DECEMBER. 2023 | #2 | www.MidwestAppeals.com |

SAFE-T ACT

FORFEITURE TRAPS
Common Mistakes Lead To Non-Starter Appeals

Learn How To Avoid This Malpractice Minefield

REMOVING BAIL CONDITIONS

Illinois Appellate Courts Are Already Split On What To Do With Defendants Arrested Before September 18, 2023

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Remember: This E-Summary is no subsitute for reading the caselaw youtself. Rely on this at your own peril.

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A QUICK THANK YOU NOTE

THIS IS NOT A TREATISE

Nor am I a professional publisher - but hey, sghr f t hcd hr cheap as free.

In this edition, you will g`ud sn dmct qd r nl d commentary from me, but whenever practical, I will let the decisions speak for themselves. So consider this more a "roundup" than a step-by-step guide.

There will be at least one more "roundup" coming out either late January or darly February on Orders of Protection. Whether I will have time to do further editions will depend on a lot of factors.

And by "a lot" I mean just one, time. Which there has been precious kssld in the last couple of months.

So I want to thank a colleague who responded to my LinkedIn plea for help and was kind enough to review an advanced copy to ensure the caselaw made sense.

As lawyers, we love caveats, so here's one einal warning; these summaries are no substitute for reading the actual decision.

So please don't be handing this cheat sheet to the judge as proof that you're right. It will play out about as well as expected.

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THE PROPER PROFFER: PEOPLE V. BATTLE

The Facts of *People v. Battle*, 2023 IL App (1st) 231838:

The defendant allegedly inpersonated someone on social media (for several months it appears) to lure the victim into meeting her. The vibtim turned out to be a former flame of the defendant. Once that meetup happened, the victim was beaten and robbed by the defendant and an accomplice.

Battle was charged with robbery (720 ILCS 5/18-1(a), aggravated vehicular hijacking (720 ILCS 5/18-4(a)(3), and aggravated battery in a public place (720 ILCS 5/12-3.05(c). The Rtate filed a petition to detain, at hearing the "pretrial report" scored Aattle 2 out of 6 on the new criminal activity scale and a 1 out of 6 on the failure to appear scale. Battle's attorney sought EM hmkdt necdsdmshnm, but the sch kcourt granted the state's petition-

This appeal followed:

SAFE-T ACT 101:

With new laws come cases that walk us though the statute. For the Safe-T Act, that case is *Battle*, which checks all the boxes:

It was a detainable offense-

The defendant's pretrial release posec a real and present threat to the safety of any person or persons or the community, based on the specific articulable facts of the case. (A threat to just one person qualifies)-

Evidence may '`mc v`r(presented by way of proffer. Meaning you don't need sworn statements, video, etc.

If defense counsel argues for EM, that's presumption the court considered less restrictive means if it's denied.

Finally, counsel for Battle received notice of the petition and said they were ready for hearing.

RECENT OPINION ROUND-UP

Three short and sweet summaries of issues that have arisen since the enactment of the Safe-T Act:

1

CASH BONDS ARE A THING OF THE PAST:

In *People v. Lippert,* 2023 IL App (5th) 230723, the defendant was arrested on August 31, 2023 for kidnapping, intimidation, and unlawful restraint. The trial court set bond at $100,000 and as a bond condition, ordered no contact with the victim.

When the new law took effect, the State did not file a motion to detain. The trial court, sua sponte, ordered the $100,000 bond remain ar ` condition for release. In reversing, the Appellate Court noted "[t]he only way monetary security could remain as a condition of the defendant's pretrial release was if the defendant made the election to stand on the original terms of his bond, set before the effective date of the Act." *Id*. at ¶ 12

2

RIGHT TO INPERSON HEARING:

In *People v. Gathing,* 2023 IL App (3d) 230491, the trial court conducted the pretrial detention hearing remotely over Defendent's objection. The Appellate Court reversed, stating "[t]he plain text of section 110-6 gives the accused the right to be physically present at a hearing at which pretrial release might be revoked.

Indeed, the Code requires an in-person hearing on such matters, subject to three exceptions: when (1) the accused waives his or her right to be physically present, (2) the court determines that an in-person hearing would endanger the physical health and safety of any necessary participant, or (3) the chief judge of the circuit orders the use of a two-way audio-video communication system due to operational challenges." *Id*. at ¶ 16

3

COCAINE IS A HELL OF A DRUG

In *People v. Johnson*, 2023 IL App (5th) 230714, a search warrant turns up guns and cocaine. The Rtate files for pretrial detention, and the defendant arguec that finding the drugs and gun, by themselves, doesn't reflect he's prone to committing a violent offense in the future.

The Appellate Court holds !violent needmrd! isn't the key inquiry. And notes sgd cdedmc`ms did not "cite any legal authority to support his proposed construction of the dangerousness finding required by the Code's provision on pretrial detention, and his arguments do not justify adopting such a construction. Reading into the statute the requirement that the State prove that the defendant will commit a violent offense would impose a material change in the plain language of the Code."

Id. at ¶ 21

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THE SPLIT OF AUTHORITY BETWEEN OLD AND NEW IS DISCUSSED IN WHITMORE:

The biggest controversy (so far) is what to do with Defendants who have been remanded or are otherwise out on bond under the old system.

725 ILCS 5/110-6.1(c) of the Code requires the State to file a petition either without notice "at the first appearance before a judge" or with notice "within the 21 calendar days *** after arrest and release ***." *Id*.

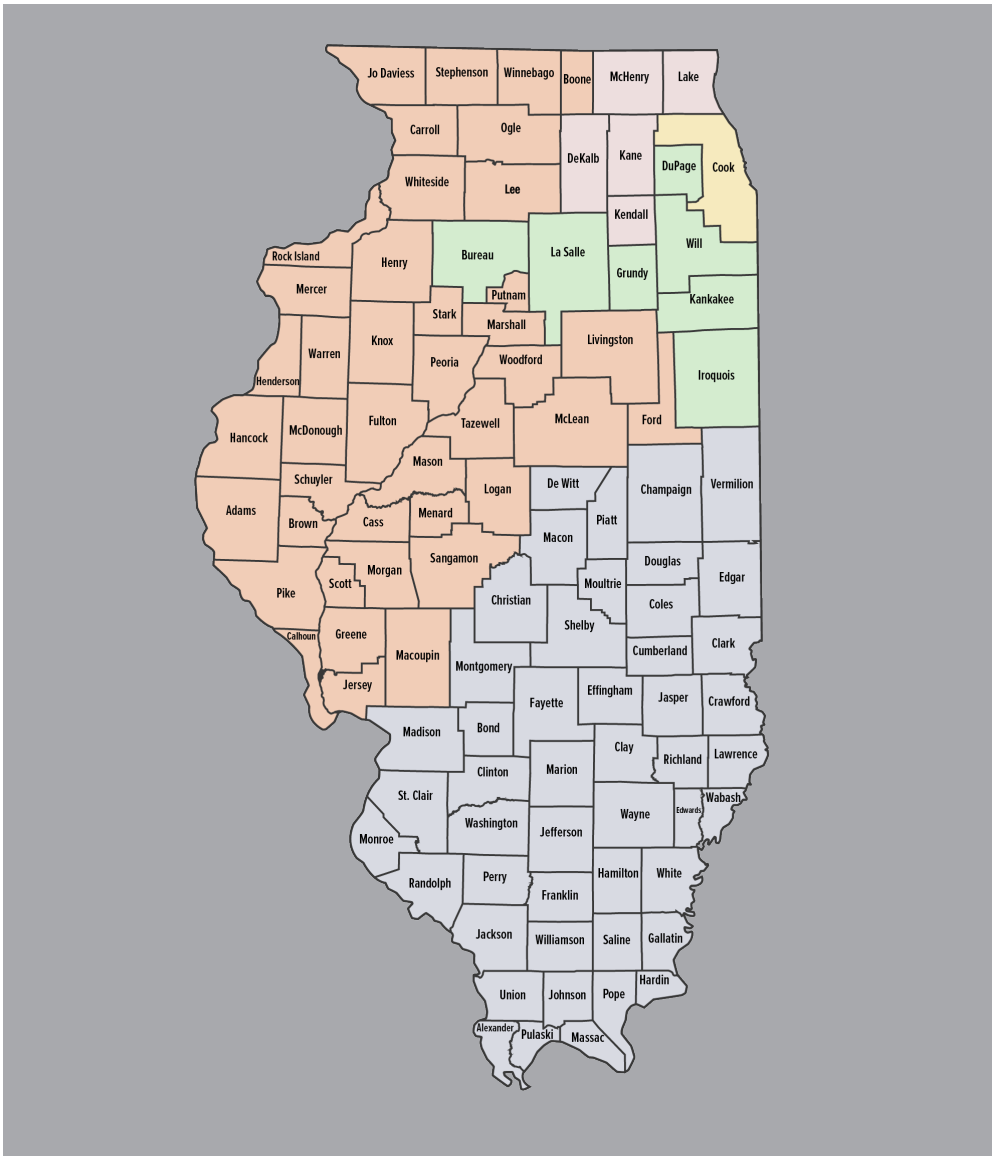
However to accomplish this for cases that are long in the tooth, the State would need Doc Brown's Time Machine[1].

The Fourth District in *Jones* held that defendants arrested and detained before the Act's effective date who remained cds`hmdc after being granted pretrial release on the condition that they pay monetary bail, sg`s a motion to deny pretrial release following the Act's implementation operates as a motion to increase the pretrial release conditions to the furthest extent. See *People v. Jones*, 2023 IL App (4th) 230837, ¶ 17

In contrast, the Fifth District has held that subsection 110-6.1(c)'s timing requirement applies to defendants who were previously ordered to be released on bail but that the State could seek pretrial detention through a hearing under subsection 110-5(e). *See People v. Rios*, 2023 IL App (5th) 230724, ¶¶ 12, 17; *People v. Vingara*, 2023 IL App (5th) 230698, ¶¶ 18, 22.

This result is in tension with the Code's language suggesting that section 110-6.1 is the method by which a court may detain a defendant. See 725 ILCS 5/110-2(e) ("This Section shall be liberally construed sn deedbst`sd the purpose of *** authorizing the court, upon motion of a prosecutor, to order pretrial detention of

\Please tell me you've seen *Back to the Future*.



the person under Section 110-6.1 ***.").

SO THE FIRST DISTRICT RESOLVES THIS IMPASSE BY HOLDING:

To give meaning to all the provisions in the Code, it seems that the timing requirement must be read to allow the State to petition to detain defendants who were ordered to be released on bond prior to the Act's effective date. Consequently, for individuals detained prior to the effective date of the Act who elect to seek relief under the amended Code—and only for such individuals—the State may file a petition for the denial of pretrial release "at the first appearance before a judge" after the effective date of the Act. 725 ILCS 5/110-6.1(c). See *People v. Witmore*, 2023 IL App (1st) 231807, ¶ 15

RULE 604(H) IS NOT A CATCH-ALL

In *People v. Cline*, , the trial court granted the cdedmc`msr motion to strike the Rtates amended petition for detention. The State Appealed, but the Appellate Court was forced to dismiss for want of it dr chbsnm

"[T]he order that the State wishes to appeal is the granting of the defendant's motion to strike the State's amended petition for detention. By its plain language, this is not one of the three orders identified in Rule 604(a) or (h) that the State may appeal from. See *People v. Cline* 2023 IL App (5th) 230849, ¶ 20.

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RULE 23 ROUNDUP:

A small collection of interesting outcomes within the last few months. Where appropriate, I will be paraphrasing directly from the decision:

PEOPLE v. DROKE, 2023 IL App (5th) 230753-U

The defendant filed a motion to remove his monetary bail conditions, and asked the court to hold a hearing within 48 hours of said request. The court denied the defendant's motion, but the Appellate Court reversed, holding that persons such as the defendant who had pretrial conditions, including the depositing of monetary security, set prior to the effective date of the Act, are entitled to request a hearing to determine the reasons for continued detention under sections 110-7.5(b) and 110-5(e) (725 ILCS 5/110-7.5(b), 110-5(e)). Section 110-5(e) indicates that the hearing should be held within 48 hours after the filing of the defendant's motion. *Id.* at ¶ 17

"CLEAR & CONVINCING" STANDARD OF PROOF AT DETENTION HEARGINGS:

Although the State must prove detention is the only option through "clear and convincing evidence," the standard of review on appeal is abuse of discretion. Or in English: that no other judge in Illinois would have done with YOUR judge did.

Here are three Rule 23's that demonstrate just how much evidence is "enough."

PEOPLE v. BOLDEN, 2023 IL App (5th) 230893-U

In *Bolden*, the state did nothing; it did not give a proffer nor did it oqdr dms facts or evidence regarding one of the defendant's charges - to include that the offense charged was a detainable offense. The judge denied pretrial release as to that charge, and the Appellate Court reversed.

PEOPLE v. FITCH, 2023 IL App (2d) 230381-U

A 71 year old defendant was charged with aggravated criminal sexual abuse of his neighbor. The Judge granted the state's motion to detain, and the defendant timely appealed.

Without minimizing the allegations, the evidence presented was that defendant fondled the victim on one occasion. No other instances of sexual contact before or after the alleged offense were presented. Nor did the court find that there was an ongoing relationship with the victim via electronic (or any other means), apparently accepting the defense's explanation that the texts they provided to the police were between defendant's wife and the victim, not him and the victim. And finally, the defendant had avoided contact with the victim and her family in the months that passed between when the police informed him there was a complaint under investigation and the date of his surrender on the warrant.

The Appellate court reversed, holding that "[i]f the Act's presumption that all persons charged with an offense are eligible for pretrial release is to have any meaning, more than is presented in this record must be required. *Id.* at ¶ 19

PEOPLE v. VILLAREAL, 2023 IL App (2d) 230381-U

A grand jury returned a 10-count indictment against the defendant related an alleged discharge of a firearm during an argument with his wife.

The court granted the state's petition to deny pretrial release, the defendant `ood`kdc, and the Appellate Court Affirmed:

The reviewing court noted the State proffered the statements of five witnesses in addition to the defendant's wife, and all of them stated that they either saw the cdedmc`ms fire a gun or heard gunshots. Multiple witnesses saw defendant enter the bar, argue with his wife, and discharge a firearm. The defendant, through counsel, admitted that he and his wife were at the bar and that she had an order of protection against him.

Although defense counsel proffered the wife's subsequent statement denying that defendant had a gun and another witnesses statement that the defendant never possessed a gun, those statements were directly at odds with the statements of uninterested third parties who saw him fire a gun or heard gunshots. @mc it's the trial court's job to resolve conflicts in the evidence (see *People v. Long*, 351 Ill. App. 3d 821, 824 (2004) (the trial court was in the best position to resolve conflicts in testimony related to its probable cause ruling)).

The trial court resolved the conflict in the evidence by reasonably believing the State's proffers, which were further supported by the recovery of three bullet casings behind the bar, matching the number and location of shots reportedly fired by defendant.

SAFE-T ACT STAIN?

Administrative Office of the Illinois Courts

December 11, 2023

OFFICE OF STATEWIDE PRETRIAL SERVICES RELEASES FIRST SETS OF DATA RELATED TO PRETRIAL LEGISLATION

The Office of Statewide Pretrial Services (OSPS) released today the first sets of data following implementation of Public Act 101-652 (previously called the Pretrial Fairness Act) on Sept. 18, 2023. OSPS currently serves 71 of Illinois' 102 counties. The Illinois Supreme Court created OSPS in 2021 to provide increased public safety and equality in the pretrial stage of the criminal justice system. The currently available data are available here and will be updated each month.

Since Sept. 18, OSPS has completed 4,375 investigations and 2,318 defendants have been ordered to OSPS supervision. There were 1,496 petitions for detention filed in OSPS involved cases filed on or after Sept. 18, with 976 petitions granted, 469 petitions denied and 51 petitions waiting to be heard.

There have been 1,231 pretrial-related appeals filed in the five Appellate Districts.

Appeals filed by Appellate District:

- 1st – 129
- 2nd – 165
- 3rd – 148
- 4th – 462
- 5th – 327

Top 5 counties by number of appeals:

- Cook: 129
- Winnebago: 119
- Rock Island: 94
- Will: 78
- Champaign: 77

OSPS and the Administrative Office of Illinois Courts are committed to transparency and the sharing of data to inform the public about the changes brought by PA 101-652. Data from additional counties will be available in 2024.

(FOR MORE INFORMATION, CONTACT: James Brunner, Public Information Officer of the Illinois Supreme Court at jbrunner@illinoiscourts.gov).

These are just the appeals filed from September 18 thru December 11th, 2023. These numbers are significant; in the 4th and 5th District this suggests a 20-25% increase to their docket.

FORFEITURE: APPELLATE COURT'S ARE GIVING LITIGANTS A PASS, BUT FOR HOW LONG?

I have not done a total head count of cases where forfeiture has been argued in Safe-T Act appeals, my shoot from the hip guess would be about 80%.

In the vast majority of cases, the Appellate Court has given a pass, with many of them inserting this caveat:

"[F]orfeiture is a limitation on the parties and not the reviewing court, and we may overlook forfeiture where necessary to obtain a just result or maintain a sound body of precedent." *People v. Holmes,* 2016 IL App (1st) 132357, ¶ 65. Given that the proceedings in the case occurred shortly after the effective date of the Act and that the State has not argued for forfeiture, we will address the merits of this argument. We caution that our decision to overlook forfeiture is limited to this specific case and ***we take no position on forfeiture in future cases."*** Rdd d-f -+ *People v. Cummings*+ 1/12 HK @oo '4sg(120//0,T+µ 04-

At s sgd 4sg Chrsqbs& cdbhrhnm hm *People v. Presley,* 1/12 HK @oo '4sg(12/86/ l `x ad ` v `qmhmf sn oq`bshshnmdq sg`s sgd eqdd o`rr v Hkr nnmbnl d sn `mdmc-

Next Issue:

The future is always a bit uncertain when it comes to publications. However there will be at least one more edition covering last year& decisions on No Contact/ No Stalking or it's more famous sibling, Orders of Protection.

Forfeiture and waiver are often confused for one another. So much so that in 2005, the Illinois Supreme Court devoted a footnote to the subject:

"'Waiver' strictly means the voluntary relinquishment of a known right. *Hill v. Cowan*, 202 Ill.2d 151, 158 (2002); accord Black's Law Dictionary 1611 (8th ed.2004). As explained by the United States Supreme Court in *United States v. Olano*, 507 U.S. 725 (1993), 'Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of the right, waiver is the 'intentional relinquishment or abandonment of a known right.' '*Olano*, 507 U.S. at 733.'" *People v. Blair*, 215 Ill. 2d 427, fn 2, (2005)"

The 5th Districts Decision in *Presley* cdunsdr a few paragraphs warning readers that the last few months of forfeiture generosity may soon come to an end:

> Generally, arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal.

"It is fundamental to our adversarial system that counsel object at trial to errors." *People v. Carlson*, 79 Ill. 2d 564, 576 (1980) (citing *People v. Roberts,* 75 Ill. 2d 1, 10 (1979)). Courts have generally held that the failure to object forfeits the right to consider the question on appeal. Id. A criminal defendant who fails to object to an error has forfeited the error, precluding review of the error on appeal. *People v. Herron*, 215 Ill. 2d 167, 175 (2005). The rationale behind this result is &because failure to raise the issue at trial deprives the circuit court of an opportunity to correct the error, thereby wasting time and judicial resources.& People v. Jackson, 2022 IL 127256, ¶ 15 (citing *People v. McLaurin,* 235 Ill. 2d 478, 488 (2009)). This forfeiture rule also prevents criminal defendants from sitting idly by and knowingly allowing an irregular proceeding to go forward only to seek reversal due to the error when the outcome of the proceeding is not favorable. *Id.*

Forfeiture is not absolute, and Rule 615(a) &embodies the exception&to the forfeiture rule. *Carlson*, 79 Ill. 2d at 576. &The plain-error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error in specific circumstances.&*People v. Thompson*, 238 Ill. 2d 598, 613 (2010). In order to consider an error that was not raised, the appealing party must request review under the plain-error doctrine. *People v. Hillier,* 237 Ill. 2d 539, 545 (2010). However, &[t]he plain error rule does not call for the review of all forfeited errors.&*Jackson*, 2022 IL 127256, ¶ 19.

The &plain error rule is a narrow exception to forfeiture principles.& Id. ¶ 18. Rule 615(a) limits application to &[p]lain errors or defects affecting substantial rights.& Application of the rule allows for review of a forfeited error under two possible prongs. *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). Under the first prong, plain-error review is applied when &a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error.&Id. at 565.

Under the second prong, plain-error review is applied when &a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.&*Id*. The burden of persuasion rests with the defendant. *Thompson*, 238 Ill. 2d at 613. A defendant that requests ok`hm dqqnq review must present an argument on how either of the two prongs of the plain-error doctrine are satisfied. *Id.* &[W]hen a defendant fails to present an argument on how either of the two prongs of the plain-error doctrine is satisfied, he forfeits plain-error review.&*Hillier*, 237 Ill. 2d at 545.!

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