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

No. 130866

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- ANTONIO COUSINS JR., Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, Fourth Judicial District, Nos. 4-24-0388 and 4-24-0389 There on appeal from the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois, Nos. 21 CF 834 and 21 CF 835. Honorable John P. Vespa, Judge Presiding.

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

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ARGUMENT

When the State fails to meet its burden to overcome the presumption of release under the Pretrial Fairness Act, the only remedy that will effectuate the legislative intent of the Act must be a hearing on the least restrictive conditions of release.

The State does not dispute the notion that reversal of the detention order and a remand for a hearing on conditions of release is the appropriate remedy in cases where a reviewing court finds the State failed to meet its burden of proof on an element of detention pursuant to Section 110-6.1 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/110-6.1 (West 2022)), as amended by Public Act 101-652 (eff. Jan. 1, 2023), commonly known as the Pretrial Fairness Act (Act). Indeed, the State agrees with Cousins that remanding for a second detention hearing in such cases would amount to an improper second bite at the apple. (St. Br. 9-10, 11) citing *People v. White*, 2024 IL App (1st) 232245-U. This Court should therefore conclude that where the State fails to present sufficient evidence at the initial detention hearing, the proper remedy is to reverse the court's detention order outright, placing the parties in the same position they would have been had the court properly denied the State's petition. See *White*, 2024 IL App (1st) 232245-U; see also *People v. Grayson*, 2024 IL App (4th) 241100-U, ¶ 62 (where the State fails to supply sufficient evidence at the first detention hearing, the proper remedy is to reverse the detention order outright and proceed to a hearing on conditions of release). This remedy is consistent with the Act's plain language providing a presumption of pretrial release, as well as its failure to provide an alternative remedy. (Def. Br. 7-8).

Further, the remedy of remand for a conditions of release hearing is appropriate here. In support of its verified petition in 21 CF 0834 and 21 CF 0835, the State represented that each of Cousins' three pending cases involved a non-probationable

charge, and listed the charges and potential sentences. (R. 65-67, 85). The State confirmed that Cousins has three prior felony convictions. (R. 65, 86). At no time during the detention hearing did the State provide a factual proffer in support of the charges. It presented no argument at the hearing that Cousins presents a real and present threat, nor did it discuss why no conditions of release could mitigate that threat. (R. 65-68, 80-97); See *People v. Cousins*, 2024 IL App (4th) 240388-U, at ¶ 17 (that "no proffer or argument" in support of the conditions of release element was raised by the State or addressed by the trial court at the detention hearing). Thus, the State failed to prove by clear and convincing evidence on requisite elements of pretrial detention. (Def. Memo 6-9); 725 ILCS 5/110-6.1 (a) (1) and (e)(1)

This Court should reject the State's argument that a second detention hearing is appropriate due to procedural deficiencies or because this was a "nontraditional" detention hearing. This argument has no basis in the plain language of the Act and, in any event, would constitute invited error by the State. Notably, the State does not argue that it presented sufficient evidence at the detention hearing or that this Court can affirm the trial court's detention order on that basis. Instead, it claims that Cousins relies on the "mistaken premise" that the appellate court found that it failed to meet its burden. (St. Br. 9)[1]. To the contrary, the appellate court correctly recognized that the State "did not make a proffer or argument on the matter of [Cousin's] detention," and that, "at no point was this issue of conditions raised by the State or addressed by the trial court." *Cousins*, 2024 IL App (4th) 240388-U, at ¶ 17.

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[1] In its statement of facts, the State asserts the appellate court "rejected" Cousins' contention that it did not meet its burden of proof. (St. Br. 6), citing *Cousins*, 2024 IL App (4th) 240388-U, at ¶¶ 17-18. In fact, the appellate court's order states that because it found a new hearing is required, "we need not consider defendant's remaining challenges to the detention order." *Id.* at ¶ 19.

It is a well-established principle of law that if a moving party fails to carry its initial burden of production on a motion, that motion must be denied as a matter of law. See generally *City of Chicago v. Illinois Workers' Compensation Com'n*, 373 Ill. App. 3d 1080 (1st Dist. 2007) ("failure of the party with the initial burden to make out a *prima facie* case requires the trial court to rule for the opposing party as a matter of law.") (internal citation omitted); see also M. Graham, Cleary & Graham's Handbook of Illinois Evidence, § 301.4 (8th ed. 2004). As applied here, given the appellate court's recognition that no evidence was elicited at the detention hearing on the element of conditions of release, the proper remedy is to reverse and remand for a conditions of release hearing due to the State's failure to carry its burden of proof. (Def. Br. 7-8); *Cousins*, 2024 IL App (4th) 240388-U, at ¶ 17.

The State, however, maintains that remand for a second detention hearing is appropriate here because it did not have the opportunity to meet its burden of proof due to the "nontraditional manner" in which the trial court conducted the detention hearing. (St. Br. 13). This argument is a red herring that should be rejected.

First, the State's argument that the detention hearing was "nontraditional" is premised entirely on a mention to that effect in the appellate court's order. See *Cousins*, 2024 IL App (4th) 240388-U, at ¶ 17 (stating, "[p]erhaps due, in part, to defendant's *pro se* status, the detention hearing proceeded in a nontraditional manner"). Yet, neither the State nor the appellate court cite any legal authority in support of that proposition. In fact, there is nothing in the Act that creates a specific statutory mandate as to how a detention hearing should proceed.

Rather, as this Court recently recognized in *People v. Mikolaitis*, 2024 IL 130693, ¶20,

> While section 110-6.1(e)(3) of the Code places the burden of proof on the State, the State's burden of proof does not require it to specifically address every conceivable condition or combination of conditions and argue why each condition does not apply. Absent from the statutory language outlining what the State must prove in order to detain defendant is any language requiring argument as to specific matters or language dictating what evidence or argument the State must present in attempting to meet its burden.

Id; 110-6.1(e)(1)-(3).

Thus, this Court in *Mikolaitis* recognized that the PFA contains no statutory language dictating what evidence or argument the State must present in attempting to meet its burden. As such, the Act does not contain support for the State's argument that the detention hearing in this case took place in an unauthorized manner that would warrant a second hearing.

Moreover, basic notions of fundamental fairness weigh against the State's argument that a procedurally irregular hearing acted to *deny* the State the opportunity to meet its burden of proof. As the State acknowledges, the appellate court found that there was "no proffer or argument" from the State on the question of whether lesser conditions could mitigate Cousins' alleged threat. (St. Br. 6, 10). Because section 110-6.1(e) places the burden of proof on the State to overcome the presumption of release, and the State chose to go forward with a petition to detain Cousins, it is axiomatic that the failure by the prosecutor to offer *any* proffer or argument must be held against State. 725 ILCS 5/110-6.1. While the State's brief places that failure of proof solely on the circuit court, arguing that it resulted from "the nontraditional manner" in which the court conducted the detention hearing, it is not too much for this Court to expect that prosecutors who are opting to seek discretionary detention voice an objection if they believe the trial court is somehow denying them the opportunity to meet their burden. (St. Br. 10).

Moreover, the State is asking this Court to make a finding – that procedural deficiencies at the detention hearing denied the State the opportunity to present evidence to meet its burden – that it never argued for or requested in either of the lower courts. Indeed, the record confirms the State never met its burden of proof on the elements of detention and never requested that the court allow it to make a record or the requisite factual proffer. When the circuit court was ultimately ruling on the detention petitions, the prosecutor stood by silently, and did not object or argue that the manner in which the court had proceeded had been unfair or had denied the State the opportunity to meet its burden under section 110-6.1(e). (R. 95-97). A party's invitation or agreement to the procedure later challenged on appeal goes beyond mere waiver, and is invited error. *People v. Harvey*, 211 Ill. 2d 368, 385 (2004).

Similarly, the State failed to argue in the appellate court that the detention hearing had not been in conformity with the Act or that the prosecutor had been denied the opportunity to present evidence or argument. Rather, in its Rule 604(h) Memorandum filed in the appellate court, the State argued that it presented sufficient evidence at the detention hearing, and that "[t]he court also conducted a full hearing and both the State and defendant were given the opportunity to present evidence and argument." (St. Memo. at 5). Accordingly, this Court should reject the State's argument that the manner in which the detention hearing proceeded denied it the opportunity to present evidence in support of its burden of proof, when it took the opposite position in the appellate court. See *People v. O'Neal*, 104 Ill. 2d 399, 407 (1984) (waiver applies to the State as well as the defendant in a criminal case).

This Court in *Mikolaitis* concluded that there is no language prohibiting the circuit court from considering evidence that "may come from a source other than the

State," and that it only makes sense that the court would consider all evidence before it that is relevant and helpful in determining whether the State has met its burden. 2024 IL 130693, at ¶ 22. Here, however, unlike in *Mikolaitis,* the State's brief does not identify any evidence elicited at the hearing on which the circuit court could have relied on for the conditions element. Thus, the State's focus on the appellate court's hypothetical acknowledgment that there *might* have been additional evidence *outside* of what was elicited at Cousins' detention hearing only serves to highlight the lack of any such evidence at the detention hearing that on which the appellate could have relied under *Mikolaitis* to find clear and convincing evidence on the element of conditions. (St. Br. 8, 12).

Finally, the State argues in the alternative that a remand to the circuit court to enter a new detention order is appropriate because the circuit court's oral and written orders invoke conflicting grounds for its detention decision. (St. Br. 14, Arg II). The State argues that because the circuit court's oral ruling found that Cousins posed a flight risk and did not expressly address detention, whereas the written order indicated detention was warranted under the willful flight standard, a remand for clarification is needed. (St. Br. 14).

However, this Court should hold the State's request for a remand for clarification of the circuit's court order is waived, where the State did not raise this argument in the appellate court and instead argued that the circuit court considered the applicable factors in section 110-5(a). It argued the court's reasoning in both the written order and at the detention hearing demonstrates that it ordered Cousins detained under the dangerousness standard. (St. Memo. at 3-5); *O'Neal*, 104 Ill. 2d at 407) (waiver applies to the State as well as the defendant in a criminal case). This Court should

enforce the State's waiver, and reject its new request for an unnecessary remand for clarification of the basis of the detention order that will serve no purpose other than to unjustly prolong Cousins' pretrial detention.

In conclusion, the parties agree that the proper legal remedy when the State fails to meet its burden of establishing the statutory criteria for detention under the Act is remand for hearing on conditions of release. (Def. Br. 7-8); (St. Br. 9-10, 11). Here, the State does not argue that there was sufficient evidence elicited at the detention hearing to support the circuit court's detention order, and its argument that the nontraditional nature of the detention hearing prevented it from meeting its burden of proof has no legal or factual basis. This Court should therefore conclude that where the State fails to present sufficient evidence at the initial detention hearing, the proper remedy is to reverse the court's detention order outright, placing the parties in the same position they would have been had the court properly denied the State's petition. Cousins therefore respectfully requests that this court remand his case for a hearing on conditions of pretrial release pursuant to sections 110-5(c) and 110-10(a).

CONCLUSION

For the foregoing reasons, Antonio Cousins, defendant-appellant, respectfully requests that this Court reverse the circuit court's detention order and remand for a hearing on conditions of pretrial release.

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 8 pages..

/s/ Lauren A. Bauser
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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 December 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.

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