NOTICE
Decision filed 01/10/24. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2024 IL App (5th) 230977-U

NO. 5-23-0977

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 23-CF-924
	)	
MARLON CARTER,	)	Honorable
	)	Jeffrey K. Watson,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE McHANEY delivered the judgment of the court.
Justice Boie concurred in the judgment.
Presiding Justice Vaughan specially concurred.

ORDER

¶ 1 *Held*: Where the State's verified petition for pretrial detention was properly filed pursuant to section 110-6(g), the defendant's counsel did not provide ineffective assistance by failing to file a motion to strike the State's petition, and we affirm the circuit court's order granting the State's motion to detain.

¶ 2 The defendant, Marlon Carter, appeals the St. Clair County trial court's order regarding his pretrial release pursuant to Public Act 101-652 (eff. Jan. 1, 2023), commonly known as the Safety, Accountability, Fairness and Equity-Today Act (Act).[1] See Pub. Acts 101-652, § 10-255, 102-

[1]The Act has also sometimes been referred to in the press as the Pretrial Fairness Act. Neither name is official, as neither appears in the Illinois Compiled Statutes or public act. *Rowe v. Raoul*, 2023 IL 129248, ¶ 4 n.1.

1104, § 70 (eff. Jan. 1, 2023); *Rowe v. Raoul*, 2023 IL 129248, ¶ 52 (lifting stay and setting effective date as September 18, 2023).[2]

¶ 3 I. BACKGROUND

¶ 4 On May 26, 2023, the State charged the defendant by information in three counts alleging that on the same date he committed the offenses of vehicular hijacking with a firearm (720 ILCS 5/18-4(b) (West 2022)), possession of a stolen motor vehicle (625 ILCS 5/4-103(a)(1) (West 2022)), and vehicular hijacking (720 ILCS 5/18-3(a) (West 2022)). Bond was set at $200,000, requiring the deposit of 10%. The trial court appointed counsel to represent him.

¶ 5 On August 23, 2023, the defendant filed a motion pursuant to section 110-7.5 of the Code of Criminal Procedure of 1963 (Code) seeking a hearing and asking the trial court to order his release without the condition of depositing security. 725 ILCS 5/110-7.5 (West 2022). Alternatively, the defendant asked the court to set the matter for hearing pursuant to section 110-5 (*id.* § 110-5) or section 110-6.1 (*id.* § 110-6.1).

¶ 6 On September 12, 2023, the State filed its verified petition seeking to have the defendant held in pretrial detention based upon the dangerousness standard set forth in the Code. A detention hearing was held on October 17, 2023, after which the trial court denied the defendant pretrial release.

¶ 7 The State outlined the facts at the October 17, 2023, hearing on its petition to deny pretrial release stating that the defendant was working on a jobsite with Kenneth Loving and James Green

[2]Pursuant to Illinois Supreme Court Rule 604(h)(5) (eff. Dec. 7, 2023), our decision in this case was due on or before January 3, 2024, absent a finding of good cause for extending the deadline. Based on the high volume of appeals under the Act currently under the court's consideration, as well as the complexity of issues and the lack of precedential authority, we find there to be good cause for extending the deadline.

in East St. Louis, Illinois. The defendant drove away in a black Mercedes that belonged to Loving's girlfriend, Erica Day. Loving later found the defendant with the Mercedes in Shiloh, Illinois, and while confronting the defendant, he got into a physical altercation. When Green interfered, the defendant pointed a gun at them and drove away in the Mercedes. The Mercedes was registered to Day, who told police that the defendant did not have permission to take her car. The State also proffered the defendant's criminal history, which included convictions for aggravated criminal sexual assault, aggravated domestic battery, and domestic violence. The defendant was on probation at the time this case was filed and had previously been unsuccessfully discharged from a period of probation. Additionally, the State informed the circuit court that the defendant was involved in a physical altercation at the county jail and had called the complaining witness in that case and told him to drop the charges. Defense counsel argued that the vehicular hijacking was all a "misunderstanding," the defendant had a job in the area, and he would comply with less restrictive pretrial conditions other than detention.

¶ 8 The circuit court found that the proof was evident and the presumption great that the defendant committed the detainable offenses and that the defendant posed a threat to a person or persons in the community. The court also found that there were not any conditions or any combination of conditions that could mitigate the real and present danger posed by the defendant. The court entered its order that the defendant should remain detained, from which the defendant timely appealed. Ill. S. Ct. R. 604(h)(2) (eff. Oct. 19, 2023).

¶ 9 II. ANALYSIS

¶ 10 On appeal, the defendant contends that because he was both (1) previously detained on an inability to make cash bond and (2) the State did not timely file its verified petition, the Code does not allow the State to seek his pretrial detention. The defendant asks this court to reverse the circuit

court's order denying his pretrial release. In response, the State argues that section 110-6(g) of the Code (725 ILCS 5/110-6(g) (West 2022)) authorizes its petition to deny the defendant's pretrial release.

¶ 11 The defendant argues that the circuit court erred when it granted the State's petition to detain because the Code does not allow the State to file a petition to detain defendants who remain in custody after having been ordered released on the condition of depositing security. Specifically, the defendant argues that the State was not permitted to file a petition to detain him due to the timing requirements of section 110-6.1(c)(1) of the Code (*id.* § 110-6.1(c)(1)).

¶ 12 The defendant acknowledges that his attorney did not move to strike the State's petition. Additionally, the defendant's attorney did not include these errors in his notice of appeal. The defendant seeks review of this issue under the second prong of the plain-error doctrine. Under the second prong of plain-error review, a reviewing court may consider a forfeited error when the error is so serious that it deprives the defendant of a substantial right. *People v. Herron*, 215 Ill. 2d 167, 170 (2005). In the alternative, the defendant contends that his counsel's failure to object to the State's petition constituted ineffective assistance of counsel. Before we determine if plain-error review is appropriate, we briefly review the applicable sections of the Code.

¶ 13 Here, the defendant was charged on May 26, 2023, before the Act took effect. Bond was set at $200,000 and the defendant was eligible to be released on bail if he had posted 10% of that amount. He was apparently not able to post the 10% and remained in jail when the Act took effect.

¶ 14 The Code separates those persons who were arrested before the Act took effect into three categories. See 725 ILCS 5/110-7.5 (West 2022). The defendant belongs to the second category—persons who remain in pretrial detention after being ordered released with pretrial conditions. *Id.* § 110-7.5(b). Section 110-7.5(b) provides that "any person who remains in pretrial detention after

having been ordered released with pretrial conditions, including the condition of depositing security, shall be entitled to a hearing under subsection (e) of Section 110-5." *Id.* Section 110-5(e) provides:

> "If a person remains in pretrial detention 48 hours after having been ordered released with pretrial conditions, the court shall hold a hearing to determine the reason for continued detention. *** The inability of the defendant to pay for a condition of release or any other ineligibility for a condition of pretrial release shall not be used as a justification for the pretrial detention of that defendant." *Id.* § 110-5(e).

¶ 15 As discussed in this court's *People v. Rios* opinion, defendants who were arrested before the Act took effect have two options:

> "Under sections 110-7.5(b) and 110-5(e), a defendant may file a motion seeking a hearing to have their pretrial conditions reviewed anew. Alternatively, a defendant may elect to stay in detention until such time as the previously set monetary security may be paid. A defendant may elect this option so that [he or she] may be released under the terms of the original bail." *People v. Rios*, 2023 IL App (5th) 230724, ¶ 16.

When the defendant asks the court for pretrial release pursuant to the Code, the defendant is asking the trial court to review appropriate pretrial conditions again. *Id.* At that point, " 'the matter returns to the proverbial square one, where the defendant may argue for the most lenient pretrial release conditions, and the State may make competing arguments.' " *People v. Gray*, 2023 IL App (3d) 230435, ¶ 14 (quoting *People v. Jones*, 2023 IL App (4th) 230837, ¶ 23).

¶ 16 Section 110-7.5 of the Code provides that "[o]n or after January 1, 2023, any person who remains in pretrial detention after having been ordered released with pretrial conditions, including the condition of depositing security, shall be entitled to a hearing under subsection (e) of Section 110.5." 725 ILCS 5/110-7.5(b) (West 2022). Section 110-5(e) provides:

> "If a person remains in pretrial detention 48 hours after having been ordered released with pretrial conditions, the court shall hold a hearing to determine the reason for continued detention. If the reason for continued detention is due to the unavailability or the defendant's ineligibility for one or more pretrial conditions previously ordered by the court or directed by a pretrial services agency, the court shall reopen the conditions of release hearing to determine what available pretrial conditions exist that will reasonably ensure the appearance of a defendant as required, the safety of any other person, and the likelihood of compliance by the defendant with all the conditions of pretrial release. The inability of the defendant to pay for a condition of release or any other ineligibility for a condition of pretrial release shall not be used as a justification for the pretrial detention of that defendant." *Id.* § 110-5(e).

¶ 17 On August 23, 2023, the defendant filed his motion asking the circuit court to release him without the condition of depositing security pursuant to section 110-7.5 of the Code. *Id.* § 110-7.5. Alternatively, he asked the court to hold a hearing pursuant to section 110-5 or 110-6.1. *Id.* §§ 110-5, 110-6.1. Subsequently, the State filed its verified petition asking the court to hold the defendant in pretrial detention because he was charged with a qualifying offense and his pretrial release would pose a real and present threat to the physical safety of a person or persons or the community. *Id.* § 110-6.1(a)(4).

¶ 18 Section 110-6.1 addresses the subject of "denial of pretrial release." Section 110-6.1(c)(1) discusses the timing of the State's petition asking the court to deny pretrial release, and also references section 110-6 as an exception to these timing requirements:

> "A petition may be filed without prior notice to the defendant at the first appearance before a judge, or within the 21 calendar days, *except as provided in Section 110-6*, after arrest and release of the defendant upon reasonable notice to defendant; provided that while such petition is pending before the court, the defendant if previously released shall not be detained." (Emphasis added.) *Id.* § 110-6.1(c)(1).

¶ 19 The defendant contends that the State's verified petition asking the court to hold him in pretrial detention was not timely pursuant to section 110-6.1(c)(1) as the State's petition was filed after his first appearance before a judge. *Id.* However, as emphasized in the preceding paragraph, section 110-6.1 provides an exception to these time requirements "as provided in Section 110-6." *Id.*

¶ 20 We do not need to determine if the State's petition to detain the defendant was timely filed as mandated by section 110-6.1(c)(1) because the State contends that its petition was filed pursuant to section 110-6(g) in response to the defendant's motion for release. Section 110-6 addresses the subjects of "[r]evocation of pretrial release, modification of conditions of pretrial release, and sanctions for violations of conditions of pretrial release." *Id.* § 110-6. More specifically, section 110-6(g) provides: "The court may, at any time, after motion by either party or on its own motion, remove previously set conditions of pretrial release ***." *Id.* § 110-6(g). "The court may only add or increase conditions of pretrial release at a hearing under this Section." *Id.*

¶ 21 Here, the circuit court held the hearing on the State's petition seeking to have the defendant held in pretrial detention. The State petitioned the court to increase the conditions in this case

pursuant to section 110-6(g) by modifying the defendant's original bond conditions set on May 26, 2023—authorizing his pretrial release on payment of 10% of the $200,000 bond. During the detention hearing, the court noted the violent nature of the charges and that they were statutory detainable offenses. The court then found by clear and convincing evidence, based upon the alleged facts in the State's proffer and argument of defense counsel, that "proof is evident or presumption great" that the defendant committed a qualifying offense. The court also found that the defendant posed a real and present danger to the safety of the victims and potentially to others in the community. The court stated that there were currently no conditions or combination of conditions that could mitigate the real and present danger posed by the defendant. The court further stated that it did not then believe that less restrictive conditions would ensure the community's safety or ensure the defendant's appearance in court.

¶ 22 Pursuant to section 110-6(g) of the Code, the State exercised its right to ask the court to modify the original conditions of pretrial release. Without the applicability and availability of section 110-6(g), the State would have limited ability to modify release conditions to maintain pretrial detention in cases where the State had safety or flight risk concerns. The timeliness requirements of section 110-6.1(c) could bar the State's efforts. Our legislature provided the "exception" language in section 110-6.1(c) allowing the State to proceed under section 110-6(g) when necessary. We conclude that the circuit court's order maintaining the defendant's pretrial detention in this case was proper under the specific facts of this case. Accordingly, we affirm the circuit court's order.

¶ 23 The defendant alternatively argues that his counsel was ineffective for not objecting to or moving to strike the State's verified petition seeking to have him held in pretrial detention. Constitutionally competent assistance is measured by a test of whether the defendant received

"reasonably effective assistance." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Overall, to prevail on an ineffective-assistance-of-counsel claim, "[the] defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Lefler*, 294 Ill. App. 3d 305, 311 (1998) (citing *Strickland*, 466 U.S. at 694). The term "reasonable probability" has been defined to mean a probability sufficient to undermine confidence in the outcome of the proceeding. *People v. Colon*, 225 Ill. 2d 125, 135 (2007); *Lefler*, 294 Ill. App. 3d at 311-12 (citing *Strickland*, 466 U.S. at 687).

¶ 24 With a claim of ineffective assistance of counsel, we apply the two-prong *Strickland* test, adopted by the Illinois Supreme Court in *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). Under this test, the defendant must prove that (1) defense counsel's performance was deficient or fell below an objective standard of reasonableness and (2) the defendant suffered prejudice because of defense counsel's deficient performance. *Strickland*, 466 U.S. at 687. If the defendant fails to establish either prong of the *Strickland* test, the ineffective assistance claim fails. *People v. Theis*, 2011 IL App (2d) 091080, ¶ 39. If the defendant does not raise his or her ineffective assistance of counsel claim in the trial court, our review on appeal is *de novo*. *People v. Berrier*, 362 Ill. App. 3d 1153, 1166-67 (2006). The reviewing court is not required to analyze both *Strickland* prongs and may conclude that the defendant failed to establish ineffective assistance because he was not prejudiced by counsel's alleged deficient performance. *People v. Perry*, 224 Ill. 2d 312, 342 (2007).

¶ 25 Although the defendant's attorney did not specifically argue his petition seeking pretrial release, we consider the State's verified petition for pretrial detention as responsive to the defendant's petition. Moreover, the Code did not bar the State from seeking the defendant's pretrial detention. While the State's petition may have been untimely with respect to section 110-6.1(c)(1)

of the Code (725 ILCS 110-6.1(c)(1) (West 2022)), the State's petition was appropriate and timely filed pursuant to section 110-6(g) of the Code (*id.* § 110-6(g)). Thus, we conclude that because the State's petition was valid under section 110-6(g) of the Code, the defendant's trial counsel did not provide ineffective assistance for failing to file a pleading asking the court to strike the State's verified petition. *Id.*

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated above, we affirm the detention order entered by the St. Clair County circuit court.

¶ 28 Affirmed.

¶ 29 PRESIDING JUSTICE VAUGHAN, specially concurring:

¶ 30 My colleagues dispense with defendant's request for plain error by finding no error stemmed from the State's filing of a petition to deny pretrial release in response to defendant's motion for release. They claim such filing is allowed pursuant to section 110-6(g). I disagree.

¶ 31 As my colleagues note, section 110-7.5 entitles defendant to a hearing under section 110-5(e). 725 ILCS 5/110-7.5(b) (West 2022). Neither section 110-7.5(b) nor section 110-5(e) provides the State authority to request detention, or the court authority to have a hearing, under section 110-6.1 for defendants who remain detained after having been ordered release with pretrial conditions, including the condition of monetary bail. See *id.* §§ 110-7.5(b), 110-5(e).

¶ 32 Section 110-6.1 also fails to provide the State authority to request detention under these circumstances. While the timing requirements of section 110-6.1 provide an exception "as provided in Section 110-6" (*id.* § 110-6.1(c)(1)), the requirements of section 110-6 must still be met.

¶ 33 Section 110-6(g) allows a court to add or increase conditions of pretrial release (*id.* § 110-6(g)), but a request to detain is not, and cannot be, a condition of pretrial release. A "bail condition" is defined as "[a] limitation placed on the *grant* of a criminal defendant's bail." (Emphasis added.) Black's Law Dictionary (11th ed. 2019). Conversely, "detention" is defined as "[t]he act or an instance of holding a person in custody; confinement or compulsory delay." *Id.* Our own and other appellate courts use "detention" or "denial of pretrial release" interchangeably. See *People v. Houts*, 2023 IL App (5th) 230715-U, ¶ 8; *People v. Rios*, 2023 IL App (5th) 230724, ¶ 10; *People v. Vingara*, 2023 IL App (5th) 230698, ¶ 16; *People v. Martin*, 2023 IL App (4th) 230826, ¶ 26; *People v. Robinson*, 2023 IL App (2d) 230345-U, ¶ 7; *People v. Inman*, 2023 IL App (4th) 230864, ¶ 11 (citing section for denial of pretrial release but stating detention); *People v. Whitmore*, 2023 IL App (1st) 231807, ¶ 11 (same). Detention cannot be a condition of release when a defendant who is ordered detained could never be released under any conditions. Therefore, detention is not the most restrictive condition of pretrial release; it is an outright denial of pretrial release.

¶ 34 My colleagues further overlook that section 110-6(g) allows the court to increase pretrial conditions only pursuant to a hearing under section 110-6. 725 ILCS 5/110-6(g) (West 2022). There are two types of hearings under section 110-6, revocation hearings (*id.* § 110-6(a)) and sanction hearings (*id.* § 110-6(b)-(d)). Neither apply here.

¶ 35 Section 110-6(a) allows for a revocation hearing "only if the defendant is charged with a felony or Class A misdemeanor that is alleged to have occurred during the defendant's pretrial release." *Id.* § 110-6(a). The court may also release defendant with or without modification of conditions of pretrial release in lieu of revocation. *Id.* Relevant to this appeal, section 110-6(c) allows the court to hold a sanction hearing when defendant violates any condition of pretrial release set by the court or commits an offense during pretrial release. *Id.* § 110-6(c)-(d). Since there is no

allegation that defendant here committed a crime during pretrial release or violated any condition of his pretrial release, section 110-6(g) is inapplicable by its own terms.

¶ 36 Contrary to my colleagues' beliefs, the inapplicability of section 110-6(g) does not unfairly limit the State's ability to modify release conditions. The State had the ability—albeit under the previous version of section 110-6.1—to request detention at the initial bond hearing but failed to do so. Moreover, the State may still request increased conditions of pretrial release in response to a defendant's motion requesting modification of his pretrial release conditions (see *id.* § 110-7.5); it simply cannot now request the denial of pretrial release.

¶ 37 The inapplicability of section 110-6(g), however, does not affect the outcome of this matter. Defendant's motion pursuant to section 110-7.5 requested a hearing under either section 110-5(e) or section 110-6.1. Defendant's claim for plain error contends the court erred in detaining him pursuant to the State's verified petition for pretrial detention, which is only allowed under section 110-6.1. Essentially, defendant is claiming the court erred by holding a hearing under section 110-6.1, which was the same hearing defendant specifically requested. Such claim of error is precluded by the invited error doctrine. "[U]nder the invited error doctrine, an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error." (Internal quotation marks omitted.) *People v. Harvey*, 211 Ill. 2d 368, 385 (2004). Because the error defendant complains of on appeal, *i.e.*, a hearing under section 110-6.1, was specifically requested by defendant as alternative relief to his request for release, the invited error doctrine precludes our review for plain error. *Id.* at 387.

¶ 38 Nor does defendant's argument to consider a claim of ineffective assistance of counsel fare any better even though claims of ineffective assistance of counsel are not precluded by the invited error doctrine. *People v. Villarreal*, 198 Ill. 2d 209, 228 (2001) (considering defendant's claim of

ineffective assistance of counsel after finding the invited error doctrine was applicable). Here, defendant claims his trial counsel was ineffective for failing to move to strike the State's petition requesting a denial of defendant's pretrial release and cites to the well-established two-prong review required under *Strickland v. Washington*, 466 U.S. 668, 690-94 (1984). "The test is composed of two prongs: deficiency and prejudice." *People v. Richardson*, 189 Ill. 2d 401, 410 (2000). "A defendant must satisfy both prongs of the *Strickland* test," and a failure to establish either prong " 'will be fatal to the claim.' " *Id.* at 411 (quoting *People v. Sanchez*, 169 Ill. 2d 472, 487 (1996)).

¶ 39 Here, the sole argument presented by defendant on appeal in regard to this claim is that he had a right to effective counsel for pretrial hearings. The premise is undisputed; however, no argument regarding why counsel's actions were deficient or how defendant was prejudiced was provided. Accordingly, I find any argument related to ineffective assistance of counsel was forfeited (*In re Commitment of Moore*, 2023 IL App (5th) 170453, ¶ 73 ("Mere contentions, without argument or citation to authority, do not merit consideration on appeal.")), and defendant's "failure to establish either proposition" is "fatal to the claim" (*Sanchez*, 169 Ill. 2d at 487). As such, just like my colleagues, I would affirm the trial court's pretrial release order.