Report and Recommendations of the Illinois Supreme Court's Pretrial Release Appeals Task Force

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Introduction and Background

On January 16, 2024, the Illinois Supreme Court created the Pretrial Release Appeals Task Force ("Task Force") to examine the volume of appeals under the statute commonly referred to as the Pretrial Fairness Act (725 ILCS 5/art. 110) ("PFA"). Noting that "appeals from pretrial release decisions by the circuit courts have dramatically increased in the five districts of the Illinois Appellate Court," the Supreme Court determined that there was a "need for a comprehensive plan to address this matter with urgency."

What follows is the Task Force's report on the issue and its recommendations on how it might be addressed. As detailed below, the Task Force solicited input from relevant stakeholders in the appellate process. Its focus was on both the quantity of appeals in the Appellate Court and the effectiveness and quality of those appeals. Our objective was to formulate a series of measures which would streamline the PFA appeal process while ensuring meaningful review of decisions to detain, release, or impose conditions of release in the pretrial setting ("detention decisions").

What Came Before PFA: Bond Appeals. A useful place to begin an assessment of the current situation is by understanding what came before it. Before the adoption of the PFA, pretrial release in Illinois was commonly accompanied by a condition that the defendant post monetary bail. Pursuant to Supreme Court Rule 604(c), a defendant could appeal any decision "setting, modifying, denying, or refusing to modify bail or the conditions thereof." The process began with the requirement that the defendant file a motion in the trial court asking it to grant the same relief the defendant would seek on appeal. If the motion for relief was denied, the defendant could then file a motion for review in the Appellate Court; the State was permitted to answer, but no briefing was allowed. Rule 604(c) does not provide for appeals by the State.

The number of bond appeals in the pre-PFA era was extremely light. In the 10-year period of 2014 through 2023, there were a total of 171 Rule 604(c) appeals of bond orders in the State of Illinois. That amounts to only 17 bond appeals *per year,* statewide. We are now looking at projected annual PFA appeal volumes for *individual judges* measured in multiples of that amount.

The question immediately arises: why were so few bond appeals taken even if they were a matter of right? There are probably several possible answers to this question, but one seems predominant: the reasonable exercise of trial counsel's discretion in determining which cases were viable candidates for success on appeal. In other words, while appeal following a conviction might be rote and automatic, defense counsel did not view the right to appeal bond decisions in the same way.

The Current PFA Appeal Process. In the wake of the legislature's adoption of the PFA, the Supreme Court displayed its commitment to the implementation of the statute by establishing rules of practice, specifically including rules to govern appeals of detention decisions. Having started down the road of examining pretrial reform well before the legislature acted, the Supreme Court faithfully made sure that the process for appeals was thoughtfully mapped out. The Supreme Court's approach, as reflected in the current version of Rule 604(h), was designed to treat PFA appeals as matters that moved at an accelerated pace, but which ultimately receive the same degree of care and attention as in other criminal appeals.

In practice, the process of a PFA has played out differently than initially imagined. Where the optional memorandum is filed, the argument on appeal is generally well presented. However, in nearly half of the appeals, no memorandum is filed by the appellant.[1] Rule 604(h)'s requirement of a "beefed up" notice of appeal was intended to allow the notice to carry the weight of the appellant's argument when no memorandum is filed. In practice, however, the notice of appeal is frequently a cursory, check-the-box affair which lacks the case-specific argument necessary to constitute adequate appellate advocacy. Where the appellant's position rests entirely on bare-bones "argument" made in the notice of appeal, our current system seems to have effectively traded quality for quantity.

Volume of PFA Appeals. When the PFA became effective, it was reasonable to anticipate some increase in the volume of appeals. However, the degree to which these appeals outstripped their predecessors—bond appeals—is staggering. As noted above, there were only 171 bond appeals over a decade's time. In only *five months* since the enactment of the PFA, there have been almost 1,900 PFA appeals. In other words, we have gone from 17 bond appeals per year to a projected 4,557 PFA appeals per year—a *268-fold increase in volume*.

The burden of these appeals has fallen first on appellate counsel. Fortunately, that burden was anticipated by the legislature, which provided funding to address it. Both the Illinois State's Attorney Appellate Prosecutor and the Office of the State Appellate Defender saw $20 million increases to their budgets; we can only imagine the disastrous impact on those offices if their new responsibilities had not been supported with additional funding. Unfortunately, it appears that few foresaw the burden that PFA appeals would also place on the Appellate Court, as it was allocated no additional resources to deal with the increased volume.

As a point of reference, we examined the experience of the Appellate Court in New Jersey following that state's adoption of a similar cashless bail system. The average per-judge case volume in New Jersey has been 26 cases per authoring judge, per year. We further understand that the review process in New Jersey is severely truncated; there is usually no transcript of proceedings below.

Compare New Jersey's experience with what we saw in Illinois in the first five months under the PFA (September 18, 2023, through February 18, 2024):

District	Appeals	Judges	Per Judge	Annualized
1	236	24	9.8	23.6
2	265	7	37.9	90.9
3	252	7	36	86.4
4	607	10	60.7	145.7
5	539	8	67.4	161.7
State Total	1899	56	33.9	81.4

[1] We draw this conclusion anecdotally from our own experience across all five appellate districts, but it is in accord with these figures from the Fourth District as of February 23, 2024: of 204 PFA appeals which went to final disposition, no appellant memorandum was filed in 95 of them (46.6%).

These figures account for the two judges recently added to the Fourth and Fifth Districts, respectively, out of the court's existing budget. On average, an appellate judge in Illinois will be responsible for drafting about 80 PFA appeal dispositions per year (*i.e.*, three times the per-judge volume in New Jersey). Because appeals are decided by three judge panels, each appellate judge will also serve as a panel member on an additional 160 PFA appeals (*i.e.*, each judge will hear a total of 240 PFA appeals per year). Compare this to New Jersey, where two-judge panels hear these types of appeals; total appeals heard by a judge as an author or a panel member would total just over 50 in New Jersey.

In the First District, PFA appeals represent approximately 39% of its entire criminal appeal volume. Adding 39% more criminal appeals with no additional judicial or support staff is a difficult challenge, but the situation is even more dire in the other four districts: in the Second, Third, Fourth, and Fifth appellate districts, the PFA appeals outnumber all other criminal appeals by a measure of approximately three to one (*i.e.*, three PFA appeals for every traditional criminal appeal). As seen above, the situation is at a particularly critical stage in the Fourth and Fifth Districts, where each judge is facing an additional 145-160 PFA appeals per year on top of existing case volume (plus serving as a panel member on another 300 or so cases).

Some have expressed hope that there might be a reduction in case filings once the system "settled in," suggesting this is what occurred in New Jersey. When we examined New Jersey's experience more closely, however, we learned that the reduction from their first year caseload was only about 10%, and the numbers then remained fairly steady over the following years. A 10% reduction in PFA appeal volume in Illinois would not materially affect the burden on the Appellate Court.

We are aware that current PFA appeal totals include the initial surge of appeals; those numbers were likely affected by the many cases of defendants who were already detained when the PFA became effective and who got a hearing shortly thereafter. While this surge will not be repeated, it is difficult to estimate how future numbers might trend differently; insufficient time has passed to permit such conclusions. We might see filings decline more than the 10% seen in New Jersey, but we are not confident that it will be substantially more.

Finally, we should not lose sight of the effect PFA appeals are having on the court's ability to resolve appeals in non-PFA cases. The irony is that a defendant who gets an accelerated PFA appeal today could, if convicted, suffer delay in his or her future direct appeal because of the crunch of PFA appeals of other defendants.

The Task Force's Process. We began our process by reaching out to relevant appellate stakeholders to solicit suggestions on measures that might help the Appellate Court deal with the heavy volume of PFA appeals. Those stakeholders are:

- The Illinois Office of the State's Attorney Appellate Prosecutor;
- The Office of the State Appellate Defender;
- The Cook County State's Attorney;
- The Cook County Public Defender;
- The Illinois States Attorneys Association;

- The Illinois Public Defender Association;
- Clerks of the Appellate Court Districts;
- The Illinois Attorney General;
- The Illinois Appellate Lawyers' Association;
- The DuPage County State's Attorney; and
- The justices of the Illinois Appellate Court.

We reviewed all suggestions received from the stakeholders along with ideas generated within the Task Force. A list of possible proposals was then circulated among the stakeholders, who were asked to respond with comment. For this round of feedback, we included the Conference of Chief Judges, as some of the proposals affected practices at the trial level.

The Supreme Court's Authority. The right to an interlocutory appeal is specified in the PFA. However, the statute also expressly provides that such appeals "shall be governed by Supreme Court Rules." This is entirely consistent with the fact that the Illinois Constitution empowers the Supreme Court to decide the rules concerning any appeals from non-final judgments*, i.e.*, interlocutory appeals. (Illinois Constitution, Article VI, Section 6.) The statute and Section 6 of the Illinois Constitution can be harmonized if the statute is viewed as the legislature's recognition of the primacy of the Supreme Court's authority in this area.

Recommendations

We believe that the Supreme Court should remain committed to providing meaningful appellate review of cases that are *meaningfully presented*. This occurs where memoranda are filed by appellate counsel; it rarely occurs when the appellant relies on the bare-bones statements made in a check-the-box notice of appeal. In such cases, minimal effort by the appellant triggers the expenditure of significant time and other resources by the Appellate Court (and the appellee).

To address this imbalance, we make the recommendations set forth below, which we believe will help accomplish the following:

- Preserve the appellate review of PFA detention decisions as a matter of right;
- Promote strategic thinking by trial counsel;
- Incentivize meaningful exposition of arguments at the trial level to better frame the issues on appeal and give trial courts the opportunity to correct deficiencies without the need for an appeal;
- Streamline the PFA appeal process; and
- Improve the quality of appellate advocacy and judicial review of PFA detention decisions.

1. **Require a Motion in the Trial Court as a Prerequisite to Appeal.**

Prior to the enactment of the PFA, Rule 604(c) required, in pertinent part, the following in appeals from bond decisions: "Before conviction a defendant may appeal to the Appellate Court from an order setting, modifying, revoking, denying, or refusing to modify bail or the conditions thereof. As a prerequisite to appeal the defendant shall first present to the trial court a written motion for the relief to be sought on appeal." An appeal from a decision setting bond and related conditions of release is functionally identical to an appeal from a detention decision under the PFA.

We propose that PFA appeals should follow the same process applicable to bond appeals. Instead of filing a detailed notice of appeal in the trial court, the appellant should first file a motion to set aside the detention decision (a "motion for relief") setting forth the reasons for such relief. Once that motion is ruled on, the appellant would utilize the same simple notice of appeal form used in other criminal cases. The time that the trial attorney now spends preparing the detailed notice of appeal would instead be spent on the motion in the trial court. An advantage to this approach is that simple, correctable errors could be quickly addressed in the trial court rather than through the much more time-consuming appellate process. It would also crystallize the issues actually being raised in the trial court.

Just as the detailed notice of appeal currently stands as the sole vessel for appellate argument when no appellant's memorandum is filed, the motion for relief would serve the same purpose in the absence of an appellate memorandum. Like the detailed notice of appeal, it could also be supplemented by a memorandum at the discretion of appellate counsel.

This proposal could be implemented with the addition of the following language in an appropriate section of Rule 604(h) (which supersedes the language currently calling for a detailed notice of appeal):

> As a prerequisite to appeal, the party seeking appeal shall first present to the trial court a written motion requesting from the trial court the same relief to be sought on appeal and the grounds for such relief. The trial court shall promptly hear and decide the motion for relief.

There is no avoiding the fact that requiring presentation of a motion in the trial court as a prerequisite to appeal will add to the dockets of the trial judges who hear them; it is for this reason that we have received mostly negative feedback from trial judges on this proposal. We do not overlook the fact that trial courts have borne much of the burden of implementing the PFA in our court system; we would never contrive to put upon them some exotic new requirement. But this is not a contrivance, and it is not new; it is a return to the norm. In virtually every other criminal appeal setting—including the essentially identical setting of bond appeals—a motion is required in the trial court before appeal. We deviated from this norm by choosing to exempt PFA appeals from this requirement, but in retrospect we think that has proven to be a mistake. Resuscitating this long-standing practice may add to the trial court's burden, but it can help diminish the effect being felt at the appellate level as a result of its absence.

Finally, we note that this change in practice would require a corresponding change to the admonitions to be given pursuant to Supreme Court Rule 605(d). We propose the following admonitions to be given after the detention decision and the order on the motion for relief, respectively, to ensure that they would accurately reflect this change:

> (d) On Entry of an Order Imposing Conditions of Pretrial Release, Granting a Petition to Deny Pretrial Release, or Revoking Pretrial Release. In all cases in which an order is issued imposing conditions of pretrial release, granting the State's petition to deny pretrial release, or revoking a defendant's pretrial release under article 110 of the Code of Criminal Procedure of 1963:
>
> > (1) at the time of issuing the order, the circuit court shall advise the defendant substantially as follows: that defendant has a right to file a motion for relief from the court's order, and also that the court will revisit the order of detention or the condition of pretrial release at each subsequent court appearance, regardless of whether a motion for relief is filed; and
> >
> > (2) at the time of its ruling on the defendant's motion for relief under Rule 604(h)(2), the circuit court shall advise the defendant substantially as follows:
> >
> > > (A) that the defendant has a right to appeal at any time before conviction and, if indigent, to be furnished, without cost to the defendant, with a transcript or audiovisual communication or other electronic recording of the proceedings of the hearing;
> > >
> > > (B) that the defendant, if indigent, has the right to have counsel appointed on appeal.

2. **Clarify the Requirements for Issue Preservation.**

A significant amount of time and resources have been expended at the appellate level on questions concerning the requirements for adequately preserving an issue for appellate review. Must the issue be presented to the trial court? Is a check-the-box notice of appeal sufficient without case-specific argument? May the memorandum go beyond the issues raised in the notice?

It would be helpful to all involved to have the rules regarding issue preservation made explicit. It seems clear that the original intention was to have a Rule 604(h) notice of appeal be a sufficient vehicle to carry the appellant's arguments, though they might be further developed in the optional memorandum. Some contend, however, that the appellant's burden might be carried by a cursory notice of appeal with no case-specific argument, or that the memorandum may address issues not raised in the trial court or in the notice of appeal. Our recommendation in this regard has four separate but related components:

- We propose the following addition to Rule 604(h): "Other than errors occurring for the first time at the hearing on the motion for relief, issues not raised in the motion will not be considered on appeal." We understand that this leaves no room for alternative means of analysis such as plain error review or a contention of ineffective assistance of trial counsel. However, we feel that an expedited, limited review of detention decisions is designed in the first instance to be review of the *trial court's* decision. It is unreasonable to expect this expedited process to carry the same weight and scope of argument that is seen in a direct appeal following conviction.

- To clarify that an argument may be raised in the motion for relief even if a filed memorandum does not address that argument, we propose addition of the following language to Rule 604(h) in connection with the new motion for relief: "Issues raised in the motion for relief are before the appellate court regardless of whether the optional memorandum is filed."

- To clarify what arguments the appellant is standing on when the optional memorandum is filed, however, we propose the following: "If a memorandum is filed, it must identify which issues from the motion for relief are being advanced on appeal, even if the memorandum does not expound on each such issue."

  We believe this is in accord with common appellate practice. Appellate attorneys are not required to advance on appeal every argument made in the trial court; they have the right to exercise strategic judgment in determining which issues to advance. The court, however, is entitled to have the appellant clearly identify in one place which issues are being advanced for appellate review, even if some of them are substantively argued in the motion for relief rather than the memorandum.

- Finally, the rules should communicate that the appellant must adequately articulate its argument in a case-specific manner: "Whether made in the motion for relief alone or as supplemented by the memorandum, the form of the appellant's arguments must contain sufficient detail to enable meaningful appellate review; boilerplate argument will not suffice."

> We believe that this rule is essential to discourage the boilerplate "arguments" we have seen in the existing check-the-box notice of appeal. We remain ever mindful that, as appellate judges, we may not serve as advocates for a party. Presentation of the appellant's argument in a cursory manner pressures the court to abandon the role it is ethically obligated to play: that of a neutral arbiter.

3. **Prompt Notification of Mootness**.

It is a waste of time for appellate counsel and the court to work on a case only to learn that it has already been resolved in the trial court.

We propose to add a new subsection to Rule 604(h):

> If the issues raised on appeal become moot due to resolution of the case or otherwise, trial counsel for the party initiating the appeal must advise the clerk of the relevant appellate district of the basis for mootness via email within 24 hours, with a copy of the email sent to all trial and appellate counsel of record and self-represented parties. Unless the appellant's email communication expressly makes a request to dismiss the appeal, it shall be followed by a motion to voluntarily dismiss.

We suggest that appellate clerks, if reasonably possible, identify a dedicated email address in their respective districts to facilitate the easy exchange of these notifications. Offices routinely handling appellate representation for PFA appeals should also establish and share appropriate email contact information for the benefit of trial counsel.

4. **Eliminate the Deadline for Filing a Notice of Appeal.**

The current PFA appeal process is intended to be an accelerated one. The current rules provide that a PFA notice of appeal must be filed within 14 days. However, there is no purpose served by limiting a party's time for filing a notice of appeal. If the party is interested in a prompt filing, that option is always available. *Requiring* a prompt filing, however, may lead to appeals being taken simply because the time period is expiring. Litigants and counsel may wish to explore different options at the trial level before taking an appeal. A litigant should be permitted to file the appeal as soon as desired, but not sooner. There is nothing gained by forcing a filing before the litigant is strategically ready to do so.

The proposal is to eliminate any time deadline for filing a notice of appeal, mirroring the language of Rule 604(c) in Rule 604(h):

> After disposition of its motion for relief in the trial court, a party may initiate an appeal by filing a notice of appeal in the circuit court at any time prior to conviction.

5. **Extend the Time for Judicial Decision**.

The current deadline for the Appellate Court to decide a PFA appeal is established by the conclusion of the other deadlines which precede it: the clerk's preparation of the record (30 days from the notice of appeal); filing of the appellant's memorandum (within 21 days of the record); and filing of the appellee's memorandum (within 21 days of the foregoing). At the end of this 72-day period—which can be extended as a result of delays in the process—comes the requirement that the Appellate Court decide the case within 14 days. In other words, assuming no delays, the process runs 86 days from the filing of the notice of appeal.

What is conspicuous about this schedule is that most participants in the PFA appellate process get at least 21 days to complete their task, but the Appellate Court gets only 14 days to produce the ultimate object of the appeal: a decision. An appellate panel is tasked with reviewing the record; reviewing the memoranda; drafting a disposition; and conferring about the disposition. It can be a challenge to complete these tasks in 14 days' time. If the authoring judge is able to complete a draft near the end of the two-week period, there may be only a few days left for the other panel members to consider it. If those panel members happen to be out of the office on those days for a variety of reasons—administrative matters, educational conferences, committee work, oral arguments, etc.—it becomes difficult to complete the process in 14 days. This is especially true if the matter requires more discussion among the panel members. These time constraints present similar difficulties for administrative staff, the appellate research departments, the Reporter of Decisions, and the appellate clerks.

We believe that the timeline for conclusion of an appeal (*i.e.*, the court's decision) should be extended to allow 28 days, rather than 14 days, for the court to issue its decision; the current 86-day timeline for completion of the appeal would be extended to 100 days. We propose implementing this change as part of recommendation No. 6, below.

6. **Make the Disposition Deadline a Fixed Date.**

At the request of the Appellate Court clerks, we propose that the deadline for completion of the appeal be stated as a global deadline, rather than a deadline on the court's decision as measured from the event immediately preceding it (the filing of the appellee's memorandum). The appellate clerks have explained that it is important for them to input a disposition deadline into their case management system as soon as the appeal is docketed. When there are delays and extensions in the earlier part of the process (filing the record, report of proceedings, or memoranda), the appellate clerk must manually compute and adjust the court's new decision deadline in the case management system. The appellate clerks have explained that in some cases this has led to the docketing of erroneous dates. If the court's decision deadline is measured from the date of the notice of appeal, however, it will remain set regardless of other adjustments to the schedule which might precede it—unless the Court extends its own deadline for good cause. This is a technical issue arising from the configuration of the case management system.

In consideration of the appellate clerks' concerns, we agree with their recommendation to establish a fixed deadline for court disposition, rather than a date running from the completion of

the prior step in the appellate process. For a case that proceeds on schedule through the filing of memoranda, this gives the court 28 days in which to file its disposition as suggested in recommendation No. 5, above. We are aware that any delays in the earlier part of the schedule will effectively reduce the court's allotted time to prepare a disposition. As in the current rule, the deadline can still be extended for good cause.

This proposal would amend Rule 604(h)(5) as follows: "Except for good cause shown, the time from the filing of the notice of appeal until disposition shall not exceed 100 days."

7. **No Contested Dispositive Motions**.

PFA appeals are heard on an accelerated basis, so they must be as direct and efficient as possible. There is insufficient time in an accelerated schedule for motion practice. Thus, we propose adding the following to Supreme Court Rule 361(h):

> (6) Dispositive motions shall not be allowed in appeals under Rule 604(h) unless they are represented to the court as unopposed. Such dispositive issues may be raised in the parties' memoranda.

8. **Provide an Audio Record Only if a Transcript is Unavailable**.

The Supreme Court has already temporarily stayed the statutory requirement of a recording, where available, to be made part of the record in any appeal. It is currently an option if there is insufficient time to prepare a transcript. There seems to be only one circuit utilizing the option of using an audio record instead of a transcript.

If the Supreme Court's temporary order were to lapse and the statutory requirement given effect, an audio recording would be required, if available, even where a transcript is available. This is a lose-lose proposition: it adds work at the trial level to produce a record which is not valued at the appellate level. Judges and clerks almost uniformly find the audio records difficult to decipher and inefficient to work with; appellate attorneys have voiced similar concerns. We found no stakeholder who prefers the audio record over a transcript.

Our proposal—largely based on a proposal from the appellate court clerks—is to amend Rule 604(h)(3) as follows (with a change in section number):

> (4) Report of Proceedings. Court reporting personnel, as defined in Rule 46, shall certify and file a report of proceedings of hearings concerning pretrial detention or release held in the circuit court with the clerk of the circuit court within 21 days of the filing of the notice of appeal. The report of proceedings should not extend to proceedings not bearing on detention or release on conditions. If a transcript can be timely prepared, the court reporting personnel shall certify and file a transcript as the report of proceedings for purposes of the appeal. If a transcript cannot be timely prepared, and if the proceedings were recorded by means of an electronic recording system, the court reporting personnel may certify the recording as the report of proceedings for purposes of the appeal and file

the recording with a detailed table of contents as required by the Supreme Court of Illinois Standards and Requirements for Electronic Filing the Record on Appeal. Upon written request from the defendant or defendant's counsel, the clerk of the circuit court shall transmit a printed copy of any transcript filed by the court reporting personnel to a defendant whom the circuit court has found indigent. The clerk of the circuit court shall provide only one printed copy of the transcript without cost to the indigent defendant.

9. **Prevent Multiplicity of Appeals in the Same Case.**

The PFA provides for review of detention orders and orders of release on conditions at "each subsequent appearance before the court." 725 ILCS 5/110-5(f-5), 6.1(i-5). The statute makes clear that continuing reviews of detention and release conditions are anticipated, but it does not speak to the effect of an appeal. Similarly, Rule 604(h)(6) specifies that the "circuit court shall retain jurisdiction to proceed with the case during the pendency of any [PFA] appeal," but this does not clearly give the trial court authority to address the issues which are the *subject* of the appeal. We are aware of conflicting viewpoints on this matter. Some judges feel that the trial court lacks jurisdiction to revisit a matter which is in the process of appellate review; other judges feel that the trial court must have the authority to address changes in the circumstances that led to a prior detention decision. This issue must at some point be sorted out by judicial determination; if, however, the Supreme Court wishes to tackle the issue via Rule, we detail later in this report how it might be addressed.

Assuming for the present time, however, that a trial court may under some circumstances revisit the defendant's detention status or conditions of release even while a previous detention order is on appeal, the question then turns to the consequences for management of appeals that arise out of such interim reviews. It presents an administrative quagmire to have multiple appeals happening in the same case at the same time. New appeals could be consolidated with the existing appeal, but the timeline for decision would be continually pushed back. Work started on the first appeal would likely be rendered inapplicable, in whole or in part, as a result of developments in the second appeal.

Our proposal would be to limit appeals from the same party to a one-at-a-time affair by providing that "No appeal from a subsequent detention or release order may be taken while a prior appeal by the same party remains pending in the appellate court." This would not prevent an appeal from an interim detention order; combined with the elimination of the deadline for taking an appeal, this provision would simply delay a second appeal until the first one is concluded. It would, however, incentivize strategic thinking by trial counsel about which detention rulings to appeal.

10. **Clarify the Requirements of the Record**.

We are aware of cases in which the Appellate Court judges feel that the record is missing important items: the indictment or charging instrument is absent; there is reference to an earlier proceeding (*e.g.*, probable cause hearing or preliminary hearing) as evidence being considered in relation to detention, but no transcript of those hearings is provided. The common-law record may not contain

documents handed to the judge at the hearing or erroneously filed under a different but related case number.

With respect to missing items in the common law record, the appellate clerks believe that it is actually simpler for the clerk to provide a record of the entire case, which is a pushbutton exercise. It is more time consuming to select out only certain portions of the record. We therefore propose to amend Rule 604(h) by adding the following streamlined language:

> (5) Record. Within 30 days of the filing of the notice of appeal, the clerk of the circuit court shall file the record on appeal as required by Supreme Court Rule 324. Motions for extension of time to file the record on appeal are disfavored and will be granted only for good cause shown.

Additionally, the Cook County State's Attorney and Cook County Public Defender have made us aware of a difficulty presented when material is not only missing from the appellate record, but from the circuit clerk's record as well. Especially in these hurry-up hearings in the trial court, material is sometimes submitted to the trial judge that never finds its way into the clerk's record. Rule 329 allows for supplementation of the record by stipulation, but there is no consensus about whether it permits supplementation with documents never filed in the trial court. While the proper construction (or possible clarification) of Rule 329 needs to be addressed, its implications go well beyond just PFA appeals. We propose simply that the PFA appeal rules "point" toward Rule 329 as the authority on this question, with the hope that clarification on these issues might come via other avenues:

> (6) Supplement to the Record on Appeal. Supplementation of the record, including by stipulation, shall be according to Supreme Court Rule 329.

11. **Prevent Premature Appeals.**

We are aware of instances in which a notice of appeal was filed after the trial court's pronouncement of its detention decision, but before a written order was entered. Supreme Court Rule 272 already addresses this situation by providing that, where the court anticipates the entry of a written order following an oral pronouncement of decision, the written order constitutes the judgment of the court.

We note, however, that a notice of appeal filed prior to the written order in this circumstance would still be premature and ineffective. In contrast, Supreme Court Rule 303(a)(1) ensures that a premature notice of appeal in a civil case can still be effective:

> A notice of appeal filed after the court announces a decision, but before the entry of the judgment or order, is treated as filed on the date of and after the entry of the judgment or order.

We see no reason why this same language should not also be included in the criminal appellate rules, and we suggest that it might be added to Supreme Court Rule 606(b). We note that, while this change would affect PFA appeals, it would also affect every other type of criminal appeal unless the

Supreme Court limits it to the former. Consequently, the breadth of this proposal may exceed the charge of this Task Force.

12. **Provide for Prompt Issuance of the Mandate in PFA Cases.**

Every part of a PFA appeal is accelerated except the issuance of the mandate. We propose replacing the existing paragraph (c) of Rule 613 with the following, and redesignating the existing paragraph (c) as paragraph (d):

> **(c) Mandates in Rule 604(h) Appeals**. In appeals under Rule 604(h), the clerk of the reviewing court shall transmit the mandate of the reviewing court to the circuit court five court days after the entry of judgment unless the court orders otherwise *sua sponte* or pursuant to motion.

This accelerates issuance of the mandate while giving a party mulling further action time to request that it be stayed. We note that this would bring the entire appellate timeline through issuance of the mandate down from 121 days to 105 days, even with the additional time for judicial decision provided for by recommendations No. 5 and No. 6.

Resource-Dependent Changes

We recognize that, beyond the foregoing recommendations, other types of changes that the Supreme Court may pursue would be possible only if additional resources are available. As a group, the Task Force does not feel it is within our charge to make recommendations concerning budgetary matters; the Supreme Court is required to balance competing needs against finite financial resources in a host of matters beyond the PFA appeal context.

If, however, the Court determines that the resources are or could be available, the Supreme Court may wish to consider options along the following lines.

- **Additional Appellate Judges.** The core resource for any appeal are the judges who decide the cases. We understand that adding judges to the Appellate Court involves not just each judge's salary, but the costs attendant to having three clerks and an office. We note, however, that utilizing short-term recall judges to assist the overburdened districts—perhaps even on a purely remote basis—might avoid the cost of chambers while providing the ability to "stand down" if the need for such positions diminishes in the future. Whatever the mechanism, it is unreasonable to expect the Appellate Court to deal with an exploding volume of appeals without adding additional judicial resources.

- **Additional Research Staff.** A less costly and less ambitious approach would be to strengthen the research staffs of the appellate districts by adding new attorney positions. This would also allow these additional resources to be channeled according to their need among districts.

Additional Considerations for the Future

We hope that adoption of the measures suggested above will result in the ability to handle PFA appeals with appropriate deliberation, but we harbor doubts about whether they will be sufficient. If time proves that the burden of PFA appeals remains unsustainable even after these changes are implemented, the Supreme Court will likely need to address more fundamental changes to the PFA process. We have considered some possible changes of this nature, but we do not recommend them unless the need becomes more apparent.

- **Convert to a Petition for Leave to Appeal Model for PFA Appeals.** If necessary, the Supreme Court may in the future wish to consider converting the process for interlocutory PFA appeals to one similar to that under Supreme Court 306, which allows for interlocutory appeals by permission. Implementation of this approach would require substitution of the current language of Supreme Court Rule 604(h) with a system providing for a petition for leave and an answer; those two pleadings would stand as the briefing in the case.

  All petitions would be reviewed on their merits. Cases which do not show a plausible basis for reversal would be denied. Petitions which are accepted would continue to result in dispositions by opinion, unpublished Rule 23 order, or summary order.

  The advantages which might flow from a "petition for leave" approach are as follows:

  - The fact that not all cases would be accepted for appeal would cause counsel to be more strategic in their decisions to seek appellate review.
  - Each party filing for appeal would know, however, that its request was reviewed and considered by the Appellate Court. In other words, the process of evaluating a request for appeal is itself a form of judicial review. However, cases not presenting a clear legal or factual basis for review would not require the Appellate Court to issue a more complete dispositive order. This level of consideration is not dissimilar to the rather abbreviated review seen in New Jersey, where appeals are disposed of summarily, and often without a transcript.
  - This process specifically anticipates that cases presenting stronger factual or legal bases for reversal would still be resolved by more complete written dispositions in order to give better guidance to trial courts and attorneys.

- **Consider Whether Three-Judge Panels are Required for PLA Appeals.** To decide a case, all three appellate judges hearing it must review the briefs, the record, and the proposed disposition submitted by the authoring judge. The three-judge panel must then have the opportunity to confer and reach agreement or discuss their differences. In the normal appellate case, there is no specific deadline for completion of this process. In PFA cases, however, two weeks (or even four) is a very short time to accomplish it all. The question has therefore been posed: is there any room for something other than three-judge panels deciding these appeals?

Article VI, Section 5 of the Illinois Constitution provides, in pertinent part, as follows: "Each Appellate division shall have at least three Judges. Assignments to divisions shall be made by the Supreme Court. A majority of a division constitutes a quorum and the concurrence of a majority of the division is necessary for a decision." In interpreting this provision, the Illinois Supreme Court has stated as follows:

> Since a final judgment of the circuit court is appealable as a matter of right under the Illinois Constitution (Ill.Const.1970, art. VI, sec. 6), the dismissal of an appeal deprives an appellant of this constitutional right. Before such action may be taken, it is a further constitutional requirement that the motion to dismiss be considered by a division of three judges and the decision be concurred in by a majority. The fulfillment of these requirements must be affirmatively shown by the record.

Arlington City Cab Co. v. Reg'l Transp. Auth., 82 Ill. 2d 458, 461 (1980).

What is unclear is whether this provision is limited to "appeals as of right under the Illinois Constitution," such that it would not apply to a statutory or rule-based provision for an interlocutory appeal. If the volume of PFA appeals does not come under control, it may be advisable for the Supreme Court to consider whether summary dispositions of cases might be made by two rather than three judges, though three would still be required in the event of disagreement.

Proposals Considered But Not Adopted

A number of proposals were given careful consideration but not ultimately recommended.

- **Elimination of Petitions for Rehearing.** We considered whether to eliminate Petitions for Rehearing given the accelerated nature of PFA appeals. There was substantial opposition to this proposal from some stakeholders. Given that Petitions for Rehearing are not common and do not add greatly to the PFA appeal volume, we decided against recommending their elimination.

- **Inter-district Reassignment of Cases to Relieve Overburdened Districts.** We are aware of proposals to move cases from overburdened appellate districts to less burdened districts in order to relieve the critical level of cases in the former. The concept is that PFA appeals from discrete counties would be directed not to that county's appellate district, but to a different appellate district.

  This proposal received serious consideration, as it is one of the few to address the significant disparity in PFA appeal caseload between appellate districts. More than one stakeholder expressed concern about the viability of this proposal.

  One concern is the difficulty it would pose with respect to precedent. Our five appellate districts have divergent precedent on a number of PFA issues. Jumping from one district's precedent to another's could create confusion on both the appellate and trial levels.

We are also concerned about the fact that circuit clerks would be sending PFA appeals to one appellate district and all of their other appeals to another. We are concerned that this creates greater opportunity for error and confusion in the filing of appellate records.

Finally, there is a fundamental concern about public acceptance of PFA decisions in one community being reviewed by a court in a distant part of the state. The PFA has already proven to be a divisive issue, and we are concerned that such an arrangement would only create another point of public division.

- **Specify by Rule Trial Court Jurisdiction Over Detention During Appeal.** As noted above, there is no clear answer to the question of whether a trial court has jurisdiction to alter a detention order while the case is on appeal. Some feel that the filing of an appeal divests the trial court of jurisdiction over the particular matter on appeal. There is some support for this viewpoint in the law with respect to appeals of preliminary injunctions. A detention order is in some ways analogous to a preliminary injunctive order in that it is entered in the course of a case but with an ancillary purpose: in the case of a detention order, to address the necessity of detention prior to trial, and in the case of a preliminary injunction, to preserve the status quo until trial. There is authority to suggest that the filing of a notice of appeal from an interlocutory order prevents "the trial court from either changing or modifying the interlocutory order." *Home Sav. & Loan Association of Joliet v. Samuel T. Isaac & Associates, Inc*., 99 Ill. App. 3d 795, 804 (3d Dist. 1981).

  Such an interpretation, however, is problematic when it comes to detention orders. As a practical matter, it is difficult to see how a trial court could lack continuing jurisdiction to enforce the terms of a detention order. For example, if a defendant violates the conditions of pretrial release, the trial court must have the authority to at least consider revocation of release and conversion to pretrial detention; the court may even return the defendant to custody pending a determination of that issue. 725 ILCS 5/110-6(a). We can also imagine situations in which a defendant might obtain access to a residential program unavailable when detention was first ordered but which would provide a sound basis to change the defendant's detention status. In both of these examples, the change in circumstances would be the strongest argument for allowing the trial court the authority to act.

  We chose not to address this decision because it calls for a judicial interpretation of the law. Waiting for a case to arise in order to answer the question, however, is likely to lead to confusion and conflicting approaches. Consequently, the Supreme Court may choose to address the issue by the exercise of its rulemaking authority. Should it so choose, we offer the following alternatives for language to include in existing Rule 604(h)(6) (or, as renumbered from the above proposals, Rule 604(h)(9)) depending on which substantive approach the Supreme Court chooses:

  - If the Court chooses to **disallow** trial court jurisdiction during an appeal: "The trial court lacks jurisdiction to alter a prior detention or release decision, including the conditions of release, while an appeal from such order is pending."

- If the Court chooses to **allow** trial court jurisdiction during an appeal: "The trial court has jurisdiction to alter a prior detention or release decision, including the conditions of release, while an appeal from such order is pending."

- If the Court chooses to **allow** trial court jurisdiction during an appeal, but only upon a change in circumstances: "The trial court has jurisdiction to alter a prior detention or release decision, including the conditions of release, while an appeal from such order is pending, but only where there has been a material change in circumstances."

Conclusion

A defendant charged with a criminal offense is presumed innocent until proven guilty at trial. Although the law allows for the detention of the accused prior to trial, the PFA now strictly limits the terms under which such detention can be ordered. Because detention decisions implicate personal liberty, the PFA and the Supreme Court Rules recognize the importance of providing defendants with a right of meaningful appellate review of detention decisions. Similarly, because release prior to trial and the conditions of release can have a direct impact on public safety, the State is afforded the same right.

The decision to take an interlocutory appeal of a detention order, however, should be a strategic one, and not one to be made in rote manner. If an appeal is taken, it must be accomplished in a way that adequately articulates the legal basis for the appeal.

The burden of PFA appeals on the Appellate Court is unprecedented and unsustainable. The most promising way to lessen the burden is to prevent the Appellate Court from having to address appeals which are poorly conceived and inadequately argued. Trial counsel knows the case best, so we should ensure strategic thinking by trial counsel when it comes to the decision to file an interlocutory PFA appeal.

Respectfully submitted,

Hon. Mark M. Boie, Illinois Appellate Court, Fifth District

Hon. Eugene G. Doherty, Illinois Appellate Court, Fourth District

Hon. David W. Ellis, Illinois Appellate Court, First District

Hon. Margaret J. Mullen, Illinois Appellate Court, Second District

Hon. Lance R. Peterson, Illinois Appellate Court, Third District