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, Plaintiff-Appellee, -vs- KENDALL CECIL MORGAN, Defendant-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.

REPLY BRIEF FOR DEFENDANT-APPELLANT IN SUPPORT OF RULE 604(h) APPEAL

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ORAL ARGUMENT REQUESTED

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ARGUMENT

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

Reviewing *de novo* "where the circuit court only considered documentary evidence" has deep roots in Illinois jurisprudence. *Cleeton v. SIU Healthcare, Inc.*, 2023 IL 128651, ¶ 26; see, e.g., *State Bank of Clinton v. Barnett*, 250 Ill. 312, 315 (1911). Even so, the State suggests that this Court overturn its century old rule because of the circuit court's "experience" and "expertise" in fact finding. (St. Br. 18-19) In support, the State cites only cases from jurisdictions that lack the same tradition of reviewing documentary evidence *de novo* as Illinois or that have passed specific statutes mandating deferential review. *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985); *State v. S.S.*, 162 A.3d 1058, 1066-1067 (N.J. 2017). The State has not proven such a sea change in Illinois law is justified.

The State also claims that the circuit court and reviewing courts are not similarly situated in the pretrial release context because the circuit court is better positioned to determine whether a non-testifying defendant will comply with conditions based upon their appearance or demeanor. (St. Br. 19-21) This Court should not sanction pretrial detention of a silent defendant based upon their physical appearance or demeanor as it is irrelevant to any of the required findings and could exacerbate implicit bias against the accused.

This Court should hold that review of the detention decision, a legal question, is *de novo*. Where both parties proceed by proffer, courts should review pretrial detention orders *de novo* because: 1) reviewing courts are in the same position as 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. Where live testimony is presented at a pretrial detention hearing the parties agree that courts should review the circuit court's three factual findings under the manifest-weight-of-the-evidence standard.

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.

For well over a century, this Court has reviewed evidence like proffers *de novo* because the reviewing court and the circuit court are similarly situated. *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). Notably, the State does not contest this long history of *de novo* review where the parties proceed solely by proffer or similar evidence and the circuit court does not "gauge the demeanor and credibility of witnesses[.]" *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453 (2009); *Cleeton*, 2023 IL 128651, ¶ 26.

Instead, the State suggests that this Court should reconsider this century old Illinois rule because of *dicta* from *Anderson v. Bessemer City*, 470 U.S. 564, 573-576 (1985), that circuit court's are better suited for fact finding because of their "experience" and "expertise." (St. Br. 18-19) But the State overlooks that the standard of review in *Anderson* came from Federal Rule of Civil Procedure 52(a) which established review would be under the clearly erroneous standard. *Id*. at 573. In *Anderson* the question was not *what* the standard of review should be, but whether or not the federal appeals court properly applied the statutorily

mandated "clearly erroneous" standard of review. *Id*. at 573-576.

The State misses that Congress specifically amended Rule 52(a) to ensure that appellate courts were not engaging in *de novo* review in similar situations. *Id*. at 574. The same justification does not hold here because the Illinois legislature has not similarly codified a less searching standard of review for documentary evidence or pretrial detention decisions due to the circuit court's fact finding expertise. See *Evans v. Cook County State's Attorney*, 2021 IL 125513, ¶ 39 (legislature's word choice "clearly afforded discretion to the Director or the circuit court."); *People v. Inman*, 2023 IL App (4th) 230864, ¶ 11 (the pretrial release statute "neither mandates nor suggests a different standard of review."). Instead, this Court has repeatedly reviewed *de novo* factual determinations when only assessing documents and oral argument because "the trial court was in no superior position than any reviewing court to make findings." *Addison*, 232 Ill. 2d at 453; see *Cleeton*, 2023 IL 128651, ¶ 26; *Riso v. Bayer Corporation*, 2020 IL 125020, ¶ 16; *Aspen American Insurance Company v. Interstate Warehousing, Inc.*, 2017 IL 121281, ¶ 12; *Russell v. SNFA*, 2013 IL 113909, ¶ 28; *People v. Radojcic*, 2013 IL 114197, ¶ 34; *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277, 285 (2007); *People v. Oaks*, 169 Ill. 2d 409, 447-448 (1996); *State Bank of Clinton*, 250 Ill. at 315; *Baker*, 118 Ill. at 370.

The State tries to carve out detention rulings as a special exception to this long standing rule by asserting that the circuit court and reviewing courts are not similarly situated in the pretrial detention context because the circuit court, unlike an appellate court, can observe and interact with the defendant. (St. Br. 19-20) Notably, the State provides no legal support for their theory that a circuit

court can and should assess a silent defendant's physical appearance or "demeanor" in determining whether they should be detained pretrial. The State only points to case law where the factfinder observed *witnesses*, not a silent defendant. (St. Br. 21) The legislature did not include the defendant's appearance or "demeanor" as a factor for the circuit court to consider in assessing the defendant's dangerousness or whether or not he would comply with any court ordered conditions. 725 ILCS 5/110-5(a); 725 ILCS 5/110-6.1(f)(g). Instead, the legislature gave the defendant a choice as to whether or not to testify. 725 ILCS 5/110-6.1(f)(3). The legislature included a provision allowing the circuit court to consider other *reasonable* factors "bearing upon the defendant's propensity or reputation for violent, abuse, or assaultive behavior." 725 ILCS 5/110-6.1(g)(9). But allowing a circuit court to use what a silent defendant is wearing, their physical appearance or any non-verbal tics or mannerisms to find that they fall under the dangerousness standard or are unable to comply with release conditions is unreasonable. 725 ILCS 5/110-6.1(g)(9); 725 ILCS 5/110-5(a); (St. Br. 20). As outlined in Section C *infra*, allowing deference to a circuit court's assessment of a silent defendant's appearance or demeanor could exacerbate implicit bias against the defendant.

In the rare instances where a party presents live testimony at a pretrial detention hearing, reviewing courts should review those factual findings 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. 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.

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.

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." *People v. Whitaker*, 2024 IL App (1st) 232009, ¶ 119 (Ellis J., specially concurring).

The State responds that "the standard of review turns on the *nature* of an issue, not its relative importance[.]" (St. Br. 22) (emphasis in original). The State points to deferential review under the manifest-weight standard in the context of terminating parental rights, commitment under the sexually dangerous person statute and civil commitment for mental illness. (St. Br. 22) (citing *In re C.N.*, 196 Ill. 2d 181, 208 (2001); *People v. Hall*, 2017 IL App (3d) 160541, ¶ 45; *In re Hannah E.*, 376 Ill. App. 3d 648, 661 (1st Dist. 2007)). But the State's argument overlooks that witnesses testified in all three of those cases. *C.N.*, 196 Ill. 2d at 186-202; *Hall*, 2017 IL App (3d) 160541, ¶¶ 6-36; *Hannah E.*, 376 Ill. App. 3d at 651-652. The State does not cite a single Illinois case where a court reviewed solely documentary evidence under the manifest-weight standard. Instead, as outlined in Section A, *supra*, Illinois courts review findings based on the type of evidence presented. *Addison*, 232 Ill. 2d at 452-53; *Cleeton*, 2023 IL 128651, ¶ 26. The parties agree that when live testimony is presented, reviewing courts should review that testimony under the manifest-weight standard. (St. Br. 13; Def. Br. 6)

Further, the cases the State relies on involve types of proceedings that allow

for a more robust evidentiary hearing than the procedures provided at a brief pretrial detention hearing where the parties proceed solely by proffer. For example, in the sexually dangerous person context the respondent "may elect to have the hearing before a jury," a right denied to an accused in the pretrial detention context. 725 ILCS 205/9(b); 725 ILCS 5/110-6.1(f). At civil commitment hearings, the respondent is also entitled to a jury and a"qualified examiner who has examined the respondent" is required to testify in person at the hearing. 405 ILCS 5/3-802; 405 ILCS 5/3-807. Again procedures not afforded a defendant at a pretrial detention hearing. 725 ILCS 5/110-6.1(f). In the termination of parental rights context, the rules of evidence apply, a protection not afforded to the accused at a pretrial detention hearing. 705 ILCS 405/2-18(1); 725 ILCS 5/110-6.1(f).

The more extensive evidentiary and fact-finding procedures outlined in these hearings highlight the difference between them and pretrial release hearings. In pretrial release hearings the parties nearly always proceed by proffer. (Def. Br. 7-8 n. 2) In the hearings identified by the State, the parties nearly always present witnesses and include additional procedural safeguards. *C.N.*, 196 Ill. 2d at 186-202; *Hall*, 2017 IL App (3d) 160541, ¶¶ 6-36; *Hannah E.*, 376 Ill. App. 3d at 651-652. That distinction is why they should be reviewed differently.

The State also suggests that *de novo* review would diminish the significance of the circuit court's decision and relegate it to a "tryout" but the State's argument ignores this Court's rules for appeals. (St. Br. 18-19) First, this Court's rules instruct appellate courts to dispose of appeals within 100 days of the filing of a notice of appeal, absent good cause, which means if a defendant is ordered detained by the circuit court and later his detention is reversed, he will still spend about 100

days in jail. Ill. S. Ct. R. 604(h)(8). Calling 100 days in jail an exercise in record-making ignores the real life consequences that pretrial detention has on the accused. *People v. Wells*, 2024 IL App (1st) 232453, ¶ 36 (Lampkin, J., specially concurring) ("pretrial detention has the potential to devastate familial relationships, employment, and educational pursuits, despite the individual being shielded by the presumption of innocence.").

Further, the State's "tryout" line overlooks that this Court's rules limit when and how a defendant can appeal. Ill. S. Ct. R. 604(h). For example, before appealing, an accused must file a written motion for relief "requesting the same relief to be sought on appeal and the grounds for such relief." Ill. S. Ct. R. 604(h)(2). If the defendant does not raise an issue in that motion for relief it "shall be deemed waived." Ill. S. Ct. R. 604(h)(2). Additionally, the accused is limited to a single appeal before the appellate court at a time; with the circuit court being required to review detention at every hearing, a defendant will not be able to appeal every detention decision. Ill. S. Ct. R. 604(h)(11); 725 ILCS 5/110-6.1(i-5). This Court's rules make clear that no matter what standard this Court sets for reviewing proffers at a pretrial detention hearing, the hearing will not be a "tryout" or an "exercise[] in record-making." Ill S. Ct. Rule 604(h); (St. Br. 18-19)

The State also attacks reviewing proffers *de novo* claiming that it will lead to "a huge cost in diversion of judicial resources." (St. Br. 19) (quoting *Anderson*, 470 U.S. at 574-75). The State points to a report from this Court's Pretrial Release Appeals Task Force to suggest "the appellate court already faces an 'unsustainable' burden[.]" (St. Br. 19) But the State's argument rests on old numbers and the state of pretrial detention appeals before this Court modified its rules in April

2024. (St. Br. 19); Report and Recommendations of the Illinois Supreme Court's Pretrial Release Appeals Task Force (Mar. 1, 2024). This Court's new rules have dramatically decreased the number of pretrial detention appeals eliminating any "unsustainable" burden. See Annual Report Fiscal Year - 2024 Office of the State Appellate Defender. (outlining an 84% drop in appointments per month for the agency since April 15, 2024) (last accessed on Aug. 19, 2024 at https://osad.illinois.gov/aboutus/annualreports.html).

Further, a less deferential standard of review will not increase reviewing court's workload, instead it will increase the accuracy of the judgments and help create "a uniform body of law" that allows the public to better understand their rights and how the law operates. 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, 73-75 (2009). Even under a deferential standard of review appellate courts still need to review the same record and the same issues; reviewing courts would only be applying a different standard of review to the record. See *Anderson*, 470 U.S. at 581 (Powell, J., concurring) (clear error review may still require "comprehensive review of the entire record").

This Court should not consider financial costs when reviewing a decision on someone's freedom when this Court has not similarly considered financial costs in determining the proper standard of review in civil cases that involve only documentary evidence. See *Addison*, 232 Ill. 2d at 451-453 (reviewing terms of an insurance policy); *Cleeton*, 2023 IL 128651, ¶ 26 (converting a respondent in discovery to a defendant), *Riso v. Bayer Coporation*, 2020 IL 125020, ¶ 16 (reviewing the proper exercise of personal jurisdiction).

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 which can be particularly acute because of the brevity of pretrial detention hearings where the parties proceed solely by proffer. As discussed in Section A, any suggestion that the circuit court should determine whether an accused is dangerous or will comply with conditions of release based upon how they look, what they are wearing, non-verbal tics or mannerisms is unreasonable. 725 ILCS 5/110-6.1(g)(9); ILCS 5/110-5(a).

Notably, the State does not contest that implicit bias can significantly impact pretrial detention hearings because of their brevity and limited evidence. (St. Br. 21); see Marty Berger, *The Constitutional Case for Clear and Convincing Evidence in Bail Hearings*, 75 Stan. L. Rev. 469, 492 (2023). Instead, the State asserts that the manifest-weight standard can adequately protect the accused from the risk of implicit bias. (St. Br. 21-22) These subtle judgments, however, of a silent defendant's appearance, be it their skin color, hair style, makeup or clothing, are the exact judgments that are harder to detect and do not make it into a cold record. It is those silent judgments in conjunction with purely documentary evidence that

makes *de novo* review warranted.

The State claims Morgan provides "no persuasive reason to think that the risk of such bias infecting pretrial detention decisions" warrants *de novo* review. (St. Br. 21) The State's argument disregards that studies show that Black and Hispanic men suffer from implicit biases in the pretrial detention context by receiving higher bail amounts than other defendants. Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 Stan. L. Rev. 987 (1994); Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. Legis. & Pub. Pol'y 919 (2013). The State also sets aside, that brief hearings, like pretrial detention hearings where the parties proceed by proffer, can exacerbate implicit bias' impact against a non-testifying defendant. Berger, *The Constitutional Case*, 75 Stan. L. Rev. at 492 (implicit bias "uniquely potent" at brief hearings where "judges make quick decisions based on limited information"); see also Chris Guthrie et. al., *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell L. Rev. 1, 36 (2007). The State further ignores that implicit bias can be especially hard to identify in a cold record. 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").

Therefore, this Court should not grant circuit courts deference to judge a silent defendant based upon how they look and this Court should find *de novo* review appropriate for pretrial detention orders when the parties proceed solely by proffer.

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.

The State agrees that the appellate court's reasons for reviewing for an abuse of discretion do not survive scrutiny because the State must meet their statutorily required burden of proof. (St. Br. 14-16) Therefore, Morgan stands on the argument in his original brief. (Def. Br. 19-26)

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

The State does not contest that detention orders have not been historically reviewed for an abuse of discretion. Thus, Morgan stands on the argument in his original brief. (Def. Br. 26-29)

F. Conclusion.

Where both parties proceed by proffer at pretrial detention hearings, this Court should follow Illinois' century old tradition and find that review should be *de novo* because: 1) reviewing courts and circuit courts are similarly situated to make factual findings; 2) "to deprive someone of his or her freedom indefinitely before they have been convicted of anything and remain presumptively innocent, is a momentous one"; and 3) to limit implicit bias against a silent defendant which can be exacerbated by the brevity of pretrial detention hearings. *Whitaker*, 2024 IL App (1st) 232009, ¶ 119 (Ellis J., specially concurring). When live testimony is presented, the circuit court's findings on those facts should be reviewed under the manifest-weight-of-the-evidence standard, and its ultimate detention decision

reviewed *de novo*.

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

This Court should invoke the public interest exception, even though Morgan's pretrial detention order is now moot, 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. The State agrees (St. Br. 11-13), therefore, Morgan stands on the argument in his original brief. (Def. Br. 31-34)

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 reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 13 pages.

/s/ Ross E. Allen
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No. 130626
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KENDALL CECIL MORGAN,	)	Honorable Amy McFarland,
Defendant-Appellant.	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

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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 August 20, 2024, the Reply Brief for Defendant-Appellant in Support of Rule 604(h) Appeal 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 defendant-appellant 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 Reply Brief for Defendant-Appellant in Support of Rule 604(h) Appeal to the Clerk of the above Court.

/s/George Freeman
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