without consequence." *People v. Wells*, 2024 IL App (1st) 232453, ¶ 36 (Lampkin, J., specially concurring). "[L]iberty is the norm, and detention prior to trial is the carefully limited exception." *Id*. (quoting *United States v. Salerno*, 481 U.S. 739, 750 (1987) (quotation marks omitted). Pretrial release "permits the unhampered preparation of a defense and serves to prevent the infliction of punishment prior to conviction." *Stack v. Boyle*, 342 U.S. 1, 4 (1951). On the other hand, "pretrial detention wreaks havoc on familial relationships, employment, and educational pursuits while the individual is still cloaked in the presumption of innocence." *People v. Pitts*, 2024 IL App (1st) 232336, ¶ 27.

The determination of the proper standard of review is a question of law and reviewed *de novo*. *Beggs v. Bd. of Educ. of Murphysboro Cmty. Unit Sch. Dist. No. 186*, 2016 IL 120236, ¶ 52.

A. Review of the detention decision should be *de novo* because, where both parties proceed by proffer, reviewing courts are in the same position as the court below.

This Court has long reviewed evidence similar to proffers *de novo* where the reviewing courts are in the same position as the court below. Where parties present live testimony, reviewing courts should review those facts under the manifest-weight-of-the-evidence standard while the detention decision is reviewed *de novo*. *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 452-53 (2009); *Cleeton*, 2023 IL 128651, ¶ 26. Where the parties proceed solely by proffer or similar evidence, and the circuit court does not "gauge the demeanor and credibility of witnesses" courts should review all the court's findings *de novo* because they are similarly situated. *Addison*, 232 Ill. 2d at 453; *Cleeton*, 2023 IL 128651, ¶ 26.

To detain an accused before trial the circuit court must make findings that involve mixed questions of law and fact. 725 ILCS 5/110-6.1(e). At pretrial detention hearings, the State customarily presents its case by proffer. *People v. Sorrentino*, 2024 IL App (1st) 232363, ¶ 13[2]; see also *People v. Whitaker*, 2024 IL App (1st)

[2] Of the first 25 opinions this year that addressed the form of evidence at a detention hearing, in 23 cases the parties cited solely documents, oral proffers, or a combination of both. Compare *People v. Forthenberry*, 2024 IL App (5th) 231002, ¶¶ 5–7; *People v. Mezo*, 2024 IL App (3d) 230499, ¶ 4; *People v. Grandberry*, 2024 IL App (3d) 230546, ¶¶ 5–6; *People v. O'Neal*, 2024 IL App (5th) 231111, ¶ 5; *People v. Casey*, 2024 IL App (3d) 230568, ¶¶ 7–8; *People v. Hodge*, 2024 IL App (3d) 230543, ¶ 4; *People v. Saucedo*, 2024 IL App (1st) 232020, ¶¶ 4–9; *People v. Minssen*, 2024 IL App (4th) 231198, ¶ 8; *People v. Gatlin*, 2024 IL App (4th) 231199, ¶¶ 4–6; *People v. Earnest*, 2024 IL App (2d) 230390, ¶ 7; *People v. Andino-Acosta*, 2024 IL App (2d) 230463, ¶¶ 4–5; *People v. Whitaker*, 2024 IL App (1st) 232009, ¶¶ 4–20; *People v. Rollins,* 2024 IL App (2d) 230372, ¶ 5; *People v. Lee*, 2024 IL App (1st) 232137, ¶¶ 4–8; *People v. Parker*, 2024 IL App (1st) 232164, ¶¶ 11–16 & n.5; *People v. Acosta*, 2024 IL App (2d) 230475, ¶¶ 5–8; *People v. Pitts*, 2024 IL App (1st) 232336, ¶¶ 5–8; *People v. Crawford*, 2024 IL App (3d) 230668, ¶¶ 2–3; *People v. Lyons*, 2024 IL App (5th)

232009, ¶ 116 (Ellis, J., specially concurring) ("vast majority" of pretrial detention hearings "consist solely of proffers"). When assessing live evidence, reviewing courts usually review under the manifest-weight-of-the-evidence standard because the circuit court "is in a superior position to determine and weigh the credibility of the witnesses, observe the witnesses' demeanor, and resolve conflicts in their testimony." *People v. Richardson*, 234 Ill. 2d 233, 251 (2009); see *People v. Salamon*, 2022 IL 125722, ¶ 75; *People v. Sneed*, 2023 IL 127968, ¶ 61. "[T]he subtleties of a witness's tone, inflection, and body language—which the trial court can see and measure—do not make it to the cold record[.]" *Whitaker*, 2024 IL App (1st) 232009, ¶ 112 (Ellis, J., specially concurring) (citing *Radojcic*, 2013 IL 114197, ¶ 34).

When the parties proceed only by proffer and the court hears no live testimony, a deferential standard is not warranted. *Radojcic*, 2013 IL 114197, ¶¶ 32, 34-35. This Court has long followed this principle. *State Bank of Clinton*, 250 Ill. at 315 (reviewing *de novo* where this Court can judge "the relative candor, fairness, and credibility of the respective witnesses" as well as the circuit court); see *Baker v. Rockabrand*, 118 Ill. 365, 370 (1886). This Court has reviewed *de novo* factual determinations when only assessing documents and oral argument in many contexts. See *Riso v. Bayer Corporation*, 2020 IL 125020, ¶ 16 (reviewing *de novo* the circuit

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231180, ¶¶ 5–8; *People v. Castillo*, 2024 IL App (1st) 232315, ¶¶ 4–7; *People v. Vojensky*, 2024 IL App (3d) 230728, ¶ 4*; People v. Wells*, 2024 IL App (1st) 232453, ¶ 6; *People v. Burke*, 2024 IL App (5th) 231167, ¶¶ 5–11 (in all cases, evidence presented by written and/or oral proffers) with *People v. Sorrentino*, 2024 IL App (1st) 232363, ¶¶ 18–20 (defense called two live witnesses) and *People v. Mancilla*, 2024 IL App (2d) 230505, ¶¶ 5–19 (summary indicates State relied on police synopsis but trial court findings mention consideration of "testimony heard by the court").

court's exercise of specific personal jurisdiction in finding "plaintiffs met their burden based solely on documentary evidence"); *Aspen American Insurance Company v. Interstate Warehousing, Inc.*, 2017 IL 121281, ¶ 12 (same); *Russell v. SNFA*, 2013 IL 113909, ¶ 28 (same); *Radojcic*, 2013 IL 114197, ¶ 34 ("evidentiary showing required for application" of crime fraud exception reviewed *de novo*); *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277, 285 (2007) (applying *de novo* review where lower court only "relied on parties' oral argument and the record"); *People v. Oaks*, 169 Ill. 2d 409, 447-448 (1996) (reviewing *de novo* where "the record contains both a videotape and a transcript of the interrogation, so that neither the facts nor the credibility of the witnesses is in issue").

In *Addison*, this Court reviewed a declaratory action and decided whether injuries to two boys "constitute[d] a single or multiple occurrences under the terms" of the insurance policy. 232 Ill. 2d at 448. Both parties presented witnesses but did so by deposition so the circuit court never heard live testimony. *Id.* at 450, 453. This Court acknowledged that it should defer to the circuit court when it "is in a position superior to a reviewing court to observe witnesses while testifying, to judge their credibility, and to determine the weight their testimony should receive." *Id.* at 452-453 (quoting *Bazydlo v. Volant*, 164 Ill. 2d 207, 214-215 (1995)). But in *Addison* "all testimony was submitted by admitting discovery depositions[.]" *Id.* at 453. Therefore, the "trial court was not required to gauge the demeanor and credibility of witnesses[.]" Accordingly, this Court found the circuit court was not better positioned "to make findings" because it "made factual findings based upon the exact record presented to both the appellate court and to this court[.]" *Addison* concluded:

> where the evidence before a trial court consists of depositions,

> transcripts, or evidence otherwise documentary in nature, a reviewing court is not bound by the trial court's findings and may review the record *de novo*.

Id.

Recently in *Cleeton*, this Court reviewed *de novo* the interpretation of section 2-402 of the Code of Civil Procedure and "an order based on documentary evidence[.]" 2023 IL 128651, ¶ 26. As to the order, this Court stressed that if the circuit court had "heard testimony and made determinations about conflicting evidence" it would give deference. *Id*. But the circuit court did not hear testimony on conflicting evidence but instead "considered documentary evidence (depositions, transcripts, etc.)." *Id*. This Court emphasized the procedural posture of the case and that it is "not determining the factual question of liability or determining . . . malpractice" but simply deciding whether "there is probable cause to proceed with the malpractice case." *Cleeton* concluded that issue should be reviewed *de novo*. *Id*.

As in *Addison* and *Cleeton*, this Court should review orders from pretrial detention hearings based solely on documentary evidence or oral argument *de novo*. *Addison*, 232 Ill. 2d at 453; *Cleeton*, 2023 IL 128651, ¶ 26. If the circuit court had "heard testimony and made determinations about conflicting evidence" it should give those factual findings deference and review them under the manifest-weight-of-the-evidence standard. *Cleeton*, 2023 IL 128651, ¶ 26. But where the circuit court only considers documentary evidence or oral proffers, review should be exclusively *de novo*. *Id*.; (C. 16; R. 18:28-21:15). Accordingly, this Court should hold that review of the detention decision is always *de novo*, but when live testimony is presented, the circuit court's findings on those facts should be reviewed under the manifest-weight-of-the-evidence standard.

The appellate court below called *de novo* review "fundamentally unworkable" because parties are not required to proceed by proffer and may call live witnesses. *Morgan*, 2024 IL App (4th) 240103, ¶ 26. The court worried that it could not properly review a finding of dangerousness if the court presented a proffer and a live witness. *Id*. ¶ 26. But reviewing courts frequently employ bifurcated standards of review and can afford deference to a circuit court's findings as to the credibility and weight of testimony while still reviewing a proffer, "police reports, body camera footage, text messages, [or] jail calls," and the court's ultimate decision *de novo*. *Morgan*, 2024 IL App (4th) 240103, ¶ 26; see *People v. Rivera*, 227 Ill. 2d 1, 11-12 (2007) (findings of fact are accepted unless they are contrary to the manifest weight of the evidence but the legal determination based on the findings is reviewed *de novo*); *People v. Bunch*, 207 Ill. 2d 7, 13 (2003) (circuit court's determination of the officer's credibility was not manifestly erroneous, therefore the court applied *de novo* review "under the officer's versions of events."). Further, the pretrial release statute specifies that the circuit court is required to make written findings explaining why an accused is denied pretrial release. 725 ILCS 5/110-6.1(h)(1). That requirement allows the circuit court to explain the basis of its finding including any credibility determinations allowing for proper appellate review. 725 ILCS 5/110-6.1(h)(1).

In the rare case where live testimony is presented, reviewing courts should review those facts under the manifest-weight-of-the-evidence standard while the detention decision is reviewed *de novo*. *Addison*, 232 Ill. 2d at 452-53; *Cleeton*, 2023 IL 128651, ¶ 26. But, where the parties proceed solely by proffer, and the circuit court is "not required to gauge the demeanor and credibility of witnesses" courts should review all the court's findings *de novo* because they are in the same

position as the court below to make factual findings. *Addison*, 232 Ill. 2d at 453; *Cleeton*, 2023 IL 128651, ¶ 26.

B. Review of the detention decision should be *de novo* because of its gravity and the constitutional right at stake.

Similar to the majority of U.S. courts of appeals, when live testimony is presented, reviewing courts should assess the detention decision *de novo* and review the live testimony under the manifest weight standard. *U.S. v. Motamedi*, 767 F.2d 1403, 1405-06 (9th Cir. 1985); *U.S. v. O'Brien*, 895 F.2d 810, 812-814 (1st Cir. 1990). Where the parties proceed solely by proffer or similar evidence, this Court should review the detention decision and the proffers *de novo* because "to deprive someone of his or her freedom indefinitely before they have been convicted of anything and remain presumptively innocent, is a momentous one." *Whitaker*, 2024 IL App (1st) 232009, ¶ 119 (Ellis J., specially concurring).

Federal courts have reviewed pretrial detention appeals for decades and the majority of federal circuit courts of appeal have settled on "'independent' or *de novo* review of the ultimate questions regarding detention with due regard to the trial court's purely factual findings." *Whitaker*, 2024 IL App (1st) 232009, ¶ 131 (Ellis, J., specially concurring); see *U.S. v. Hurtado*, 779 F.2d 1467, 1470-72 (2d Cir. 1985) (collecting circuit precedents). Federal courts of appeal have not addressed the standard of review when the parties proceed solely by proffer or other documentary evidence but the reasoning aligns with Illinois Supreme Court caselaw applying the deference only to credibility determinations concerning live testimony. See *U.S. v. Hazime*, 762 F.2d 34, 37 (6th Cir. 1985) ("[t]his court does not conduct evidentiary hearings and hear witnesses, and we will not disturb the factual findings of the district court"); *U.S. v. Portes*, 786 F.2d 758, 763 (7th Cir.

1985) (adopting reasoning from *Hazime*).

This Court, similar to the majority of federal courts of appeal, should settle on *de novo* review for the detention decision because it reflects the gravity of the detention decision and both schemes require probing and prompt findings. *Hurtado*, 779 F.2d at 1470-73; *O'Brien*, 895 F.2d at 812-14. In settling on "independent" or *de novo* review of the detention decision, federal courts have relied on "the nature of the question" and the gravity of the decision because "[a] crucial liberty interest is at stake." *O'Brien*, 895 F.2d at 814 (quoting *U.S. v. Delker*, 757 F.2d 1390, 1399 (3rd Cir. 1985)). If "[t]his traditional right to freedom" is not protected, "the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

The U.S. Supreme Court has stressed "the importance and fundamental nature" of an "individual's strong interest in liberty." *U.S. v. Salerno*, 481 U.S. 739, 750 (1987). "[T]he prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation." *Baldwin v. New York*, 399 U.S. 66, 73 (1970). "[P]retrial detention has the potential to devastate familial relationships, employment, and educational pursuits, despite the individual being shielded by the presumption of innocence." *Wells*, 2024 IL App (1st) 232453, ¶ 36 (Lampkin, J., specially concurring). The government as well has a strong interest in an accurate and fair decision in order to ensure the safety of the community and to secure a defendant's appearance in court. *Delker*, 757 F.2d at 1399. Wider and more encompassing review ensures that constitutional and statutory rights are respected. *Motamedi*, 767 F.2d at 1405.

Further, Illinois and the federal law both require probing and prompt findings.

Federal courts have relied on the requirement that circuit courts must set forth their reasons in writing explaining "[t]he very encompassing nature of this inquiry . . . especially the requirement that the trial court set forth in some detail its reasoning, suggests that the inquiry is to be probing." *Hurtado*, 779 F.2d at 1472. The Illinois legislature established a similarly probing scheme requiring the circuit court to "make a written finding summarizing the court's reasons" for denying the accused pretrial release "including why less restrictive conditions" could not mitigate their purported risk. 725 ILCS 5/110-6.1(h)(2). Federal courts have also focused on the requirement that because appeals "should be prompt," "a more searching review than our customary examination for clear error is in order." *O'Brien*, 895 F.2d at 814. Illinois's scheme also requires prompt appeals, suggesting that a more comprehensive review is warranted. Ill S. Ct. Rule 604(h)(8) ("[e]xcept for good cause shown, the time for filing of the notice of appeal until disposition shall not exceed 100 days").

Below the appellate court worried that *de novo* review "would diminish the significance of the trial court's decision making and guarantee every defendant a second bite at the apple[.]" *Morgan*, 2024 IL App (4th) 240103, ¶ 30. But appellate review is not a second bite, the higher court is just reviewing the same information that was presented to the circuit court but under a less deferential standard. See *U.S. v. Campbell*, 168 F.3d 263, 266 (6th Cir. 1999) (dismissing that *de novo* review constitutes a "second bite at the apple"). The appellate court's concern also overlooked that *de novo* review would apply if the State appeals as well if an accused appeals, thereby ensuring accurate and fair decisions no matter who appeals. 725 ILCS 5/110-6.1(j)(k). Considering that appeals take about 100 days to decide and that parties are limited to one appeal at a time before the appellate court it behooves

this Court to establish a standard of review that ensures accuracy and consistency while taking into account the gravity of incarcerating someone for months or years before trial. Ill. S. Ct. R. 604(h)(8)(11); see *Motamedi*, 767 F.2d at 1405 ("The Fifth and Eighth Amendments . . . require careful review of pretrial detention orders to ensure that the statutory mandate has been respected.").

Where there is no live testimony, review should be *de novo* because both this Court "and the U.S. Supreme Court "have embraced independent *de novo* review in other fact-intensive contexts where the importance of the constitutional rights at stake so warranted." *Whitaker*, 2024 IL App (1st) 232009, ¶ 122 (Ellis, J., specially concurring). In the context of the government violating an accused's rights under the fourth amendment, courts review live testimony under the manifest-weight-of-the-evidence standard but review *de novo* whether the State violated the accused's fourth amendment rights. *Id.* ¶ 126; see also *People v. Ward*, 2023 IL App (1st) 190364, ¶ 99, *pet. for leave to appeal allowed*, No. 129627 (Sep. 27, 2023) (applying *de novo* review of circuit court's denial of motion to suppress where decision was based on recording of interrogation and arguments by the parties). *De novo* review helps create "a uniform body of law" that allows the public to better understand their rights and how the law operates. *Whitaker*, 2024 IL App (1st) 232009, ¶ 126 (Ellis, J., specially concurring) (relying on *In re G.O.*, 191 Ill. 2d 37, 47 (2000); *Ornelas v. United States*, 517 U.S. 690, 697-699 (1996); see also Storm, *The Standard of Review Does Matter*, 34 S. Ill. U. L.J. at 75. It is inequitable that courts should review a minutes- or hours-long seizure *de novo* while reviewing pretrial incarceration that can last months or years under a more deferential standard. *Whitaker*, 2024 IL App (1st) 232009, ¶ 127 (Ellis, J., specially concurring).

Similar to the majority of federal circuit courts of appeal, when live testimony

is presented, courts should review the detention decision *de novo* but review the evidence from the live testimony under the manifest weight standard. *Motamedi*, 767 F.2d at 1405-06; *O'Brien*, 895 F.2d at 812-14. Where the parties proceed solely by proffer or similar evidence, this Court should review the detention decision and the proffers *de novo* because of the gravity of the detention decision and the constitutional right at stake. *Whitaker*, 2024 IL App (1st) 232009, ¶ 122 (Ellis, J., specially concurring) ("[P]retrial detention . . . deprives children of their parents, men and women of their spouses, families of their caregivers and financial support; it abruptly interrupts employment and educational pursuits.").

C. Review should be *de novo* to minimize any implicit bias against a non-testifying defendant.

Review of orders from pretrial detention hearings should be *de novo* to minimize any implicit bias against a non-testifying defendant. As noted in Section A, pretrial detention hearings in Illinois typically proceed by proffer. Proceeding by proffer allows the hearings to be brief but that brevity can exacerbate the impact of implicit bias against a non-testifying defendant. See Marty Berger, *The Constitutional Case for Clear and Convincing Evidence in Bail Hearings*, 75 Stan. L. Rev. 469, 492 (2023) ("[i]mplicit biases can be uniquely potent during the initial appearance, as judges make quick decisions based on limited information."). The appellate court below rejected *de novo* review, in part because of the circuit court's "ability to observe something that the reviewing court never will: the defendant." *Morgan*, 2024 IL App (4th) 240103, ¶ 25. Deference to a circuit court's judgment of a non-testifying defendant's physical appearance or demeanor exposes our criminal justice system to "implicit" or "unconscious biases" that could allow people to be detained pretrial at a higher rate because of how they look. See Jeffrey J. Rachlinski

et. al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1231 (2009) (suggesting *"de novo* review rather than clear error review" when "trial court findings of fact might be tainted by implicit bias").

This Court has acknowledged that:

> Racism exists, whether it be actualized as individual racism, institutional racism or structural racism, and it undermines our democracy, the fair and equitable administration of justice, and severely diminishes individual constitutional protections and safeguards of full citizenship with the attendant rights and benefits sacred to all.

Press Release, Ill. Supreme Court, Supreme Court Releases Statement on Racial Justice, Next Steps for Judicial Branch (June 22, 2020), https://www.illinoiscourts.gov [https://perma.cc/E66J-2ZYX]. A study by this Court's Committee on Equality revealed "judges are just like everyone else in their susceptibility to implicit bias – formed from influences which unconsciously affect decision making." *Id*. This Court should not afford greater deference to the circuit court because it can purportedly assess the accused's risk of dangerousness or willful flight based solely upon their physical appearance or demeanor.

"There is copious evidence that individuals of all races have implicit racial biases linking blacks with criminality and whites with innocence." L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 Yale L.J. 862, 876 (2017) (reviewing Nicole Gonzales Van Cleve, *Crook County: Racism and Injustice in America's Largest Criminal Court* (2016) (footnote omitted). "Implicit bias is largely automatic; the characteristic in question (skin color, age, sexual orientation) operates so quickly, in the relevant tests, that people have

no time to deliberate." Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 Cal. L. Rev. 969, 975 (2006). "[T]he judiciary remains complicit, albeit perhaps unknowingly, in permitting continued discrimination." Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 158 (2010).

Implicit or unconscious bias can seep into bail or pretrial detention hearings when the circuit court is allowed to assess a non-testifying defendant; therefore, reviewing courts should not give greater deference where only documentary evidence is presented. See Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 Stan. L. Rev. 987, 1010 (1994) (a study on bail in Connecticut showed "average bail amounts for black and Hispanic men are 35 and 19 percent higher, respectively, than those for white men"). "Over the last fifty years, research studies have consistently found that African American defendants receive significantly harsher bail outcomes than those imposed on white defendants." Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. Legis. & Pub. Pol'y 919, 938 (2013).

Implicit or unconscious bias can be problematic at pretrial detention hearings because of their brevity. See Chris Guthrie et. al., *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell L. Rev. 1, 36 (2007) (rulings at pretrial conferences "are more likely to be intuitive and impressionistic rather than deliberative and well reasoned."). A similar phenomenon plays out in the fast pace context of jury selection. Bennett, *Unraveling the Gordian Knot of Implicit Bias*, 4 Harv. L. & Pol'y Rev. at 164 (allowing strikes based on demeanor "disregards the effect of implicit bias upon perceptions of body language or demeanor."). For example,

"[a] judge's own conscious or unconscious racism" might lead him to accept an unsupported demeanor objection against a Black prospective juror. *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

Implicit bias can be hard to identify and rectify, therefore, this Court should not grant circuit courts greater leeway and deference to detain defendants pretrial based upon their physical appearance in court or on zoom. See Bennett, *Unraveling the Gordian Knot of Implicit Bias*, 4 Harv. L. & Pol'y Rev. at 168-69 (reviewing courts should give "less deference to trial courts' *Batson* determinations.") Implicit bias is well known and *de novo* review can help minimize the impact of that bias on detention decisions and prevent the great hardship that entails. See Illinois Pattern Jury Instructions 1.01; Richardson, *Systemic Triage* 126 Yale L.J. at 876 ("[i]mplicit biases are more likely to influence judgments when individuals make discretionary decisions quickly, based upon incomplete information.")

Therefore, because of the brevity of pretrial detention hearings, this Court should not afford the circuit court deference to observations about a non-testifying defendant because of the well known dangers of implicit bias and its potential to impact racial minorities.

D. The appellate court's reasons for reviewing for an abuse of discretion do not survive scrutiny, the detention decision should be reviewed *de novo* with live testimony reviewed under the manifest weight standard because of the legislatively defined burden of proof.

Below, the appellate court found that orders from pretrial detention hearings should be reviewed for an abuse of discretion even when the parties proceed solely by proffer. *Morgan*, 2024 IL App (4th) 240103, ¶ 35. In doing so, the appellate

court called the statute "an anomaly," "curiously constructed[,]" "doctrinally unsound" and rewrote the State's burden of proof "where proffers are involved." *Id*. ¶ 15-16. The Fourth District's criticism of the pretrial release statute is unjustified. The legislature made explicit the State's burden to detain an accused pretrial: the State must show by clear and convincing evidence three things; that the defendant committed a detainable offense, that he poses a real and present danger or a high likelihood of flight, and that no conditions can mitigate that risk. 725 ILCS 5/110-6.1(e). Orders from pretrial detention hearings are not simply judgment calls. *Whitaker*, 2024 IL App (1st) 232009, ¶ 92 (Ellis, J., specially concurring). Accordingly, because the State must meet their statutorily required burden of proof, review of the detention decision should be *de novo* and in the rare circumstances live testimony is presented, the findings of facts should be reviewed under the manifest weight standard. *Addison*, 232 Ill. 2d at 452-53.

The appellate court here settled on the abuse of discretion standard because the detention decision, according to them, is a "judgment call." *Morgan*, 2024 IL App (4th) 240103, ¶ 20. But calling a pretrial detention finding a "judgment call" overlooks that "there is nothing discretionary about making a finding as to whether the State has met its standard of proof of a particular fact." *Saucedo*, 2024 IL App (1st) 232020, ¶ 74 (Ellis, J., specially concurring). "Whether the State has supplied the requisite proof is a binary question; either the State has met its burden of proof or it has not." *Wells*, 2024 IL App (1st) 232453, ¶ 38 (Lampkin, J., specially concurring). "[W]hether the State met its standard" of proof does not implicate the "exercise of discretion[.]" *Whitaker*, 2024 IL App (1st) 232009, ¶ 93 (Ellis, J., specially concurring).

The appellate court below sought to avoid the problem of the standard of

proof by changing the State's statutory burden. *Morgan*, 2024 IL App (4th) 240103, ¶ 15. The appellate court rewrote it "at least where proffers are involved," defining it as "clear and convincing *description* of the evidence." *Id*. (emphasis in original). But this Court should not read additional words into the State's statutorily required burden of proof. *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 92 (1992) (statutes "should not be re-written by a court to make them consistent with the court's idea of orderliness and public policy.") The legislature defined the burden of proof at pretrial detention hearings. 725 ILCS 5/110-6.1(e) ("the State shall bear the burden of proving by clear and convincing evidence"). The pretrial detention statute allows parties to proceed by proffer but does not require them to do so. 725 ILCS 5/110-6.1(f)(2). That allowance does not change the State's burden of proof. 725 ILCS 5/110-6.1(e).

The appellate court also questioned the evidentiary value of a proffer, calling it not "true evidence." *Morgan*, 2024 IL App (4th) 240103, ¶¶ 15, 19. While the State is allowed to proceed by proffer at a pretrial detention hearing, they are not required to. 725 ILCS 5/110-6.1(f)(2). Naturally, the value, weight and credibility given to a proffer should be different than if the evidence was presented by way of a live witness. *Morgan*, 2024 IL App (4th) 240103, ¶ 15. But that is the State or the accused's choice. Where the evidence is solely by proffer, review should be *de novo* because the State must meet their statutorily required burden of proof and the reviewing court is in the same position as the court below. *Cleeton*, 2023 IL 128651, ¶ 26.

This Court's decision in *Evans v. Cook County State's Attorney*, 2021 IL 125513, ¶ 39, highlights the importance of "the burden of proof set forth in the statute." In *Evans*, both parties agreed that review should be *de novo* because

the circuit court "considered only documentary evidence." *Id.* ¶ 38. But the statute required that the petitioner "establish the section 10(c) factors '*to the court's or Director's satisfaction*.'" *Id.* ¶ 39 (emphasis in original) (citing 430 ILCS 65/10(c)). This Court stressed that the legislature's word choice "clearly afforded *discretion* to the Director or the circuit court." *Id.* (emphasis added). Accordingly, this Court found that it could not "review *de novo* whether a petitioner had established the factors 'to the court's or Director's satisfaction" and held that where a statute is drafted as such, review is for an abuse of discretion. *Id.* ¶¶ 40-41.

Here, the legislature's word choice in crafting the pretrial detention statute did not afford similar discretion to the circuit court. 725 ILCS 5/110-6.1(e); 725 ILCS 5/110-2(b). Instead, the legislature's language makes clear that the State needed to prove, by clear and convincing evidence, each of the three required elements. 725 ILCS 5/110-6.1(e). If the legislature had wanted to afford the circuit court deference it could have included similar language as it did in 430 ILCS 65/10(c) but it did not. Therefore, where both parties proceed by proffer, review should be *de novo* because of the legislatively defined burden of proof and because the reviewing court is in the same position as the court below. *Evans*, 2021 IL 125513, ¶¶ 39-41; *Addison*, 232 Ill. 2d at 453.

The appellate court below compared the circuit court's decision at a pretrial detention hearing to decisions entering a temporary restraining order (TRO). *Morgan*, 2024 IL App (4th) 240103, ¶ 21. The appellate court compared the use of affidavits or verified complaints for a TRO to the proffers used in the pretrial detention context and noted that the court's determinations "appear to be fundamentally factual[.]" *Id.* "The granting or denial of a TRO is within the sound discretion of the trial court." *Stocker Hinge Manufacturing Co. v. Darnel Industries,*

Inc., 94 Ill. 2d 535, 541 (1983). The court below overlooks that there is no statutorily mandated burden of proof in TRO proceedings. 735 ILCS 5/11-101. "Its purpose is to allow the trial court to preserve the status quo until it can hold a hearing to determine whether it should grant a preliminary injunction." *Stocker*, 94 Ill. 2d at 541. A plaintiff "only needs to show that he raises a 'fair question' about the existence of his right[.]" *Id.* at 542.

A "fair question" is a far cry from the requirement at a pretrial detention hearing that the State prove three elements "by clear and convincing evidence." 725 ILCS 5/110-6.1(e). "The more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision." *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 283 (1990). "A clear and convincing standard underscores the importance" of the interest in question "and the fact that such interest will not be extinguished lightly." *In re D.T.*, 212 Ill. 2d 347, 364 (2004). The appellate court's analogy fails because TRO proceedings do not implicate a similar burden of proof as pretrial detention hearings and therefore the legislature did not intend for the risk of error to fall in a similar manner. See *Whitaker*, 2024 IL App (1st) 232009, ¶ 89 (Ellis, J., specially concurring) ("there is nothing discretionary about making a finding as to whether the State has met its standard of proof of a particular fact.").

The appellate court below suggested that because the circuit court assesses various factors in determining whether or not the State has established two of the statutory elements that the court's finding is a discretionary one. *Morgan*, 2024 IL App (4th) 240103, ¶ 20. But the weighing and balancing of factors does not make a factual finding subject to the circuit court's discretion. See *In re D.T.*, 212 Ill. 2d at 354-56 (rejecting similar argument in termination of parental rights

context because fact-finding is not discretionary). "A multi-faceted question of fact is no more discretionary than a one-dimensional question of fact; it is just more complex." *Whitaker*, 2024 IL App (1st) 232009, ¶ 90. In *People v. Crane*, 195 Ill. 2d 42, 49 (2001), the State argued that "a trial court faced with a constitutional speedy-trial claim exercises discretion when it balances the four *Barker* factors." But this Court rejected that argument because the "trial court is in no better position than the reviewing court to balance competing concerns[,]" finding "the ultimate determination" that "a defendant's constitutional speedy-trial right has been violated" is reviewed *de novo*. *Id*. at 52.

The appellate court also suggested that the abuse-of-discretion standard is appropriate for reviewing orders from pretrial detention hearings because sentencing decisions are reviewed under that standard and "have an even greater impact on the defendant's liberty than do decisions regarding pretrial release[.]" *Morgan*, 2024 IL App (4th) 240103, ¶ 29 (relying on *Wells*, 2024 IL App (1st) 232453, ¶ 19). But the appellate court overlooks that "[a] defendant at a pretrial detention hearing retains" the presumption of innocence while "a defendant at a sentencing hearing has been found guilty of an offense and thus stripped of the presumption of innocence." *People v. Wells*, 2024 IL App (1st) 232453, ¶ 37 (Lampkin, J., specially concurring). The appellate court also misses the importance of the State's burden of proof at pretrial detention hearings. 725 ILCS 5/110-6.1(e). When courts review the propriety of a sentence under the abuse of discretion standard it is not reviewing whether the State proved any elements by "clear and convincing evidence." 730 ILCS 5/5-5-3; 730 ILCS 5/5-5-3.1; 730 ILCS 5/5-5-3.2; see *People v. Deleon*, 227 Ill. 2d 322, 331-332 (2008) (whether the defendant inflicted "severe bodily injury" and therefore mandated to serve consecutive sentences is a question of fact and

reviewed under the manifest-weight-of-the-evidence standard).

The appellate court also tried to diminish the importance of an accused's presumption of innocence by comparing pretrial detention, which can last months or years, to a defendant's right to choice of counsel and their right to a specific jury instruction. *Morgan*, 2024 IL App (4th) 240103, ¶ 29 (relying on *People v. Ortega*, 209 Ill. 2d 354, 360 (2004); *People v. McDonald*, 2016 IL 118882, ¶ 42). Again neither of those rights require the State to prove three statutory elements by clear and convincing evidence. 725 ILCS 5/110-6.1(e).

The circuit court's decisions in the contexts that the appellate court below relied on are far different than that of reviewing the loss of one's freedom for months or years. *Pitts*, 2024 IL App (1st) 232336, ¶ 27 ("pretrial detention wreaks havoc on familial relationships, employment, and educational pursuits"). In the context of choice of counsel, circuit court's have discretion because they "need latitude. . . to accept a proffered waiver before trial, when the 'likelihood and dimensions of nascent conflicts . . . are notoriously hard to predict[.]'" *Ortega*, 209 Ill. 2d at 358-359. The issuance of jury instructions are reviewed for an abuse of discretion because "[i]t is not the province of the trial court to weigh the evidence when deciding whether a jury instruction is justified." *McDonald*, 2016 IL 118882, ¶ 25. Instead, these decisions require the court to protect a defendant from a complex question or determine whether *some* evidence exists. *Ortega*, 209 Ill. 2d at 358-359; *McDonald*, 2016 IL 118882, ¶ 25, Unlike pretrial detention, these decisions fall within the ones "made by a trial judge in overseeing his or her courtroom or in maintaining the progress of a trial" that are "traditionally" reviewed for an abuse of discretion. *In re D.T.*, 212 Ill. 2d at 356.

Therefore, the appellate court's justification for an abuse-of-discretion

standard falls short. The legislature's word choice in crafting the pretrial detention statute considered in conjunction with an interest that should "not be extinguished lightly" means review of live testimony should be under the manifest-weight-of-the-evidence standard while the overall detention decision or any reviews of proffers or similar evidence should be reviewed *de novo*. *In re D.T.*, 212 Ill. 2d at 364; *Evans*, 2021 IL 125513, ¶¶ 39-41; 725 ILCS 5/110-6.1(e); 725 ILCS 5/110-2(b).

E. Detention orders have not been historically reviewed for an abuse of discretion.

The appellate court below found the former standard of review for bail appeals, abuse of discretion, appropriate for orders from pretrial detention hearings because of the similarities between bail appeals and appeals of orders from pretrial detention hearings. *Morgan*, 2024 IL App (4th) 240103 ¶¶ 33-34. Other courts have justified reviewing for an abuse of discretion because "[w]eighing the factors implicated in setting the conditions of pretrial release has always been entrusted to the discretion of the trial judge." *People v. Whitmore*, 2023 IL App (1st) 231807, ¶ 24. But bail appeals and appeals from pretrial detention hearings are dissimilar, as detention hearings have long required the State to meet a statutory burden of proof while the setting of bail has been left to the circuit court's discretion. Ill. Rev. Stat. 1987, ch. 38, ¶ 110-6.1(b); Ill. Rev. Stat. 1988, ch. 38, ¶ 110-5. As outlined in D, the weighing and balancing of factors does not make a finding subject to the circuit court's discretion. See *In re D.T.*, 212 Ill. 2d at 354-56.

Courts have also explained that "absent a legislative mandate intended to disrupt this precedent, abuse of discretion remains the proper standard of review." *Whitmore*, 2023 IL App (1st) 231807, ¶ 18, n.1; see also *People v. Inman*, 2023 IL App (4th) 230864, ¶ 11. But there is no historical basis for saying that pretrial

detention appeals have been reviewed for an abuse of discretion. *Whitaker*, 2024 IL App (1st) 232009, ¶¶ 97-99 (Ellis, J., specially concurring). "There is not a single published decision that has ever discussed the standard of review for *detention orders* under the previous version of the Illinois detention statute." *Id.* ¶ 95 (citing *Inman*, 2023 IL App (4th) 230864), ¶ 99) (emphasis in the original). The concurrence in *Whitaker* outlines "[t]he genesis of this myth": *People v. Simmons*, 2019 IL App (1st) 191253, a case cited by many in support of the abuse-of-discretion standard, actually analyzed "the statute *governing the setting of bail and other conditions of release*" not the earlier detention statute. *Id.* ¶ 99 (emphasis in the original). The *Whitaker* concurrence summarized as follows:

> [N]o court has ever held, under the previous system of pretrial release, that an order detaining a defendant – that is, denying him release under any condition whatsoever, not even a high monetary bail – was reviewed for an abuse of discretion. So to the extent that our appellate decisions have relied on history as a guide, that reliance is misplaced.

Id. ¶ 109.

The appellate court below dismissed the distinction between bail orders and detention orders calling them "two sides of the same coin" and called the idea that "the former bond and detention statutes" would be reviewed under different standards a "curious suggestion[.]" *Morgan*, 2024 IL App (4th) 240103, ¶ 33. The appellate court found them similar because of the common practice of imposing "astronomical sums" that "historically served as a denial of bail in disguise." *Id.* ¶ 34 (relying on *People ex rel. Sammons v. Snow*, 340 Ill. 464, 469 (1930)). A practice that our legislature sought to eliminate by the passage of Illinois' new pretrial

detention statute. See 725 ILCS 5/110-2. Representative Gong-Gershowitz explained during the debate on the trailer pretrial detention bill:

> [A] system wherein somebody's detention pretrial is determined not based on whether they are a threat to the community but whether or not they have enough cash to bail out of a jail is one that has been deemed manifestly unjust.

116th Ill. Gen. Assem., House Proceedings, Dec. 1, 2022 at 60 (statements of Rep. Gong-Gershowitz).

What the appellate court below missed, and is outlined in detail by Justice Ellis in his concurrence in *Whitaker*, is that Illinois's pretrial detention statute took effect in 1987 and it is distinct and legally dissimilar to the old bail statute. *Whitaker*, 2024 IL App (1st) 232009, ¶¶ 100-107; Ill. Rev. Stat. 1987, ch. 38, ¶ 110-6.1(b); Ill. Rev. Stat. 1988, ch. 38, ¶ 110-5. In particular, the prior detention statute required the same or similar showings as our current pretrial detention statute. Ill. Rev. Stat. 1987, ch. 38, ¶ 110-6.1(b); 725 ILCS 5/110-6.1(e). For example, the court needed to determine that the: 1) "proof is evident or presumption great that the defendant has committed" a detainable offense; 2) "defendant poses a real and present threat to the physical safety of any person or persons[;]" and 3) "no condition or combination of conditions . . . can reasonably assure the physical safety of any other person or persons." Ill. Rev. Stat. 1987, ch. 38, ¶ 110-6.1(b). Importantly, the prior detention statute required a showing "supported by clear and convincing evidence presented by the State" as to the second element whether the accused "pose[d] a real and present threat to [anyone's] physical safety[.]" Ill. Rev. Stat. 1987, ch. 38, ¶ 110-6.1(c)(2).

As outlined in D, a burden of proof changes the circuit court's decision from

a "judgment call" to a "binary question; either the State has met its burden of proof or it has not." *Wells*, 2024 IL App (1st) 232453, ¶ 38 (Lampkin, J., specially concurring). Notably, the old bail statute, similar to the current 110-5, did not include a standard of proof. Ill. Rev. Stat. 1988, ch. 38, ¶ 110-5. Instead the bail statute required assessing a variety of factors in determining "the amount of monetary bail or conditions of release" in order to "reasonably assure" the accused's appearance or the safety of others. Ill. Rev. Stat. 1988, ch. 38, ¶ 110-5 (a). In setting monetary bail it required bail to be: "(1) [s]ufficient to assure compliance with the conditions set forth in the bail bond; (2) [n]ot oppressive; (3) [c]onsiderate of the financial ability of the accused." Ill. Rev. Stat. 1988, ch. 38, ¶ 110-5 (b). "Given the absence of a standard of proof (or even a burden of proof)" in the old bail statute, "it is hardly surprising that courts employed an abuse of discretion[.]" *Whitaker*, 2024 IL App (1st) 232009, ¶ 107 (relying on *People v. Simmons*, 2019 IL App (1st) 191253, ¶¶ 12-13; *People v. Saunders*, 122 Ill. App. 2d 922, 929 (1984); *People v. Edwards*, 105 Ill. App. 3d 822, 830 (1982)).

Contrary to the appellate court's belief below, bail appeals and appeals from pretrial detention hearings are dissimilar because detention hearings have long included a statutory burden of proof while the setting of bail has been left to the circuit court's discretion. Ill. Rev. Stat. 1987, ch. 38, ¶ 110-6.1(b); Ill. Rev. Stat. 1988, ch. 38, ¶ 110-5. Therefore, detention orders have not been historically reviewed for an abuse of discretion and this Court should not give any weight to how old bail appeal decisions were reviewed in deciding the proper standard of review for appeals under the current pretrial release statute. *Whitaker*, 2024 IL App (1st) 232009, ¶¶ 95-108.

F. Conclusion.

Where both parties proceed by proffer, the standard of review of orders from pretrial detention hearings should be *de novo* because: 1) the reviewing courts are in the same position as to the circuit court to make factual findings; 2) the gravity of the detention decision and the constitutional right at stake; and 3) to minimize any implicit bias against a non-testifying defendant. Additionally, contrary to the appellate court's decision below, review for an abuse of discretion is improper where there is a burden of proof and detention orders have not been historically reviewed for an abuse of discretion. Therefore, this Court should hold that review of the detention decision is *de novo* but when live testimony is presented the circuit court's findings on those facts are reviewed under the manifest-weight-of-the-evidence standard.

II. This Court should apply the public interest exception to mootness and determine the proper standard of review for orders from pretrial detention hearings.

Even though Kendall Cecil Morgan is no longer being held awaiting trial, this Court should still decide the proper standard of review for orders from pretrial detention hearings because the standard of review is a frequently recurring question of great public importance. A "debate" has arisen in the appellate court "regarding the appropriate standard of review" for reviewing orders from pretrial detention hearings. *People v. Pitts*, 2024 IL App (1st) 232336, ¶ 12. Setting the proper standard of review for these orders will guide the appellate court and provide "[c]lear and stable legal norms" for "society at large by allowing people to more clearly understand their rights and risk." Timothy J. Storm, *The Standard of Review Does Matter: Evidence of Judicial Self-Restraint in the Illinois Appellate Court*, 34 S. Ill. U. L.J. 73, 76 (2009). Additionally, this issue is likely to occur again so this Court should resolve this issue now. Accordingly, even though Morgan's appeal from his pretrial detention order is moot, this Court should invoke the public interest exception and decide the standard of review for orders from pretrial detention hearings.

This Court does not usually "issue advisory opinions on moot or abstract questions of law." *People ex rel. Partee v. Murphy*, 133 Ill. 2d 402, 408 (1990). However, since formally adopting the public interest exception over 70 years ago "this court has reviewed a variety of otherwise moot issues under this exception." *In re Shelby R.*, 2013 IL 114994, ¶ 18 (collecting cases). The public interest exception requires that the question: 1) would provide needed guidance to the appellate court; 2) is of a public nature; and 3) will likely recur. *Id.* ¶ 16 (citing *Wisnasky-*

Bettorf v. Pierce, 2012 IL 111253, ¶ 12).

Since the appellate court began reviewing appeals under the new pretrial detention statute, it has called out for guidance on the proper standard of review. See *Pitts*, 2024 IL App (1st) 232336, ¶ 12 ("[A] debate has already arisen among the appellate districts . . . regarding the appropriate standard of review to apply" in reviewing decisions under 725 ILCS 5/110-6.1(e)); *People v. Castillo*, 2024 IL App (1st) 232315, ¶ 16 ("Appellate decisions conflict as to the precise standard of review to apply to pretrial release orders of the circuit court."); *People v. Sorrentino*, 2024 IL App (1st) 232363, ¶ 34 ("Our standard of review is unsettled."); *People v. Parker*, 2024 IL App (1st) 232164, ¶ 48 (noting lack of "direction from our supreme court on this significant issue"); *People v. White*, 2024 IL App (1st) 232245, ¶ 22 (the standard of review for pretrial detention hearings is "an unsettled question of law"); *People v. Morgan*, 2024 IL App (4th) 240103, ¶¶ 12-35 (discussing "the three most common options suggested for the standard of review").

The different districts and divisions of the appellate court have invoked various standards. *Morgan*, 2024 IL App (4th) 240103, ¶¶ 31-35 (abuse of discretion); *People v. Pitts*, 2024 IL App (1st) 232336, ¶ 29 (manifest weight of the evidence); *People v. Saucedo*, 2024 IL App (1st) 232020, ¶ 67 (Ellis, J., specially concurring) (*de novo*); *People v. Trottier*, 2023 IL App (2d) 230317, ¶ 13 (bifurcated: detention decision reviewed for an abuse of discretion; whether the State presented sufficient evidence on the required elements reviewed for the manifest weight of the evidence); *People v. Reed*, 2023 IL App (1st) 231834, ¶¶ 24, 31 (bifurcated: reviewing conditions element for an abuse of discretion; reviewing other elements for the manifest weight of the evidence). Accordingly, this Court should answer the appellate court's calls for guidance and settle the standard of review for orders from pretrial detention

hearings.

This Court should further invoke the public interest exception and address the proper standard of review because the question is of a public nature. This Court's own rules highlight the importance of the standard of review by requiring appellant's in their brief to "include a concise statement of the applicable standard of review for each issue[.]" Ill. S. Ct. R. 341(h)(3). The standard of review could also impact whether an accused is properly detained before trial pursuant to the statute or is released. *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1095 (9th Cir. 1999) (reviewing *de novo* compared to clearly erroneous "could be outcome determinative"); see also *People v. Coleman*, 2024 IL App (1st) 232064-U, ¶¶ 27-28 (Ocasio J., dissenting); *People v. Burgos*, 2024 IL App (1st) 232121-U, ¶¶ 21-29 (Ocasio J., dissenting). The question of how to review a circuit court order is of a public nature because "[c]lear and stable legal norms . . . provide benefits to society at large by allowing people to more clearly understand their rights and risks." Storm, *The Standard of Review Does Matter*, 34 S. Ill. U. L.J. at 76. "[P]eople must believe that disputes of like kind will be resolved in (essentially) the same way, regardless of the identities of the individual parties." *Id.* Therefore, this Court should invoke the public interest exception here because the question of the proper standard of review is of a public nature.

This Court should additionally invoke the public interest exception because the issue will likely recur. With these issues being challenged regularly on appeal and the possibility that the standard of review could impact whether an accused is detained pretrial or not it is likely that this Court will continue to be petitioned to clarify the standard of review. *Kearney*, 175 F.3d at 1095; *Coleman*, 2024 IL App (1st) 232064-U, ¶¶ 27-28 (Ocasio J., dissenting); *Burgos*, 2024 IL App (1st)

232121-U, ¶¶ 21-29 (Ocasio J., dissenting); see also *People v. Hutt*, 2024 IL App (2d) 230585-U, *pet. for leave to appeal filed*, No. 130548 (filed Mar. 20, 2024) (detained pretrial as of Jul. 16, 2024)*; People v. Mosley*, 2024 IL App (3d) 230686-U, *pet. for leave to appeal filed*, No. 130617 (filed Apr. 17, 2024) (detained pretrial as of Jul. 16, 2024). Accordingly, this Court should apply the public interest exception and determine the proper standard of review for orders from pretrial detention hearings because the issue will likely recur.

Therefore, even though Morgan's pretrial detention order is now moot, this Court should invoke the public interest exception and decide the proper standard of review for orders from pretrial detention hearings because the standard of review: 1) would provide needed guidance to the appellate court; 2) is of a public nature; and 3) will likely recur. See *In re Shelby R.*, 2013 IL 114994, ¶ 16.

CONCLUSION

For the foregoing reasons, Kendall Cecil Morgan, respectfully requests that this Court hold that the proper standard of review for the pretrial detention decision is *de novo* but when live testimony is presented the circuit court's findings on those facts are reviewed under the manifest-weight-of-the-evidence standard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 35 pages.

/s/ Ross E. Allen
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APPENDIX TO THE BRIEF

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4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
KENDALL CECIL MORGAN,	)	No. 24CF3
Defendant-Appellant.	)	
	)	Honorable
	)	Amy L. McFarland,
	)	Judge Presiding.

JUSTICE DOHERTY delivered the judgment of the court, with opinion.
Justices Lannerd and Vancil concurred in the judgment and opinion.

OPINION

¶ 1 Defendant Kendall Cecil Morgan appeals the trial court's order denying him pretrial release pursuant to article 110 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/art. 110 (West 2022)), as amended by Public Act 101-652, § 10-255 (eff. Jan. 1, 2023), commonly known as the Pretrial Fairness Act (Act). See Pub. Act 102-1104, § 70 (eff. Jan. 1, 2023) (amending various provisions of the Act); *Rowe v. Raoul*, 2023 IL 129248, ¶ 52 (setting the Act's effective date as September 18, 2023).

¶ 2 On appeal, defendant argues that (1) we should review the trial court's rulings *de novo* and (2) the court erred by denying him pretrial release because the State failed to establish by clear and convincing evidence that no condition or combination of conditions of release would

mitigate the real and present threat he posed to the community. We disagree on both points and affirm.

¶ 3 I. BACKGROUND

¶ 4 On the evening of December 29, 2023, defendant arrived visibly drunk and upset at the apartment of Vanessa Williams, the mother of his child. Williams refused to let defendant inside because she was seeking an order of protection against him, so he broke a front window and kicked in the front door. He then began hitting Williams in the face and threw her against a mirror in the apartment, causing it to break. Three minor children were in the apartment at the time; two of them ran to a neighbor's home and called 911. When officers arrived on the scene, they found defendant on top of Williams in the doorway to the apartment. The officers observed blood and bruises on Williams's head and face as well as a bite mark on her left hand. Defendant struggled with one of the officers but was eventually taken into custody.

¶ 5 Defendant was charged by information with one count of home invasion (720 ILCS 5/19-6(a)(2) (West 2022)) and one count of domestic battery (*id.* § 12-3.2(a)(1)). On January 2, 2024, the State filed a verified petition to deny defendant pretrial release on dangerousness grounds, citing both charges as qualifying offenses. See 725 ILCS 5/110-6.1(a)(1), (4) (West 2022). The State also sought a no contact provision in the detention order preventing defendant from contacting Williams while he remained in custody. See *id.* § 110-6.1(m)(2) (allowing for such a provision). The trial court held the detention hearing immediately.

¶ 6 At the hearing, the State proffered evidence of the above allegations, as well as details regarding defendant's criminal history. Defendant was convicted of a 2007 armed robbery and was sentenced to 14 years in the Illinois Department of Corrections. Defendant had two additional prosecutions pending against him in McLean County, one for driving under the

influence in 2021 and another for battery against Williams in December 2023 (*i.e.*, the same month as the home invasion and battery alleged in this case). At the time of both alleged attacks of Williams, defendant was serving a term of 30 months' probation for aggravated battery of a peace officer in McLean County case No. 21-CF-175. His release status from the battery alleged to have occurred earlier in the month is unclear from the record, as are any conditions attendant to that release. Defendant's public safety assessment report rated him as a 5 out of 6 on the "New Criminal Activity" scale and a 4 out of 6 on the "Failure to Appear" scale.

¶ 7 Defense counsel proffered evidence that defendant had just been diagnosed with bipolar disorder and would seek and comply with mental health treatment on release; no specific treatment plans were identified. Counsel suggested that defendant be placed on electronic monitoring with a condition prohibiting contact with Williams. According to defense counsel, defendant might assert an affirmative defense of involuntary intoxication because he had taken a pain pill from a friend and blacked out before attacking Williams.

¶ 8 The trial court concluded that no release conditions could mitigate the real and present threat defendant posed, in particular because defendant had committed the charged offenses while on probation. The trial court entered a written detention order and included the requested no contact provision.

¶ 9 This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 On appeal, defendant argues that (1) we should review the trial court's rulings *de novo* and (2) the court erred by denying him pretrial release because the State failed to establish by clear and convincing evidence that no condition or combination of conditions of release would mitigate the real and present threat he posed to the community.

¶ 12 A. Standard of Review

¶ 13 Since this court began deciding appeals under the Act, the Fourth District has consistently reviewed the trial court's findings regarding pretrial release for an abuse of discretion. See, *e.g.*, *People v. Inman*, 2023 IL App (4th) 230864, ¶¶ 10-11; *People v. Martin*, 2023 IL App (4th) 230826, ¶ 21. " 'An abuse of discretion occurs when the [trial] court's decision is "arbitrary, fanciful or unreasonable" or where "no reasonable person would agree with the position adopted by the [trial] court." ' " *Inman*, 2023 IL App (4th) 230864, ¶ 10 (quoting *People v. Simmons*, 2019 IL App (1st) 191253, ¶ 9, quoting *People v. Becker*, 239 Ill. 2d 215, 234 (2010)). When reviewing issues of statutory construction, however, we have employed *de novo* review. See, *e.g.*, *People v. Jones*, 2023 IL App (4th) 230837, ¶ 13; *People v. Minssen*, 2024 IL App (4th) 231198, ¶ 17; see also *People v. Battle*, 2023 IL App (1st) 231838, ¶ 24 (rejecting the defendant's objection to the trial court's findings where her objection "fail[ed] to consider the plain language of section 110-6.1 [of the Code]").

¶ 14 Relying primarily on the special concurrence in *People v. Saucedo*, 2024 IL App (1st) 232020, ¶ 64 (Ellis, J., specially concurring), defendant invites us to depart from our prior decisions and review the trial court's findings under a less deferential standard. While *Inman* stands as presumptively appropriate authority in this district, it was an early decision under the Act; we are aware that other courts have disagreed with *Inman* and applied a different standard. Consequently, we use this case as the opportunity to reexamine *Inman*'s conclusion in light of these cases. Because our deliberations required additional time, we find there is good cause for extending the deadline for this decision from its original deadline of April 3, 2024. See Ill. S. Ct. R. 604(h)(5) (eff. Dec. 7, 2023). As discussed below, however, our examination of the matter ends

up exactly where *Inman* left us: the conclusion that the abuse of discretion standard of review is appropriate in appeals of pretrial detention decisions under the Act.

¶ 15 We begin our examination by recognizing that the standard for the trial court's initial detention decision as set forth in the Act is something of an anomaly. When seeking to detain a defendant prior to trial, the State is specifically authorized to proceed via "proffer based upon reliable information." 725 ILCS 5/110-6.1(f)(2) (West 2022). Normally, a proffer is not considered evidence but a statement as to what evidence would be. See *People v. Weinke*, 2016 IL App (1st) 141196, ¶ 41 ("A proffer is used to convince a trial court to admit evidence and must apprise the trial court 'what the offered evidence is or what the expected testimony will be, by whom it will be presented and its purpose.' " (quoting *Kim v. Mercedes-Benz, U.S.A., Inc.*, 353 Ill. App. 3d 444, 451 (2004))). The Act, however, appears to equate "proffer" with "evidence," as it permits the presentation of "*evidence* at the hearing by way of *proffer*." (Emphases added.) 725 ILCS 5/110-6.1(f)(2) (West 2022). This creates an anomaly because the State's proffered "evidence" must reach the level of "clear and convincing" weight in order to justify detention (*id.* § 110-6.1(e)), even though it is unclear how a proffer can be "weighed" in the same way that witness testimony or documentary evidence might be. A more apt description of the standard of proof in the trial court, at least where proffers are involved, might be proof by a "clear and convincing *description* of the evidence." It is not difficult to see how this description, though accurate, is out of harmony with traditional notions of the burden of proof.

¶ 16 Anomalous or not, this is the scheme the Act prescribes, so the task facing the appellate court is to determine how best to review a trial court's finding that the State's proffer, by itself or combined with admitted evidence, satisfies the "clear and convincing" evidentiary burden. Selecting a standard of appellate review of decisions made under such a curiously constructed

standard of proof presents a significant challenge; if the foundation (the standard in the trial court) is doctrinally unsound, it becomes more difficult to have confidence in the structure built upon it (the standard of review in the appellate court). With these challenges in mind, we now proceed to assess the three most common options suggested for the standard of appellate review—manifest weight of the evidence, *de novo*, and abuse of discretion—fully aware that each may present reasons to find it less than entirely satisfactory.

¶ 17 1. *Manifest Weight of the Evidence*

¶ 18 Some have suggested that the trial court's findings in the detention context should be reviewed under a manifest weight of the evidence standard. *People v. Pitts*, 2024 IL App (1st) 232336, ¶ 29; *People v. Johnson*, 2023 IL App (5th) 230714, ¶ 14. We find ourselves in agreement with this approach in one respect: it suggests a standard that employs a degree of deference to the trial court's decision.

¶ 19 Our specific concern with the manifest weight standard, however, is that it builds on the anomaly noted above. At least where some or all of the "evidence" before the trial court consists of proffers, the manifest weight standard asks the appellate court to determine whether a finding is against the "weight" of something that cannot be weighed, at least not in the same way that true evidence can be. For example, neither we nor the trial court can decide the "weight" to give to the credibility of a declarant whose testimony was only described via proffer. Viewed properly, the trial court's role is not to evaluate such a declarant's credibility but to digest the proffered information, assess its strength in the light of contrary information, and make a *judgment* about how all of the information received bears on the statutory requirements regarding pretrial release.

¶ 20 On the question of dangerousness, for example, the Act directs the trial court to consider eight different factors, as well as a ninth catchall factor. See 725 ILCS 5/110-6.1(g)(1)-(9) (West 2022). There can be little doubt that not all judges would examine and balance all relevant factors in precisely the same way or even reach the same result. It is not even a finding of historical fact but a prediction of the risk of future conduct (and, in regard to conditions of release, what steps might adequately mitigate that risk). The United States Supreme Court has explained that "a prediction of future criminal conduct is 'an experienced prediction based on a host of variables' which cannot be readily codified." *Schall v. Martin*, 467 U.S. 253, 279 (1984) (quoting *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 16 (1979)). These are not the kind of decisions where any particular outcome can be described as "clearly evident," the relevant outer boundary under manifest weight review. See *People v. Chambers*, 2016 IL 117911, ¶ 75 ("Review for abuse of discretion is proper when the trial court *** must, for lack of a better phrase, make a judgment call.").

¶ 21 Procedurally, where the "evidence" presented below is composed mostly or entirely of proffers, a trial court's decision under the Act is not dissimilar to the decision of whether to enter a temporary restraining order (TRO) in a civil proceeding. The "evidence" at a TRO hearing is composed of "specific facts shown by affidavit or by the verified complaint." 735 ILCS 5/11-101 (West 2022). The trial court must make determinations that appear to be fundamentally factual: whether "immediate and irreparable injury, loss, or damage will result to the applicant" if the TRO does not issue. *Id.* Despite the fact-intensive nature of the issue, the trial court's decision is reviewed not under the "manifest weight" standard but the abuse of discretion standard. See *Stocker Hinge Manufacturing Co. v. Darnel Industries, Inc.*, 94 Ill. 2d 535, 541-42 (1983).

¶ 22 Similarly, in the context of a motion to disqualify a defendant's chosen counsel in a criminal case, the supreme court has recognized that a trial court may disqualify counsel "only if it could reasonably find that defense counsel has a specific professional obligation that actually does conflict or has a serious potential to conflict with defendant's interests." *People v. Ortega*, 209 Ill. 2d 354, 361 (2004). Although this decision requires the trial court to weigh facts, it is nevertheless reviewed for an abuse of discretion on appeal, even when those facts are undisputed. *Id.* at 360; see *People v. Holmes*, 141 Ill. 2d 204, 223 (1990) (rejecting the view "that courts can always determine in a definite, precise manner whether a conflict or potential conflict of interest exists" and provide a simple "yes or no" answer).

¶ 23 Both the manifest weight and abuse of discretion standards of review are deferential to the trial court's ruling. See *Best v. Best*, 223 Ill. 2d 342, 350 (2006) (manifest weight standard); *In re D.T.*, 212 Ill. 2d 347, 356 (2004) (abuse of discretion standard). Between the two, we continue to believe the abuse of discretion standard is the better fit for reviewing pretrial detention decisions under the Act. While the manifest weight standard is properly employed with respect to trial court findings based on evidence, the trial court making a detention decision is presented with "evidence" consisting primarily, if not wholly, of proffers. Furthermore, the broad subjects of the trial court's ruling—"dangerousness" and "sufficiency" of conditions as provided by statute—are inherently exercises of judgment informed by an abbreviated record.

¶ 24 2. *De Novo Review*

¶ 25 Others have argued that, at least when the trial court's decision is based on proffers with no assessment of credibility, the reasons for deference to the trial court disappear, so we should employ a *de novo* standard of review. *Saucedo*, 2024 IL App (1st) 232020, ¶ 102 (Ellis, J., specially concurring). However, even where all of the "evidence" presented is by way of proffer,

the trial court also has the ability to observe something that the reviewing court never will: the defendant. A trial judge "can observe the defendant's demeanor and whether he or she appears compliant versus defiant or threatening," an opportunity not afforded to the reviewing court. *Pitts*, 2024 IL App (1st) 232336, ¶ 42 (Van Tine, J., specially concurring). The trial court's greater opportunity to observe the defendant is reason enough to afford deference to its findings. This is similar to the imposition of a sentence following conviction, a decision we review for an abuse of discretion "because the trial judge, having observed the defendant and the proceedings, is in a much better position to consider factors such as the defendant's credibility, demeanor, moral character, mentality, environment, habits, and age." *People v. Snyder*, 2011 IL 111382, ¶ 36; see *Rowe*, 2023 IL 129248, ¶ 49 (comparing discretion under the Act with discretion in sentencing). This standard of review still applies even though sentencing decisions "often involve materials that are not admitted as evidence, such as presentence investigation reports and statements from victims, friends, and family." *People v. Wells*, 2024 IL App (1st) 232453, ¶ 19; see 730 ILCS 5/5-4-1(1) (West 2022) (outlining materials the trial court may consider at a sentencing hearing).

¶ 26 Furthermore, the "evidence" at some detention hearings will include more than just proffers, documentary evidence, and the trial court's observations of the defendant; it may extend to evidence such as live witness testimony, police reports, body camera footage, text messages, jail calls, and the like. It would be fundamentally unworkable to apply a different standard of review for each piece of evidence depending on its nature. For example, if a trial court evaluating a defendant's dangerousness considers the State's proffer about the facts supporting the underlying charges but also hears eyewitness testimony that the defendant violently resisted arrest, the trial court would still have to make a unitary finding on the single issue of dangerousness. How could this court employ *de novo* review of the evidentiary proffer while affording deference to the trial

court's evaluation of the witness's credibility? A single finding based on testimony and direct observation of the defendant, as well as documentary or proffered evidence, cannot be simultaneously reviewed under one standard for the former and a different one for the latter.

¶ 27 It has been further argued that the *de novo* standard is justified even for traditional evidence because a pretrial detention order interferes with a defendant's strong interest in liberty. See *Saucedo*, 2024 IL App (1st) 232020, ¶ 107 (Ellis, J., specially concurring) ("[B]oth our supreme court and the United States Supreme Court have embraced independent *de novo* review in other fact-intensive contexts where the importance of the constitutional rights at stake so warranted."). We take no issue with the premise that defendants have a strong interest in liberty from incarceration, but we find neither authority nor reason to conclude that the importance of a constitutional right dictates a *de novo* standard of review for every appeal in which that right is implicated. See, *e.g.*, *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 176 n.13 (1983) (declining to review a fact-intensive constitutional claim *de novo*); see also Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 264-65 (1985) ("[T]here are a wide range of constitutional challenges in which the [United States Supreme] Court does not see itself under an inexorable duty to engage in constitutional fact review."). The United States Supreme Court has pointedly *not* embraced *de novo* review even when independently reviewing some of a trial court's factual determinations, stating: "The independent review function is not equivalent to a '*de novo*' review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 n.31 (1984).

¶ 28 In any event, while it has been suggested that the supreme court has "rejected the abuse-of-discretion standard when deciding issues of constitutional magnitude" (*Saucedo*, 2024 IL App (1st) 232020, ¶ 108 (Ellis, J., specially concurring)), this has not been invariably the case. In *Ortega*, 209 Ill. 2d at 359, the court employed abuse of discretion review of a decision disqualifying counsel, specifically rejecting the proposition that *de novo* review "is particularly important to achieve consistency when a constitutional right is at stake"—there, the constitutional right to the assistance of counsel. Although the United States Supreme Court endorsed the due process safeguard of "immediate appellate review of [a] detention decision" under the federal Bail Reform Act of 1984 (18 U.S.C. § 3141 *et seq.* (2018)), it did not hold that any particular standard of review was required to protect the defendant's liberty. *United States v. Salerno*, 481 U.S. 739, 752 (1987).

¶ 29 As noted above, it is well established that sentencing decisions are reviewed for an abuse of discretion. *People v. Webster*, 2023 IL 128428, ¶ 32; accord *Gall v. United States*, 552 U.S. 38, 51 (2007). Trial court decisions on whether to sentence a defendant to imprisonment, or how long the sentence should be, have an even greater impact on the defendant's liberty than do decisions regarding pretrial release, but the restriction on the defendant's liberty is no less important. See *Wells*, 2024 IL App (1st) 232453, ¶ 19 ("If we entrust trial courts to exercise discretion in fashioning sentences, then we should trust them to exercise discretion in making pretrial detention rulings ***."). Similarly, the fact that a defendant facing a criminal sentence lacks the same presumption of innocence afforded a defendant before trial does not mean that a less deferential standard is appropriate; the presumption of innocence is not fundamentally incompatible with abuse of discretion review even when bedrock constitutional rights are involved.

See *Ortega*, 209 Ill. 2d at 360 (right to counsel of defendant's choice); *People v. McDonald*, 2016 IL 118882, ¶ 42 (right to present a theory of defense).

¶ 30 At bottom, *de novo* review means that "[w]e perform the same analysis that a trial court would, and we owe no deference to the trial court." *People v. Avdic*, 2023 IL App (1st) 210848, ¶ 25. Coupling the automatic right of appeal from detention decisions (see 725 ILCS 5/110-6.1(j) (West 2022)) with a *de novo* standard of review would diminish the significance of trial courts' decision-making and guarantee every defendant a second bite at the apple on every aspect of every detention decision. We do not believe this unworkable outcome is demanded either by the kind of materials considered or the gravity of the rights involved in a detention decision.

¶ 31 3. *Abuse of Discretion*

¶ 32 In *Inman*, we reasoned that pretrial detention appeals most closely resemble appeals from "order[s] setting, modifying, revoking, denying, or refusing to modify bail or the conditions thereof" under Illinois Supreme Court Rule 604(c)(1) (eff. Sept. 18, 2023); we held that the same standard applicable in bail appeals—abuse of discretion—should also apply to appeals "by the defendant from an order denying pretrial release" under Illinois Supreme Court Rule 604(h)(1)(iii) (eff. Sept. 18, 2023). *Inman*, 2023 IL App (4th) 230864, ¶¶ 10-11 (citing *Simmons*, 2019 IL App (1st) 191253). The abuse of discretion standard for bail appeals under Rule 604(c) dates to *People v. Edwards*, 105 Ill. App. 3d 822, 830 (1982). Before Rule 604(c) was enacted in 1971, defendants challenging bail decisions were required to petition the supreme court for a writ of *habeas corpus*. *People v. Kelly*, 24 Ill. App. 3d 1018, 1032 (1975). Even these earlier decisions, however, employed abuse of discretion review. See, *e.g.*, *People ex rel. Smith v. Blaylock*, 357 Ill. 23, 26 (1934) ("[T]he statute is silent on the subject of the amount of the bond that the magistrate may

impose ***, yet the discretion committed to the magistrate must be exercised reasonably and neither arbitrarily nor tyrannically ***.").

¶ 33 *Pitts* attempted to distinguish *Simmons* and other cases predating the Act on the basis that those cases involved "the setting of bail rather than detention." *Pitts*, 2024 IL App (1st) 232336, ¶ 19; compare 725 ILCS 5/110-5 (West 2018) (governing the determination of conditions of release), with 725 ILCS 5/110-6.1 (West 2018) (governing the denial of bail in nonprobationable felony offenses). But see Ill. S. Ct. R. 604(c)(1) (eff. Dec. 7, 2023) (drawing no distinction between "order[s] setting, modifying, revoking, denying, or refusing to modify bail or the conditions thereof"). In other words, *Pitts* suggested that, while the abuse of discretion standard might be appropriate when reviewing the amount of bail or other conditions of release imposed, a less deferential standard of review is necessary when bail is denied and no conditions of release are found adequate. But detention and release are merely two sides of the same coin. A decision not to detain is a decision to release, subject only to a determination of the appropriate conditions; a decision not to release is a decision to detain. We are aware of no authority supporting the curious suggestion that such implicitly interrelated decisions under the former bond and detention statutes would or should have been subjected to different standards of appellate review.

¶ 34 Furthermore, we fail to understand why a different standard of review would be appropriate when, for instance, the trial court sets bail at an astronomical sum as opposed to denying bail altogether; indeed, such astronomical sums historically served as a denial of bail in disguise. See *People ex rel. Sammons v. Snow*, 340 Ill. 464, 469 (1930) ("The amount of $50,000 could have no other purpose than to make it impossible for [the defendant] to give the bail and to detain him in custody, and is unreasonable."). A cursory review of the caselaw on bond appeals demonstrates that the underlying reason for each appeal is that the *defendant was detained* due to

an inability to post sufficient bond. The suggestion that bond appeals present lesser implications for the defendant's liberty than cases involving no-bond detention is simply unsupportable. The various provisions of the old and new statutes address what is fundamentally a single overarching inquiry: whether and under what conditions a defendant may be detained prior to trial. Accordingly, the trial court's detention decision should be reviewed under a single standard, and a continuation of the former standard is sensible.

¶ 35 In short, we will continue to abide by our prior holdings that a trial court's decision and findings on issues of pretrial detention are appropriately reviewed under the abuse of discretion standard. See *Inman*, 2023 IL App (4th) 230864, ¶¶ 10-11. When reviewing the trial court's decision for an abuse of discretion, we do not disregard the State's burden of proving its case by clear and convincing evidence because, "for a reviewing court to determine whether the trial court abused its discretion, it must undertake a review of the relevant evidence." *McDonald*, 2016 IL 118882, ¶ 32. Moreover, " '[a] trial court abuses its discretion if it fails to apply the proper criteria when it weighs the facts,' and a reviewing court 'must consider both the legal adequacy of [the] way the trial court reached its result as well as whether the result is within the bounds of reason.' " *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 99 (2006) (quoting *Ortega*, 209 Ill. 2d at 360). Therefore, while the abuse of discretion standard is deferential, it affords the defendant meaningful review and does not amount to a rubber-stamp of the trial court's decision. *Id.*; see, *e.g.*, *People v. James*, 368 Ill. App. 3d 433, 436 (2006) (applying *Ortega* and finding that the trial court abused its discretion). Indeed, we have not hesitated to overturn detention decisions under the abuse of discretion standard. See, *e.g.*, *People v. Atterberry*, 2023 IL App (4th) 231028, ¶ 20; *People v. Shaffer*, 2024 IL App (4th) 240085-U, ¶ 27; *People v. Sims*, 2024 IL App (4th) 231335-U, ¶ 31; *People v. Perez*, 2024 IL App (4th) 230967-U, ¶ 16.

¶ 36 B. Conditions of Release

¶ 37 Defendant here argues that "the State presented no evidence that a condition of release ordering treatment for his recent bipolar diagnosis would not mitigate [defendant's] dangerousness." Thus, defendant argues, "the State failed to establish by clear and convincing evidence that no condition or combination of conditions could mitigate the danger he posed." Of course, this court is not directly assessing the State's evidence and making our own findings; we are assessing whether the record adequately shows that the trial court acted within its discretion in making the finding it did.

¶ 38 The initial problem with defendant's argument is its failure to recognize the sequence of events. The record here suggests that the State made its proffer before defendant ever suggested he had recently been diagnosed with bipolar disorder, so it would be unreasonable to expect the State's proffer to extend to an undisclosed issue. Defendant fails to explain how the State was expected, if not required, to present evidence on a matter first disclosed at the hearing.

¶ 39 While the Act provides that the State always has the burden of proving that no combination of conditions of release is adequate, there is no limit to the number or kind of reasonable conditions that the trial court can impose. See 725 ILCS 5/110-10(b)(9) (West 2022). We cannot expect the State to specifically raise and argue against every possible condition of release in every case; there must be some limiting principle. In general, it is reasonable to anticipate that the State will address conditions insofar as they relate to the charged conduct, the defendant's criminal history, the defendant's risk assessment score, and any other relevant considerations about the defendant known to the State at the hearing. See *id.* §§ 110-6.1(f)(7), 110-10(b) (emphasizing that decisions regarding conditions of release must be individualized); see also *Atterberry*, 2023

IL App (4th) 231028, ¶ 19 (holding that the trial court's findings must relate to the particular defendant and not a "typical" defendant in similar circumstances).

¶ 40 Here, the State's central argument against the sufficiency of conditions was defendant's past misconduct, including violent misconduct occurring when defendant was on probation. While defendant's focus was on his recent mental health diagnosis and his stated intention to seek treatment, it is hardly surprising that the parties had different views on which issue was most important when considering conditions of release. It became the trial court's responsibility to evaluate each party's argument and evidence. Ultimately, the court found the State's position to be more persuasive, as the court was concerned about defendant's continuing misconduct while on probation or pretrial release. This is a highly relevant concern, as a defendant's release on conditions depends on the court having confidence that the defendant will *comply* with those conditions.

¶ 41 In *Martin*, 2023 IL App (4th) 230826, ¶ 23, we held that a trial court must make a record showing that less restrictive conditions of release have been considered so that we can meaningfully review whether the trial court properly exercised its discretion in denying pretrial release. But the issue in *Martin* was that there was no discussion of possible conditions by counsel or the court, with the trial court summarily declaring that the defendant " 'need[ed] to be detained.' " *Id.* Here, on the other hand, both sides' attorneys presented arguments on the issue of conditions. When the court listens to a complete rendition of the parties' arguments and essentially sides with one of them, perhaps the imperative for lengthy or detailed findings is diminished. In the absence of an explicit indication to the contrary, we will presume that the court considered all available conditions of release on such a record. *Cf. People v. Halerewicz*, 2013 IL App (4th) 120388, ¶ 43 (taking a similar approach when reviewing a trial court's sentencing decision).

Regardless, the trial court here *did* share its specific rationale for finding that conditions could not adequately address the potential danger posed.

¶ 42 It is true that the trial court did not specifically address defendant's suggestion that he should be released to allow for treatment of his recently diagnosed bipolar disorder, but this case is a far cry from the one relied upon by defendant, *People v. Castillo*, 2024 IL App (1st) 232315. In *Castillo*, the defendant proffered evidence about efforts *already* undertaken to "make positive changes to herself, including group therapy, substance abuse treatment, and parenting classes." *Id.* ¶ 4. The defendant also showed that she had "secured in-patient treatment" at an appropriate facility. *Id.* The trial court denied her pretrial release without addressing her proposed course of action on release. Here, on the other hand, defendant gave the court only the most cursory reference to his "recently diagnosed" condition, did not explain how the condition related to the alleged offenses, and had only a vague plan to seek treatment in the future. The trial court acted well within its discretion in finding that defendant's history of noncompliance was more probative on the issue of the adequacy of conditions for release.

¶ 43 III. CONCLUSION

¶ 44 Because the trial court did not abuse its discretion in ordering defendant detained, we affirm the court's judgment.

¶ 45 Affirmed.

People v. Morgan, 2024 IL App (4th) 240103

Decision Under Review:	Appeal from the Circuit Court of McLean County, No. 24-CF-3; the Hon. Amy L. McFarland, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Carolyn R. Klarquist, and Ross E. Allen, of State Appellate Defender's Office, of Chicago, for appellant.
Attorneys for Appellee:	Patrick Delfino and David J. Robinson, of State's Attorneys Appellate Prosecutor's Office, of Springfield, for the People.

IN THE CIRCUIT COURT OF McLean COUNTY
ELEVENTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

-vs-

KENDALL MORGAN,
Defendant-Appellant.

No. 2024CF0003

NOTICE OF APPEAL FROM ORDER UNDER PRETRIAL FAIRNESS ACT PURSUANT TO ILLINOIS SUPREME COURT RULE 604(h)

(Defendant as Appellant)

Court from which appeal is taken:

Circuit Court of McLean County.

The Judge(s) who entered the order(s) being appealed: Judge Amy McFarland

Date(s) of Order(s) Appealed: January 2, 2024

Date(s) of Hearing(s) Regarding Pretrial Release: January 2, 2024

Court to which appeal is taken:

Appellate Court of Illinois, Fourth Judicial District

Name of Defendant and address to which notices shall be sent (if Defendant has no attorney):

Defendant's Name: c/o McLean County Public Defender
Defendant's Address: 104 W. Front St. Rm. 603 Bloomington, IL 61704
Defendant's E-mail:
Defendant's Phone:

If Defendant is indigent and has no attorney, do they want one appointed? (If Cook County, the Cook County Public Defender will be appointed, in all other Counties, then OSAD will be appointed).

☑ Yes ☐ No

Name of Defendant's attorney on appeal (if any):

Attorney's Name: Office of State Appellate Defender
Attorney's Address: 400 W. Monroe, Suite 303 Springfield, IL 62704
Attorney's E-mail: 4thDistrict@osad.state.il.us
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Attorney's Phone: (309) 888-5235
Is the trial attorney a public defender? ☑ Yes ☐ No

Nature of Order Appealed (check all that apply):

☑ Denying pretrial release
☐ Revoking pretrial release
☐ Imposing conditions of pretrial release

Are there currently pending any other appeals in this matter under the Pretrial Fairness Act? ☐ Yes* ☑ No

***If Yes, list appeal number(s):** _____

Rule 328 Supporting Record* (check all that are attached):

☑ Copy of the order appealed from
☐ Supporting documents or matters of record (please list)

_____

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_____

☐ Affidavit of attorney or party (in lieu of clerk certificate of authentication)

***You may attach a supporting record to this notice of appeal. A full supporting record must be filed with the appellate court within 30 days after filing this notice of appeal.**

Relief Requested: Release with conditions.

Grounds for Relief (check all that apply and describe in detail):

Denial or Revocation of Pretrial Release

☐ Defendant was not charged with an offense qualifying for denial or revocation of pretrial release or with a violation of a protective order qualifying for revocation of pretrial release.

☐ The State failed to meet its burden of proving by clear and convincing evidence that the proof is evident or the presumption great that defendant committed the offense(s) charged.

☑ The State failed to meet its burden of proving by clear and convincing evidence that defendant poses a real and present threat to the safety of any person or persons or the community, based on the specific, articulable facts of the case.

The Defendant has ties to the jurisdiction, a local address to reside at, employment and provides support to two minor children. The Defendant has mental health conditions for which he will seek appropriate medical care and medication, if presecribed.

☑ The State failed to meet its burden of proving by clear and convincing evidence that no condition or combination of conditions can mitigate the real and present threat to the safety of any person or persons or the community, based on the specific, articulable facts of the case, or defendant's willful flight.

A no contact order with the alleged victim and her residence was enough to mitigate any safety concerns. The Defendant agreed to travel restrictions and to be supervised by pre-trial services.

☑ The court erred in its determination that no condition or combination of conditions would reasonably ensure the appearance of defendant for later hearings or prevent defendant from being charged with a subsequent felony or Class A misdemeanor.

☐ Defendant was denied an opportunity for a fair hearing prior to the entry of the order denying or revoking pretrial release.

☐ Other (explain).

Imposing Conditions of Pretrial Release

The State failed to meet its burden of proving by clear and convincing evidence that conditions of pretrial release are necessary.

In determining the conditions of pretrial release, the court failed to take into account the factors set forth in 725 ILCS 5/110-5(a). Specifically, the court failed to consider the following factors (list all that apply):

☐ The conditions of release are not necessary to ensure defendant's appearance in court, ensure that the defendant does not commit any criminal offense, ensure that defendant complies with all conditions of pretrial release, prevent defendant's unlawful interference with the orderly administration of justice, or ensure compliance with the rules and procedures of problem-solving courts.

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☐ Other (explain).

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I certify that everything in this NOTICE OF APPEAL FROM ORDER UNDER PRETRIAL FAIRNESS ACT PURSUANT TO ILLINOIS SUPREME COURT RULE 604(h) is true and correct. I understand that making a false statement on this form is perjury and has penalties provided by law under 735 ILCS 5/1-109.

Brian McEldowney

Your Signature

Brian McEldowney

Printed Name

6205089

Attorney # (if any)

No. 130626
IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- KENDALL CECIL MORGAN, Petitioner-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-24-0103. There on appeal from the Circuit Court of the Eleventh Judicial Circuit, McLean County, Illinois, No. 24 CF 3. Honorable Amy McFarland, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 115 S. LaSalle St., Chicago, IL 60603, eserve.criminalappeals@ilag.gov;

Mr. David J. Robinson, Chief Deputy Director - PTFA, State's Attorneys Appellate Prosecutor, 725 South Second Street, Springfield, IL 62704, Safe-T@ilsaap.org;

Don Knapp, McLean County State's Attorney, 104 W. Front St., Room 605, Bloomington, IL 61701-2400, stateattny@mcleancountyil.gov;

Mr. Kendall Cecil Morgan, Register No. B87047, Illinois River Correctional Center, P.O. Box 999, Canton, IL 61520

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On July 16, 2024, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Christine Purol
LEGAL SECRETARY
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Pretrial Fairness Unit
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