

No. 18-

IN THE
SUPREME COURT OF THE UNITED STATES

MIGUEL ADORNO,
Petitioner
- vs -
MICHAEL MELVIN, Warden,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

APPENDIX

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APPENDIX

Appendix A: Opinion of the United States Court of Appeals for the Seventh Circuit
(December 1, 2017)

Appendix B: Order of the United States Court of Appeals for the Seventh Circuit
denying rehearing *en banc* (January 4, 2018)

Appendix C: Order of the United States District Court, Northern District of Illinois
(April 29, 2016)

Appendix D: Order of the Illinois Supreme Court (September 25, 2013)

Appendix E: Order of the Illinois Appellate Court (June 14, 2013)

Appendix A

Opinion of the United States Court of Appeals for the Seventh Circuit
(December 1, 2017)

876 F.3d 917
United States Court of Appeals,
Seventh Circuit.

Miguel ADORNO, Petitioner-Appellee,

v.

Michael MELVIN, Respondent-Appellant.

No. 16-2273

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Argued January 12, 2017

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Decided December 1, 2017

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Rehearing and Rehearing En

Banc Denied January 4, 2018 *

Synopsis

Background: Following affirmance on direct appeal of petitioner's state-court conviction for attempted murder and using a firearm, 2013 WL 3063703, he filed a petition for federal habeas relief. The United States District Court for the Northern District of Illinois, No. 14 C 00791, John J. Tharp, Jr., J., 2016 WL 1719788, granted the petition. The state appealed.

[Holding:] The Court of Appeals, Sykes, Circuit Judge, held that state trial judge's comments to jury during voir dire about reasonable doubt standard did not invite jury to convict on a lesser standard, as would violate petitioner's due process rights.

Reversed.

Bauer, Circuit Judge, filed concurring opinion.

*918 Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 14 C 00791—John J. Tharp, Jr., Judge.

Attorneys and Law Firms

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Garson Fischer, Attorney, Office of the Attorney General, Chicago, IL, for Respondent-Appellant.

Before Bauer, Sykes, and Hamilton, Circuit Judges.

Opinion

Sykes, Circuit Judge.

Miguel Adorno, an Illinois prisoner, was convicted of attempted murder using a firearm. On direct appeal he challenged certain remarks by the trial judge about the state's burden of proof. More particularly, he argued that the judge's comments—delivered impromptu during voir dire—invited the jury to convict on less than the reasonable-doubt burden of proof required by the Constitution's guarantee of due process of law. He also claimed that the judge's remarks violated state law. The Illinois Court of Appeals addressed only the state-law argument and rejected the claim; the court made no reference to federal law. Adorno then sought federal habeas relief under 28 U.S.C. § 2254. Applying de novo review, the district judge found a due-process violation and granted the petition.

[1] [2] We reverse the judgment. Because the state court did not specifically address Adorno's federal claim, our first task is to decide whether the *Richter* presumption applies. See *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). When a state prisoner presents a federal claim to a state court and the court denies relief without explanation, *Richter* requires a federal habeas court to presume that the state court adjudicated the claim on the merits. *Id.* at 99, 131 S.Ct. 770. The presumption triggers deferential review under § 2254(d); the federal court must give the state-court judgment the benefit of any arguments or theories that *could have* supported the state court's judgment. *Id.* at 102, 131 S.Ct. 770.

The *Richter* presumption is rebuttable, but we do not need to decide whether it has been rebutted here. Even under de novo review, Adorno's claim fails. There is no reasonable likelihood that the jury convicted him on less than the reasonable-doubt standard.

I. Background

While attending a house party in the Hermosa neighborhood in Chicago, Adorno was accused of stealing an iPod and a laptop from one of the hosts. After the laptop was retrieved from the back seat of the car Adorno arrived in, he and his friends were asked to leave. A fistfight ensued between Adorno and Jeffery Nagamine, the host's brother. According to several witnesses, Adorno threatened to kill Nagamine and retrieved a gun from his friend's car to make good on the threat. As the other guests retreated back into the house, Adorno fired several shots into the crowd. The partygoers were lucky; no one was killed and only one person was hit, sustaining a gunshot wound to the arm.

Adorno was arrested and initially told police that he knew nothing about the house party. He claimed to have spent the entire evening with his mother. Later Adorno admitted his involvement in the shooting but claimed that he fired his gun at the crowd in self-defense. The State's Attorney charged him with attempted murder in the first degree while armed with a firearm.

The case proceeded to jury trial. During voir dire, the judge preliminarily informed the venire about the presumption of innocence and the burden of proof in criminal cases. He told the prospective jurors that Adorno was presumed innocent and that the presumption could be overcome only if the state proved his guilt beyond a reasonable *920 doubt. The judge explained that Adorno was not required to present any evidence on his own behalf but could instead rely entirely on the presumption of innocence. The judge then discussed the standard of proof in greater detail:

Illinois does not define reasonable doubt, but any of you who may have sat on a civil jury there's a preponderance of the evidence, reasonable doubt is the highest burden of proof in our country and in our [s]tate. Those of you who may have sat on civil cases, preponderance of the evidence, if you look at this like a scale, all you have to do is tilt it. So the definition of preponderance of the evidence is, it's more likely than not that the event occurred.

Again, Illinois doesn't define reasonable doubt. That's up for you to decide in words, but in analogy to the scale thing, you would have to tip it like this, so that would be some insight into what proof beyond a reasonable doubt would be.

The last sentence in this passage implies that a nonverbal hand gesture accompanied the judge's "scale" analogy, but no record was made of it.

A jury was seated, and at the close of the evidence, the judge read formal instructions about the presumption of innocence, the elements of the charged crime, and the state's burden to prove every element beyond a reasonable doubt. The jury convicted Adorno as charged, and the judge imposed a sentence of 30 years.

On direct appeal Adorno challenged the judge's attempt to explain the reasonable-doubt standard during voir dire. Citing *Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994), he argued that the judge's remarks invited the jury to convict on less than the reasonable-doubt standard required by the federal Constitution's guarantee of due process. His argument relied almost exclusively on federal law, but he also alluded to Illinois common law, which precludes trial judges from defining reasonable doubt, and to *Illinois Supreme Court Rule 431(b)*, which requires judges to verify that the jurors understand and accept the reasonable-doubt standard. He raised other challenges as well, though none are relevant here.

The state appellate court affirmed. In evaluating Adorno's challenge to the voir dire remarks by the judge, the court relied exclusively on state law and treated the claim as one alleging ordinary trial error rather than an error of constitutional magnitude. That is, the court applied the state-law framework for evaluating improper judicial comments at trial and concluded that because the remarks were not prejudicial, Adorno was not entitled to relief.

Adorno skipped state postconviction proceedings and moved directly to federal court seeking habeas relief under § 2254, repeating his federal constitutional challenge to the judge's voir dire remarks. The district judge determined that the state court had not adjudicated Adorno's federal claim on the merits and thus reviewed it de novo, without the deference normally required by § 2254(d)(1). The judge concluded that the state trial judge's remarks improperly invited the jury to convict on a constitutionally insufficient standard of proof. Accordingly, the judge granted Adorno's § 2254 petition and ordered Illinois to release him or file notice within 30 days of its intent to retry the case against him. The State appealed.

II. Discussion

[3] [4] [5] We review the judge's § 2254 ruling de novo. *Thompkins v. Pfister*, 698 F.3d 976, 983 (7th Cir. 2012). A state court's decision on a prisoner's federal claim ordinarily is entitled to substantial deference on federal habeas review; we will not set it aside unless it “was contrary *921 to, or involved an unreasonable application of, clearly established Federal law” or “was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding.” 28 U.S.C. § 2254(d)(1), (2). The AEDPA¹ standard is deliberately difficult, setting a high bar for relief; the prisoner must demonstrate that the state court's ruling was “so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Richter*, 562 U.S. at 103, 131 S.Ct. 770.

[6] But deferential review under AEDPA “applies only to claims that were actually ‘adjudicated on the merits in [s]tate court proceedings.’” *Harris v. Thompson*, 698 F.3d 609, 623 (7th Cir. 2012) (quoting § 2254(d)). For all other claims, we apply the pre-AEDPA standard of 28 U.S.C. § 2243 and review de novo. *Id.*

In its decision resolving Adorno's direct appeal, the Illinois Appellate Court did not explicitly address the federal claim. Though Adorno's briefing squarely challenged the trial judge's voir dire remarks on federal due-process grounds, the court made no mention of federal law in its opinion. The court's only hint of a nod to a claim based on federal law is a single sentence that contains faint echoes of the *Victor* standard: “We do not believe that the court's comments during voir dire could reasonably be construed as inviting the jury to convict [the] defendant based on less than the reasonable doubt standard.”

Even when a federal claim is wholly unaddressed by the state court, however, a question remains whether it was “adjudicated on the merits” for purposes of § 2254(d). Where, as here, a state prisoner adequately presents a federal claim to a state court and the court denies relief, the Supreme Court has instructed us to presume that the federal claim was adjudicated on the merits “in the absence of any indication or state-law procedural principles to the contrary.” *Richter*, 562 U.S. at 99, 131 S.Ct. 770; see also *Keith v. Schaub*, 772 F.3d 451, 454 (7th Cir. 2014). In

Johnson v. Williams, 568 U.S. 289, 292, 133 S.Ct. 1088, 185 L.Ed.2d 105 (2013), the Court held that the *Richter* presumption applies in cases like this “when a defendant convicted in state court attempts to raise a federal claim, either on direct appeal or in a collateral state proceeding, and a state court rules against the defendant and issues an opinion that addresses some issues but does not expressly address the federal claim in question.” See also *Lee v. Avila*, 871 F.3d 565, 571 (7th Cir. 2017).

[7] Although “the *Richter* presumption is a strong one that may be rebutted only in unusual circumstances, it is not irrebuttable.” *Williams*, 568 U.S. at 302, 133 S.Ct. 1088. The presumption may give way if “the state court relies exclusively on state law, and the state standard is less protective than the federal one”; or if the governing federal standard was simply “ ‘mentioned in passing in a footnote or ... buried in a string cite’ ”; or if the prisoner can show that the claim was overlooked “ ‘as a result of sheer inadvertence.’ ” *Brady v. Pfister*, 711 F.3d 818, 825 (7th Cir. 2013) (quoting *Williams*, 568 U.S. at 301–03, 133 S.Ct. 1088). We do not need to decide whether the *Richter* presumption has been rebutted here; the due-process claim fails on plenary review.

[8] [9] [10] The Fourteenth Amendment's guarantee of due process includes the requirement in criminal cases that the state prove every element of a charged offense beyond a reasonable doubt. *922 *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). As a matter of Illinois common law, trial judges are instructed not to attempt to define reasonable doubt for the jury. *People v. Thomas*, 191 Ill.App.3d 187, 138 Ill.Dec. 568, 547 N.E.2d 735, 741 (1989). In contrast, “the [federal] Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course.” *Victor*, 511 U.S. at 5, 114 S.Ct. 1239. Accordingly, the voir dire remarks by the trial judge in Adorno's case will amount to federal constitutional error only if “there is a reasonable likelihood that the jury understood the [remarks] to allow conviction based on proof insufficient to meet the [reasonable-doubt] standard.” *Id.* at 6, 114 S.Ct. 1239.

[11] There is no reasonable likelihood of that here. The trial judge expressly recognized that under Illinois law there is no need for a judicial definition of the term “reasonable doubt.” He told the prospective jurors that it was “up for you to decide in words” what the term means.

That was not, as Adorno argues, an invitation to the jury to convict on some lesser standard of proof.

The judge's reference to the civil burden of proof using the metaphor of a scale likewise did not invite the jurors to convict on a constitutionally insufficient standard of proof. The judge invoked the civil standard solely for the purpose of distinguishing it from the criminal reasonable-doubt standard, explaining that proof by preponderance of the evidence is insufficient for criminal cases. And he emphasized that “reasonable doubt is the highest burden of proof in our country and in our [s]tate.” Finally, at the close of the case, the judge formally instructed the jury on the presumption of innocence, the elements of the offense, and the state's burden to prove each of the elements beyond a reasonable doubt. The propriety of those instructions was and is unchallenged.

[12] The judge's voir dire comments must be viewed “in the context of the entire charge,” not in isolation. *Jones v. United States*, 527 U.S. 373, 391, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999). Taken as a whole, nothing in the judge's remarks creates a reasonable likelihood that the jury “underst[ood] the phrase [‘reasonable doubt’] to mean something less than the very high level of probability required by the Constitution in criminal cases.” *Victor*, 511 U.S. at 14, 114 S.Ct. 1239. Put slightly differently, the judge's remarks do not suggest that the jurors would have understood that they were free to convict Adorno on less than proof beyond a reasonable doubt. Because the

conviction was not tainted by a due-process violation, the order granting habeas relief was unwarranted and is

REVERSED.

Bauer, Circuit Judge. Concurring.

Attempts at defining reasonable doubt have always occasioned problems. Both “reasonable” and “doubt” are words in common usage and are constantly used in the language of law. No matter how glib the speaker, it is necessary to use other words that require further definition in trying to refine the terms “reasonable” or “doubt.” The language used by this learned trial judge makes that point clearly.

Illinois Pattern Instructions and the Seventh Circuit Criminal Instructions make this point emphatically. Judges and lawyers must accept the fact that we select jurors who presume to be reasonable and who understand through years of normal living what is meant by “doubt.”

***923** It is with a sore heart then, that I concur in the opinion.

All Citations

876 F.3d 917

Footnotes

* Circuit Judge Joel M. Flaum did not participate in the consideration of this petition for rehearing en banc.

1 The Antiterrorism and Effective Death Penalty Act of 1996.

Appendix B

Order of the United States Court of Appeals for the Seventh Circuit
denying rehearing *en banc* (January 4, 2018)

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 4, 2018

Before

WILLIAM J. BAUER, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 16-2273

MIGUEL ADORNO,
Petitioner-Appellee,

v.

MICHAEL MELVIN,
Respondent-Appellant.

Appeal from the
United States District Court for the
Northern District of Illinois,
Eastern Division.

No. 14 C 00791

John J. Tharp, Jr.,
Judge.

ORDER

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc,* and all of the judges on the original panel have voted to deny rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is **DENIED**.

* Circuit Judge Joel M. Flaum did not participate in the consideration of this petition for rehearing en banc.

Appendix C

Order of the United States District Court, Northern District of Illinois
(April 29, 2016)

2016 WL 1719788

Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois, Eastern Division.

Miguel Adorno, Petitioner,

v.

Guy Pierce,¹ Respondent.

Case No. 14 C 00791

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Signed 04/29/2016

MEMORANDUM OPINION AND ORDER

John J. Tharp, Jr., United States District Judge

*1 The petitioner, Miguel Adorno, a prisoner at the Pontiac Correctional Center, brings this *pro se* habeas corpus petition pursuant to 28 U.S.C. § 2254 challenging his criminal conviction in the Circuit Court of Cook County for attempted murder in the first degree while armed with a firearm. The evidence at Adorno's jury trial showed that he shot a gun during a fight at a party and struck a victim in the arm. *Illinois v. Adorno*, 2013 IL App (1st) 110028-U, 2013 WL 3063703, at *1 (Ill. App. Ct. June 14, 2013). Adorno claims that the trial judge violated his due process rights by giving jury instructions that diminished the State's burden of proof. This Court concludes that the Illinois Appellate Court's decision on this issue was contrary to clearly established federal law as set forth by the Supreme Court of the United States, see 28 U.S.C. § 2254(d)(1), and that under the resulting *de novo* review, the trial judge improperly instructed the jury on "reasonable doubt" in a manner that created a reasonable likelihood of conviction based on a constitutionally insufficient degree of proof. Therefore, the petition for a writ of habeas corpus is granted.

A. Background

At the start of jury selection at Adorno's trial, the judge gave the venire a number of preliminary instructions which, he explained, were not final or complete. Trial Tr. K-14, ECF No. 13-4. The judge explained that the jury's full instructions would come after all the evidence and final arguments from the lawyers at the end of the

case. *Id.* The trial judge's initial instructions included those required by Illinois Supreme Court Rule 431, which provides that a trial judge must ask prospective jurors whether they understand and accept:

- (1) that the defendant is presumed innocent of the charge(s) against him or her;
- (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt;
- (3) that the defendant is not required to offer any evidence on his or her own behalf; and,
- (4) that if a defendant does not testify it cannot be held against him or her.²

Ill. S. Ct. R. 431(b); see also *Illinois v. Zehr*, 469 N.E.2d 1062 (Ill. 1984); *Illinois v. Kidd*, 7 N.E.3d 188, 195 (Ill. App. Ct. 2014) (explaining that Rule 431 is a codification of the Supreme Court of Illinois's *Zehr* decision). There is no requirement that the trial judge use specific language when examining the prospective jurors regarding the Rule 431 principles. *Kidd*, 7 N.E.3d at 199 (citations omitted).

The trial judge explained that a defendant is presumed innocent, that the presumption stays with him throughout the trial, and that it is not overcome unless the evidence convinces the jury that the defendant is guilty beyond a reasonable doubt. Trial Tr. K-16, ECF No. 13-4. The judge also explained that the burden of proving the defendant guilty beyond a reasonable doubt is on the State, and that a defendant is not required to prove his innocence. *Id.* at K16 – K18. The judge then said the following about reasonable doubt:

*2 Illinois does not define reasonable doubt, but any of you who may have sat on a civil jury there's a preponderance of the evidence, reasonable doubt is the highest burden of proof in our country and in our State. Those of you who may have sat on civil cases, preponderance of the evidence, if you look at this like a scale, all you have to do is tilt it. So the definition of preponderance of the evidence is, it's more likely than not that the event occurred.

Again, Illinois does not define reasonable doubt. That's up for you to decide in words, but in analogy to the scale thing, you would have to tip it like this, so that would

be some insight into what proof beyond a reasonable doubt would be.

Id. at K17 – K18. Nothing in record explains what the judge did, or referred to, when he told the jury that “you would have to tip it like this.”

At the end of the trial, the judge read the final jury instructions and also provided the jury with a copy of the instructions. The jury instructions again explained that Adorno was presumed innocent and that the burden was on the State to prove each element of the charges beyond a reasonable doubt. Trial Tr. N30-N31, ECF No. 13-4. The final jury instructions made no mention of the preponderance of the evidence standard or scales, and did not offer any further explanation of the “beyond a reasonable doubt” standard. Following deliberations, the jury found Adorno guilty. The trial judge sentenced Adorno to 15 years’ imprisonment for attempted murder, and a mandatory consecutive 15-year sentence for discharging the firearm. [Adorno, 2013 IL App \(1st\) 110028-U, 2013 WL 3063703, at *1.](#)

Adorno filed a direct appeal raising three issues, including the argument that the trial judge’s attempt to explain the reasonable doubt standard during *voir dire* violated Adorno’s due process rights. Appellant Br. 21-26, ECF 13-1. Relying upon [Victor v. Nebraska, 511 U.S. 1 \(1994\)](#), Adorno argued that there was a reasonable likelihood that the jury understood the trial judge’s instructions to allow conviction based on proof insufficient to meet the reasonable-doubt standard set forth in [In Re Winship, 397 U.S. 358 \(1970\)](#). *See id.*

Although the Illinois Appellate Court agreed that the trial judge’s remark on the meaning of reasonable doubt was improper, it rejected Adorno’s argument that the improper instruction had deprived him of due process. [Adorno, 2013 WL 3063703, at *10.](#) The appellate court noted that Adorno did not contemporaneously object or move for a new trial because of the trial judge’s definition of reasonable doubt and so held that a plain-error standard should be applied in evaluating the issue. The appellate court concluded that the trial judge’s comments on the reasonable-doubt standard did not constitute reversible error. The court explained: “For comments by a trial judge to constitute reversible error, the defendant must show that the remarks were prejudicial and that he was harmed by the comments.” [Adorno, 2013 WL 3063703, at *9](#) (citing [Illinois v. Heidorn, 449 N.E.2d 568,](#)

[573 \(Ill. App. Ct. 1983\)](#)). It further stated: “The verdict will not be disturbed unless the judge’s remarks constituted a material factor in the conviction or unless prejudice to the defendant appears to be their probable result.” *Id.* at *10.

After reproducing the trial judge’s offending comments about the meaning of “reasonable doubt,” the appellate court noted that “the trial court made subsequent pre-and post-trial admonishments to the jury that its comments were to be disregarded as well as anything except the evidence received in the case.” *Id.* at *10. It quoted the judge’s final jury instructions on reasonable doubt: “The defendant is presumed to be innocent of the charges against him. This presumption remains with him throughout every stage of the trial and during your deliberations on the verdict and is not overcome unless from all the evidence you are convinced beyond a reasonable doubt that he is guilty. The State has the burden of proving the guilt of the defendant beyond a reasonable doubt and this burden remains on the State throughout the case. The defendant is not required to prove his innocence.” *Id.*

*3 The appellate court then concluded the judge’s comments during *voir dire* could not “reasonably be construed as inviting the jury to convict defendant based on less than the reasonable doubt standard.” *Id.* This conclusion is not further explained; the appellate court did not address the accuracy of the definition given, the comparison to the preponderance standard, or the invocation of scales as a representation of reasonable doubt. “Moreover,” the court concluded, “the subsequent remarks cured any possible error” and Adorno had “not shown that he was prejudiced by the comments.” *Id.* Finally, the court said: “We conclude, in view of the overwhelming evidence of defendant’s guilt, that the trial court’s comments while improper and should not have been made, had no effect on the verdict of the jury and constituted harmless error.” *Id.* The appellate court therefore affirmed the conviction.

Adorno petitioned for leave to appeal to the Supreme Court of Illinois, which denied his request. [Illinois v. Adorno, No. 116316, 996 N.E.2d 16 \(Ill. Sept. 25, 2013\)](#) (Table). Adorno did not file a post-conviction petition in Illinois state court; he proceeded directly to filing his federal petition for a writ of habeas corpus. That petition raises only one claim: that his right of due process was violated by the judge’s erroneous definition of reasonable

doubt, which created a reasonable likelihood that the jury convicted on a lesser degree of certainty than required by the Constitution.

B. Discussion

Because the state appellate court adjudicated Adorno's claims on the merits, this Court's review of the habeas corpus petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). This Court may not grant habeas relief unless the state court's decision on the merits was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or the state court decision is based on an unreasonable determination of facts. 28 U.S.C. § 2254(d); *McManus v. Neal*, 779 F.3d 634, 649 (7th Cir. 2015).

1. Forfeiture of Procedural Default Defense

Before turning to the merits of Adorno's due process claim, the Court notes that the state appellate court, the last state court to rule on merits of Adorno's claim, held that the claim was not properly preserved in the trial court through a contemporaneous objection and timely post-trial motion. *Adorno*, 2013 WL 3063703, at *8. Despite Adorno's failure to properly preserve the issue, the appellate court went on to review the claim for plain error, and also discussed it within the context of ineffective assistance of counsel.³ *Id.* at *8-*11.

The state court's finding that the claim was not properly preserved at trial, resulting in plain error review, created a procedural default defense for the respondent. *Gray v. Hardy*, 598 F.3d 324, 329 (7th Cir. 2010). However, the State failed to assert the procedural default, instead answering the claim on the merits. Procedural default is an affirmative defense that is forfeited if not raised in response to a habeas petition. *Cheeks v. Gaetz*, 571 F.3d 680, 685 (7th Cir. 2009) (citation omitted). Therefore this Court will address the merits of Adorno's claim that he was deprived of his right of due process at trial because the jury was erroneously instructed about reasonable doubt.

2. Governing Federal Law

As a threshold issue, this Court agrees with the petitioner that the trial judge's comments on reasonable doubt are appropriately viewed as part of the jury instructions, although they were made to the entire venire and they

were preliminary in nature. The context of the remarks compels this conclusion. After welcoming the venire and questioning them on their familiarity with the parties, lawyers, and potential witnesses in the case, the trial judge stated:

*4 Ladies and gentlemen, I now want to talk to you about some principles of law that apply to all criminal cases. These are not your final nor complete instructions. Those will come after you've heard all of the evidence and the final arguments of the lawyers. When the time for giving instructions come [sic], I will read them to you, and will get them in writing along your [sic] verdict forms for your consideration.

Trial Tr. K14, ECF No. 13-4. The trial judge then went on to explain: "You must follow the law as I give it to you and you may not use your own ideas of what the law should be." The judge then set forth the charges against Adorno, explained that he was presumed to be innocent, and stated that the presumption of innocence could not be overcome unless the jury was convinced beyond a reasonable doubt that he was guilty. *Id.* at K15-K16. The judge continued with the preliminary instructions, including the required Rule 413 statements, which is the context in which the judge gave his explanation of the reasonable-doubt standard.

Inexplicably, however, the Illinois Appellate Court characterized the judge's statements on reasonable doubt not as instructions of law but as general comments by the judge. The appellate court then analyzed the statements not by reference to constitutional standards applicable to attempts to define the meaning of reasonable doubt but to state law applicable to assessing whether stray comments made by a judge during the course of a trial may have prejudiced a party.⁴ In defining reasonable doubt for the jury, however, the trial judge was not making spontaneous, offhand comments to the jurors; he was instructing them on the meaning of the most fundamental concept in our criminal jurisprudence. These were not stray remarks; they were instructions of law—even if not "complete" or "final"—provided by the judge so that jurors could understand the questions put to them during voir dire pursuant to Rule 431. Indeed, the trial judge

prefaced his remarks by saying that he was giving the prospective jurors “principles of law” to apply. The State does not disagree with this view, and it does not argue that the statements about reasonable doubt should be reviewed simply as a comment by the trial judge. Resp. Br. 9-10, ECF No. 12. It too treats the statements as part of the jury instructions and applies the corresponding line of authority. *See id.*

Adorno, therefore, has properly identified the clearly established federal law that applies to his claim that the instructions on reasonable doubt violated his right of due process. “[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *Winship*, 397 U.S. at 364; *see also Victor v. Nebraska*, 511 U.S. at 5. A jury must therefore be instructed on the “necessity that the defendant’s guilt be proved beyond a reasonable doubt,” but “the Constitution does not require that any particular form of words be used in advising the jury of the government’s burden of proof.” *Victor*, 511 U.S. at 5 (citing *Jackson v. Virginia*, 443 U.S. 307, 320 n.14 (1979); *Taylor v. Kentucky*, 436 U.S. 478, 485-86 (1978)). According to the Supreme Court, the Constitution neither requires, nor prohibits, the defining of reasonable doubt for the jury.⁵ *Victor*, 511 U.S. at 5 (citing *Hopt v. Utah*, 120 U.S. 430, 440-41 (1887)). But where a court attempts to explain the meaning of reasonable doubt, the Constitution requires that “‘taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury.’” *Victor*, 511 U.S. at 5 (quoting *Holland v. United States*, 348 U.S. 121, 140 (1954)).

^{*5} *Winship* describes the “beyond a reasonable doubt” standard as one requiring “utmost certainty.” 397 U.S. at 364. The standard is required in criminal cases because it “impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.” *Id.* (citing Doreen & Reznick, *In Re Gault and the Future of Juvenile Law*, 1 Family Law Quarterly 4 at 26-27 (1967)). In *Winship*, the Supreme Court expressly rejected the notion that it is a standard comparable to the preponderance-of-the-evidence, which “is susceptible to the misinterpretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence.” *Id.* at 367. As noted in McCormick, “[t]he ‘reasonable doubt’ formula points to what we are really concerned with, the state of the jury’s mind, whereas

the [preponderance standard] divert[s] attention to the evidence, which is a step removed, being the instrument by which the jury’s mind is influenced. [Formulations of the preponderance standard], consequently, are awkward vehicles for expressing the degree of the jury’s belief.” 2 McCormick On Evid. § 339 (7th ed.).

With respect to review of a trial judge’s instructions on reasonable doubt, “[t]he constitutional question...is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard.” *Victor*, 511 U.S. at 6. *See also Tyler v. Cain*, 533 U.S. 656, 658 (2001) (“a jury instruction is unconstitutional if there is a reasonable likelihood that the jury understood the instruction to allow conviction without proof beyond a reasonable doubt”). And because “[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned,” *Winship*, 397 U.S. at 364, an erroneous reasonable-doubt instruction is a structural error mandating the automatic reversal of a criminal conviction. *Sullivan v. Louisiana*, 508 U.S. 275 (1993); *see also United States v. Marcus*, 560 U.S. 258, 263 (2010) (citing “erroneous reasonable doubt instruction” as part of “limited class” of structural errors).⁶ The Supreme Court has held in no uncertain terms that “the essential connection to a ‘beyond a reasonable doubt’ factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury’s findings.” *Sullivan*, 508 U.S. at 281 (emphasis in original).

3. Application to Adorno’s Claim

According to the petitioner, the Illinois Appellate Court’s decision was “an unreasonable application” of the Supreme Court’s decisions in *Victor* and *Cage*, and its application of harmless-error analysis violated *Sullivan*’s holding that an erroneous reasonable doubt instruction is a structural error that cannot be harmless. Adorno takes particular issue with the trial judge’s reference to the preponderance-of-the-evidence standard and the analogy drawn by the judge between the government’s burden and a balance scale. Adorno contends that the judge’s statements were “confusing” and “license[d] jurors to convict on a standard less than the constitutionally required ‘near certitude of the guilt of the accused.’” Pet. 7, ECF No. 1 (quoting *Jackson v. Virginia*, 443 U.S. 307, 315

(1979)). The jury, Adorno argues, could have interpreted the judge's instruction as allowing conviction based on a "tilt of the scale." *Id.* Furthermore, he maintains, "[b]y comparing reasonable doubt to a scale that has to be tipped, the trial judge made it seem like the defendant must present a defense," and implied that the prosecution and defense began on equal footing. Reply 5, ECF No. 15.

*6 In its very brief counterargument, the State contends that the appellate court's ruling was consistent with *Victor* because it concluded that the trial judge's comments "did not invite the jury to convict based on less than the reasonable doubt standard." Answer 9-10, ECF No. 12. It further contends that the "alternative" conclusion that any error was harmless because of the overwhelming evidence of guilt, even if improper, is "irrelevant to federal habeas inquiry" because the primary conclusion was based on an appropriate application of the holding in *Victor*. *Id.* at 11.

The State's position is untenable. The appellate court failed to apply the due-process inquiry set forth in *Victor* and *Sullivan* and, indeed, did not discuss at all whether the trial judge's definition of reasonable doubt comports with the *Winship* standard. The petitioner characterizes these deficiencies as a misapplication of federal law, but that description understates the problem in the appellate court's analysis. This is not a case in which the state court identified but misapplied the appropriate legal principles; this is a case in which the state court applied the wrong law altogether. It therefore contradicts clearly established federal law. As the Supreme Court has explained: "A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases." *Brown v. Payton*, 544 U.S. 133, 141 (2005). "A decision is 'contrary to' federal law if the state court applied an incorrect rule—i.e., one that 'contradicts the governing law'." *Caffey v. Butler*, 802 F.3d 884, 894 (7th Cir. 2015). Put more simply, a "state court's decision is 'contrary to' federal law if it employs the wrong legal standard established by the Supreme Court." *Ford v. Wilson*, 747 F.3d 944, 952-53 (7th Cir. 2014). See also *Early v. Packer*, 537 U.S. 3, 8 (2002) (*per curiam*) (AEDPA deference required "so long as *neither* the reasoning nor the result" of the state-court decision contradicts Supreme Court precedent) (emphasis added); *Panetti v. Quarterman*, 551 U.S. 930, 954 (2007) (*Early* "indicat[es] that § 2254 does not preclude relief if either the reasoning [or] the result

of the state-court decision contradicts [Supreme Court precedent]") (internal quotation marks omitted).

That is precisely what occurred here. The state appellate court did not identify and rely upon the appropriate standard for reviewing the trial judge's instructions about reasonable doubt; it applied a framework applicable to an entirely different problem. Rather than review the judge's statements about reasonable doubt as the preliminary instructions of law they plainly were, the state appellate court mischaracterized them as the equivalent of stray comments by the judge that the jurors were later instructed to disregard. No reasonable juror would have understood that, in subsequently instructing the jurors that "[n]either by these instructions nor by any ruling or remark which I have made do I mean that to indicate any opinion as to the facts or as to what your verdict should be," [ECF No. 13-4 at N 28], the judge was instructing the jurors to disregard his earlier instructions about important "principles of law" governing the criminal trial, including his instructions on the meaning of reasonable doubt. Adorno's claim, as presented to the state appellate court and in his habeas petition, is not whether the judge said something that suggested to the jury that he had an opinion on the merits of the case; the issue he raises is whether the judge explained the applicable standard of proof to the jurors in a manner that made it reasonably likely that they understood that standard to be less demanding than required by the Supreme Court. The state appellate court did not apply the legal framework necessary to address that issue.

*7 The State maintains that, notwithstanding the appellate court's mischaracterization of the trial judge's statements about reasonable doubt as comments to be disregarded rather than instructions the jurors were required to follow, the appellate court applied the correct standard because it included a single sentence stating: "We do not believe that the court's comments during *voir dire* could reasonably be construed as inviting the jury to convict defendant based on less than the reasonable doubt standard." *Adorno*, 2013 IL App (1st) 110028-U, 2013 WL 3063703, at *10. Although this language nods toward the inquiry required by *Victor*, which Adorno used in framing the issue in appellate brief, the appellate court's analysis shows that despite using some of the right words, it employed the wrong standard in reaching its conclusion. See *McManus*, 779 F.3d at 659 (reversing denial of habeas

relief where, despite reciting the correct standard, the state court “never actually applied it”).⁷

Here, the appellate court's conclusion was incontrovertibly based on its mischaracterization of the judge's instructions about reasonable doubt as comments that the jury had been told to disregard, not on an evaluation of whether the import of the words suggested a standard that was something less than the “utmost certainty” required by *Winship*. Immediately after quoting the trial judge's comments about reasonable doubt, the appellate court stated, without further analysis, that “the trial court made subsequent pre-and post-trial admonishments to the jury that its comments were to be disregarded as well as anything except the evidence received in the case.” [¶ 53]. At no point did the appellate court consider whether the jury instructions as whole correctly conveyed the concept of reasonable doubt to the jury; see *Victor*, 511 U.S. at 5. Indeed, having dismissed the trial judge's comments as stray remarks, the appellate court never examined the correctness of trial judge's “insight into” reasonable doubt at all. Moreover, it never inquired whether it was *reasonably likely* “that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard” of proof beyond a reasonable doubt. See *Victor*, 511 U.S. at 6.

Additional evidence of the appellate court's failure to apply the controlling Supreme Court standard is its conclusion that “in view of the overwhelming evidence of defendant's guilt, that the trial court's comments, while improper and should not have been made [sic], had no effect on the verdict of the jury and constituted harmless error.” *Adorno*, 2013 WL 3063703, at *10. Harmless error has no place in the analysis under the controlling standard because the Supreme Court has held that an erroneous reasonable doubt instruction results in structural error. *Sullivan*, 508 U.S. at 281. See also, e.g., *Morris v. Cain*, 186 F.3d 581, 585 (5th Cir. 1999) (the state habeas court's legal determination that misdescription of reasonable doubt standard in jury instructions was harmless “was contrary to clearly established federal law as determined by the United States Supreme Court in *Sullivan*”). Structural errors “defy analysis by ‘harmless error’ standards.” *Neder*, 527 U.S. at 7 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)). Even the State concedes that the appellate court was wrong to engage in harmless-error review, although it says that this error is of no consequence because it was simply an “alternative” conclusion to the

holding that the judge's remark was not a violation of due process.

*8 Not so. By simply inquiring whether Adorno had been prejudiced by the trial judge's explanation of reasonable doubt, the state appellate court did not identify and apply the correct line of Supreme Court precedent to a statement that was part of the jury instructions on reasonable doubt. By analyzing the statement as an “improper remark” and not an instruction, the state appellate court applied a lesser degree of scrutiny than is required and failed to answer (or even ask) whether the instructions correctly conveyed the concept of reasonable doubt. In employing a prejudice analysis to determine whether an error had been made in the first place, the state appellate court here made a mistake similar to that which prompted the Seventh Circuit to affirm the grant of habeas relief in *Harrison v. McBride*, 428 F.3d 652 (7th Cir. 2005). In *Harrison*, the petitioner asserted a due process claim of judicial bias—another species of structural error. Observing that the state supreme court had reviewed the bias claim under an abuse of discretion standard, the Seventh Circuit held that the state court had reviewed the claim too narrowly. *Id.* at 667 (concluding that the due process guarantee of an impartial judge “indisputably is much broader” than the protection that would be afforded by an abuse of discretion standard). As a result, conduct that violated the clearly established federal standard passed muster under the more lenient state court standard of review. See also *McManus*, 779 F.3d at 659 (“By subjecting a constitutionally inadequate trial-court decision to deferential review, the Indiana Supreme Court did not adequately vindicate the federal due-process interests at stake.”). As in *Harrison* and *McManus*, here the state court's erroneous resort to a more permissive standard of review⁸ contradicts the Supreme Court's clear statement that the right is so fundamental to due process that any erroneous denial of the right requires reversal, not just those that as to which actual prejudice can be proved. Accordingly, the state court decision is contrary to clearly established federal law as determined by the Supreme Court of the United States.

4. Adorno's Entitlement to Relief

Although the state court decision is contrary to the clearly established federal law from the Supreme Court, satisfying a necessary condition for habeas relief, see § 2254(d), Adorno is not automatically entitled to a writ

of habeas corpus. “Where a district court properly finds that a state court’s decision was contrary to or involved an unreasonable application of clearly established federal law, it must still answer the question underlying § 2254(a): whether a petitioner is actually ‘in custody in violation of the Constitution or laws or treaties of the United States.’” *Mosley v. Atchison*, 689 F.3d 838, 842 (7th Cir. 2012). “Where the state court’s decision is ‘contrary to’ federal law, that decision is not entitled to the usual AEDPA deference and is therefore reviewed *de novo* with the reviewing court applying the correct legal standard.” *Id.* at 844 (7th Cir. 2012). See also, e.g., *Lafler*, 132 S. Ct. at 1390-91 (after determination that state court decision was contrary to *Strickland v. Washington* because the state court applied the wrong standard, the Supreme Court engaged in its own *Strickland* analysis to determine if the prisoner was entitled to habeas corpus relief). And because this court’s review is *de novo*, relevant federal law is not confined to the contours limned by Supreme Court precedent.

Although it may be possible to elucidate the meaning of reasonable doubt in a manner that comports with due process,⁹ the trial judge’s attempt in this case confirms the truth of the Seventh Circuit’s declaration that “an attempt to define reasonable doubt presents a risk without any real benefit.” *United States v. Hall*, 854 F.2d 1036, 1039 (7th Cir. 1988). See also *United States v. Shaffner*, 524 F.2d 1021, 1023 (7th Cir. 1975) (“It is our opinion that any use of an instruction defining reasonable doubt presents a situation equivalent to playing with fire.”). Applying the *Victor* standard *de novo*, this Court concludes that “taken as a whole,” the jury instructions did not “correctly convey the concept of reasonable doubt to the jury,” and, further, that there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the standard of “beyond a reasonable doubt.” See *Victor*, 511 U.S. at 5-6.

*9 To begin, the trial judge described reasonable doubt by comparison to the preponderance-of-the-evidence standard without adequately distinguishing them and without making clear the much greater level of certainty required to find guilt beyond a reasonable doubt. Indeed, although he told the jurors the definition of “preponderance of the evidence” (“more likely than not”), the trial judge never actually told the jurors that “the preponderance of the evidence” constitutes a “burden of proof,” much less that it is a lesser burden of proof than

“reasonable doubt,” or one that does not apply in criminal cases. In this regard, the state appellate court’s instruction falls short of even the trial court’s problematic attempt to define reasonable doubt in *Lanigan v. Maloney*, 853 F.2d 40, 47 (1st Cir. 1988), where in affirming a grant of habeas relief, the First Circuit criticized (among other aspects of the trial court’s attempt to define reasonable doubt) its “confused and confusing” discussion of the preponderance standard because “[n]owhere did the instruction actually contrast the level of proof required for the government to meet its burden in a criminal case with the level of proof needed by a civil plaintiff, except to say that, in the criminal case, the standard was proof beyond a reasonable doubt rather than a preponderance of the evidence.”

Further, as the Supreme Court noted in *Winship*, the preponderance of the evidence standard “is susceptible to the misinterpretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted.” 397 U.S. at 367-68. This problem is exacerbated where the trial judge invokes a metaphorical scale that further suggests that applying the reasonable-doubt standard is a quantitative rather than qualitative exercise. Federal courts have consistently condemned efforts to define reasonable doubt by resort to scales and other analogies based on assessments of the quantity, rather than the quality, of the evidence presented. See, e.g., *Reed v. Roe*, 100 F.3d 964 (9th Cir. 1996) (government conceded error where the trial court described reasonable doubt by reference to a numerical scale); *United States v. Pungitore*, 910 F.2d 1084, 1145 (3d Cir. 1990) (use of scale analogy to illustrate proof beyond a reasonable doubt constituted an improper attempt to quantify reasonable doubt and citing cases disapproving of the practice). Cf. *United States v. Hall*, 854 F.2d 1036, 1044 (7th Cir. 1988) (Posner, J., concurring) (“It is one thing to tell jurors to set aside unreasonable doubts, another to tell them to determine whether the probability that the defendant is guilty is more than 75, or 95, or 99 percent.”).¹⁰ Here, the *only* comparison that the trial judge made between the two standards of proof was by means of a scale analogy, so there is little reason to think that the jurors were left with any other impression but that proof beyond a reasonable doubt requires a greater quantum of evidence than does proof by a preponderance of the evidence. Nothing the judge said told the jurors

that it is the degree of certainty, rather than the quantum of evidence, that distinguishes the two standards, or that “utmost certainty” or some equivalent is required by the reasonable doubt standard.

***10** Clearly, there is a gap in the trial record to the extent that the judge appears to have used a physical gesture to illustrate his comment that reasonable doubt required a tilting of the scales “like this.” Neither the petitioner nor the respondent attempts to explain how much tilting the judge pantomimed (assuming that that is what he did). But this only serves to highlight how inapt the scale analogy is to explain reasonable doubt; no matter where the trial judge put his hands to illustrate the respective positions of the two sides of a scale, it is reasonably likely that the jurors would have been left with the impression that their verdict should be determined by quantitative, rather than qualitative, factors. If the trial judge's demonstration suggested less than a complete vertical tilt to the scale (e.g., with hands at the two o'clock and eight o'clock positions), it would reasonably suggest that some numerical ratio applies in comparing the evidence presented by the government to that adduced by the defendant. And because the defendant has no obligation to present any evidence at all, a demonstration that reflected a full, completely vertical tilt to the scale would be even more problematic; any scale with significant weight on only one side will tilt decisively to that side, a fact that makes it reasonably likely that a jury would understand the scale analogy to require conviction any time a defendant presented little or no evidence.

In a criminal trial the defendant is presumed innocent and has no burden of production or proof. The reasonable doubt standard is not a relative measurement comparing one side's evidentiary presentation to the other's, but that is the message an analogy to a balance scale provides to a jury—or at least there is a reasonable likelihood that jurors may understand it that way. Jurors may have reasonable doubts notwithstanding a one-sided evidentiary presentation; a doubt is “reasonable” if it “arises from the evidence *or lack of evidence.*” *Johnson v. Louisiana*, 406 U.S. 356, 360 (1972) (citation omitted) (emphasis added). The reasonable-doubt standard requires a jury to attain “a subjective state of certitude of the facts in issue.” *Winship*, 397 U.S. at 364. As Adorno argues, the jury is not tasked with simply weighing evidence, but with

determining whether the government's evidence persuades it to high degree of certainty that the defendant is guilty. Nothing in the trial judge's attempt to define the standard accurately conveyed this degree of certainty contemplated by *Winship*. And because he never told the jury *what* was to be weighed on the scales, he invited the incorrect, but reasonable, conclusion that the jury's task was to weigh the prosecution's case against the defendant's, or the evidence of guilt versus evidence of innocence, rather than to determine, in light of all of the evidence presented, whether there was near-certainty about the defendant's guilt. Given the quantum of evidence adduced against Adorno, as recounted by the Illinois Appellate Court, the scales almost certainly would have tipped in favor of the State, and might have tipped dramatically. But that is not what the Supreme Court contemplated in *Winship*. The jurors must be convinced of the defendant's guilt as an absolute, not a relative, matter.

That the judge stated several times, in both the preliminary and final jury instructions, that the defendant is presumed innocent, that the burden of proof is with the government, and that only proof beyond a reasonable doubt can sustain a conviction does not mean that the instructions as whole accurately conveyed what “reasonable doubt” is. Those instructions—no matter how many times they were given—could do nothing to cure the misimpression that the judge's prior statements created because they offered no further elucidation of the meaning of the standard. The *only* time the trial judge gave the jurors “some insight into” the term was during jury selection, with the incomplete and faulty comparison to the preponderance standard and the simulation of a scale. No attempt was ever made to retract or correct the incomplete comparison to the preponderance standard.¹¹ The jurors, then, likely applied that flawed definition each time the term was used, compounding, rather than mitigating, the risk that they understood the instructions to allow conviction based on insufficient proof.

***11** The trial judge further compounded the risk that the jurors would misconstrue the level of certainty required by the reasonable doubt standard by expressly telling them that the state “doesn't define reasonable doubt” and “that's up for you to decide in words.” Trial Tr. K-16, ECF No. 13-4. To say that reasonable doubt should not be defined for the jury is not, of course, to say that the term lacks a fixed meaning and may be interpreted to mean whatever the jurors believe it should mean,¹² but that is

the import of the trial judge's statements. Moreover, that jurors are to apply "reasonable doubt" without further definition does not mean that they should be *instructed* that the meaning is "up for [them] to decide," any more than the fact that jurors have the power to nullify the law means that they should be instructed about that power. See, e.g., *United States v. Davis*, 724 F.3d 949, 954-55 (7th Cir. 2013) ("Although jury nullification is a natural and at times desirable aberration under our system, it is not to be positively sanctioned by instructions") (internal quotation marks omitted). Nevertheless, here the trial judge issued an express invitation to the jurors to define the term as they saw fit, with the benefit of his own problematic "insight." The judge's implication that the term has no fixed meaning—that the jury could "decide" on a meaning rather than to simply give the term its plain and ordinary meaning—is a further reason that the jury instructions did not, as a whole, accurately convey what "reasonable doubt" is, and in combination with the judge's own faulty explanation, created a substantial risk that the jurors would apply a standard insufficient to satisfy due process.

To recap: The trial judge invoked the preponderance-of-the-evidence standard but failed to distinguish it from proof beyond a reasonable doubt. Indeed, the trial judge never said outright that the preponderance standard does not apply in criminal cases. If he intended to use the preponderance standard merely as a comparative baseline, he did not finish the thought. The judge told

the jury to use a scale analogy without saying what was to be weighed on that scale. He said nothing to advise the jury that "beyond a reasonable doubt" is a qualitative standard based on the degree of certainty the evidence engenders rather than a quantitative comparison of the evidence presented by each side. Instead, he affirmatively invited the jurors to supply their own definition of the term. Although not every attempt to define "reasonable doubt" will violate the due-process clause, in this case, these statements by the trial judge created a reasonable likelihood that the jury would apply a lesser standard of certainty than the Constitution demands. Because of this structural error, Adorno was denied due process.

The petition for a writ of habeas corpus is therefore granted. Judgment will be issued in the petitioner's favor. The respondent is ordered to release Adorno from custody unless the State of Illinois files in this Court a timely notice of appeal from the Judgment or written notice within 30 days of the entry of the Judgment of its intent to retry Adorno and confirmation that counsel has been appointed for him. Execution of the writ is stayed in the interim. Nothing in this opinion, however, precludes the State from retrying the petitioner whether or not he is released pursuant to the Judgment in this matter.

All Citations

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Footnotes

- 1 On the Court's own motion, Rick Harrington is terminated as the respondent. Guy Pierce, Warden, Pontiac Correctional Center, is added as Respondent. The Clerk is directed to alter the case caption to *Adorno v. Pierce*.
- 2 Rule 431(b)(4) also provides that "no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects." There is no indication in the record that the defendant objected to the Court's inclusion of the instruction prohibiting any adverse inference from a defendant's decision not to testify.
- 3 Adorno only raises the underlying due process claim, and does not assert an ineffective assistance of counsel claim, in his habeas petition.
- 4 This standard used by the appellate court applies to numerous categories of comments by the judge during trial; it is not specific to the reasonable-doubt definition or to jury instructions in general. See, e.g., *Illinois v. Anderson*, No. 2015 IL App (1st) 131143-U, 2015 WL 9272728, at *24 (Ill. App. Ct. Dec. 15, 2015); *Illinois v. Burgess*, 40 N.E.3d 284, 320 (Ill. App. Ct. 2015); *Illinois v. Lopez*, 974 N.E.2d 291, 302 (Ill. App. Ct. 2012). The same standard is applied to evaluate whether a judge's comments constitute reversible error in both civil and criminal trials. See *In re Marriage of Cicinelli*, 2015 IL App (2d) 140657-U, 2015 WL 8528005, at *6 (Ill. App. Ct. Dec. 10, 2015); *Nichols v. Agnew*, 2014 IL App (1st) 132901-U, 2014 WL 3906845, at *14 (Ill. App. Ct. Aug. 11, 2014).
- 5 Illinois "has long and consistently held that neither the trial court nor counsel should define reasonable doubt for the jury." *People v. Downs*, ___ N.E. 3d ___, 2015 IL 117934, ¶ 19, 2015 WL 3791445, at *4 (Ill. June 18, 2015). But the fact that the trial court may have violated this state rule prohibiting a court from defining reasonable doubt is irrelevant to whether Adorno is entitled to habeas relief, because a violation of a state law is a noncognizable claim. *Estelle*, 502 U.S. at 67.

The Seventh Circuit also prohibits trial courts from defining reasonable doubt for the jury. *United States v. Bruce*, 109 F.3d 323, 329 (7th Cir. 1997). However, a violation of a Seventh Circuit precedent does not entitle Adorno to relief under AEDPA, either, because Adorno must demonstrate that the state court addressing his claim violated clearly established precedent as set forth by the Supreme Court of the United States. *Glebe v. Frost*, 135 S. Ct. 429, 431 (2014) (per curiam) (“As we have repeatedly emphasized, [] circuit precedent does not constitute clearly established Federal law, as determined by the Supreme Court.”) (internal quotation marks and citations omitted). And in any event, the Seventh Circuit’s rule is based on its supervisory authority, not on a determination that the Constitution precludes all attempts to elucidate the meaning of reasonable doubt.

- 6 In *Sullivan*, the trial court gave an erroneous reasonable-doubt instruction identical to the one that the Supreme Court had held to be unconstitutional in *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam). 508 U.S. at 277. In evaluating the challenged instruction, *Cage* inquired whether whether jurors “could have understood the charge as a whole.” 498 U.S. at 329. The Supreme Court later clarified in *Victor* that the “proper inquiry is not whether the instruction ‘could have’ been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it.” *Victor*, 511 U.S. at 6 (quoting *Estelle*, 502 U.S. at 72 & n.4) (emphasis in original). Despite this later clarification of the standard stated in *Cage*, the holding from *Sullivan* that an erroneous reasonable-doubt instruction is structural error remains undisturbed. The Supreme Court has reiterated this principle several times in the two decades following *Sullivan*. See *Marcus*, 560 U.S. at 260 (citing *Sullivan* for proposition that erroneous reasonable doubt instruction results in structural error); *Hedgpeth v. Pulido*, 555 U.S. 57, 61 (2008) (per curiam) (same); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (same); *Neder v. United States*, 527 U.S. 1, 8 (1999) (same).
- 7 Notably, although Adorno’s brief before the state appellate court identified the controlling Supreme Court cases of *Victor v. Nebraska*, 511 U.S. 1 (1994), *Sullivan v. Louisiana*, 508 U.S. 275 (1993), and *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam), the appellate court addressed none of these precedents. That does not mean that the state court’s determination necessarily contradicts those controlling Supreme Court precedents, but here it underscores the state court’s application of the wrong legal inquiry.
- 8 Although at the outset of its discussion the Illinois Appellate Court stated that it would review only for plain error, it later set forth and applied the simple “prejudice” standard applicable to all judicial comments, and then proceeded to a harmless-error analysis.
- 9 As previously noted, the Constitution is agnostic when it comes to defining reasonable doubt for a jury, neither prohibiting nor requiring the attempt. *Victor*, 511 U.S. at 5. The decision is left to federal lower courts and state courts under their supervisory power. *Id.* at 17. Both Illinois and the Seventh Circuit prohibit trial courts from defining the reasonable doubt standard for the jury. See *United States v. Glass*, 846 F.2d 386, 387 (7th Cir. 1988); *Bruce*, 109 F.3d at 329; *Downs*, 2015 WL 3791445, at *4. That fact does not, however, entitle Adorno to relief. A violation of the Illinois rule is not cognizable under § 2254. *Estelle*, 502 U.S. at 67. As for the Seventh Circuit’s rule, like that of the Supreme Court, is premised on supervisory authority rather than a constitutional command, and so does not itself provide a basis for habeas relief. See *Cupp v. Naughten*, 414 U.S. 141, 146 (1973) (instructing that a prisoner has no right to habeas corpus relief when a state court violates a rule established by a federal court when that rule is not mandated by the Constitution); *Vargas v. Keane*, 86 F.3d 1273, 1280 (2d Cir. 1996) (recognizing that rule prohibiting trial courts from straying from pattern jury instructions on reasonable doubt is based on court’s supervisory authority, not constitutional, and cannot be basis for habeas corpus relief).
- 10 Some courts have found that referring to scales and the preponderance standard in the context of reasonable doubt did not violate the due-process rights of the accused. See *United States v. Romero*, 32 F.3d 641, 650-52 (1st Cir. 1994) (finding no constitutional violation when jury was instructed on differences between beyond a reasonable doubt from preponderance of the evidence by analogizing to a scale, and how evidence must move the scale more towards the government side under the reasonable doubt standard to show the government has a heavier burden); *Little v. Murphy*, 62 F. Supp. 2d 262, 269 (D. Mass. 1999) (rejecting habeas petitioner’s argument that reasonable doubt instructions improperly included reference to preponderance of evidence and scales). However, the totality of the jury instructions in these cases went much further to clarify the degree of proof needed to meet the standard. In *Romero*, the trial court expressly stated that the jury should “disregard the particular notion of preponderance” and that the government had a “heavier burden” where the “scale must tip more to the government’s side”; the court later explained that the jury needed to be “firmly convinced” of the defendants’ guilt. 32 F.3d at 651. Moreover, the First Circuit agreed that “the use of the scale analogy has the potential for misleading the jury into applying a diluted burden of proof” but held, considering all the instructions as a whole, that there was not a due process violation. *United States v. Romero*, 32 F.3d 641, 652 (1st Cir. 1994). In *Little*, although the court referred to the preponderance standard (and said, crucially, “That’s not enough”), the

jury instructions also included this statement: "A fact is proved beyond a reasonable doubt when it is proved to a moral certainty, when it is proved to that degree of certainty that satisfies your conscience and your judgment as reasonable people and leaves in your mind a well settled conviction of guilt. That's what we do mean by reasonable doubt." *Little v. Murphy*, 62 F. Supp. 2d 262, 269 (D. Mass. 1999). The judge's only reference to "scales" was to say that if the evidence seemed equally consistent with guilt as with innocence, then the defendant must be acquitted. *Id.* at 269.

- 11 The trial court's challenged instruction bears some resemblance to the Federal Judicial Center pattern criminal jury instructions that were in effect at the time of the *Victor* decision. Justice Ginsburg's concurrence in *Victor* suggested that the Federal Judicial Center's instructions are "clear, straightforward, and accurate." *Victor*, 511 U.S. at 26 (Ginsburg, J., concurring). The relevant instruction provided:

[T]he government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Federal Judicial Center, Pattern Criminal Jury Instruction 21. Any resemblance, however, is overborne by the significant differences in the instructions. Most notably, here the trial court failed to explain that the government's proof must be "more powerful" than what is required under the preponderance standard, and it did not explain that reasonable doubt requires the jury to be "firmly convinced" or certain. The FJC instruction does not analogize application of the reasonable doubt standard to the comparative weighing of evidence on a scale.

- 12 Indeed, prohibitions on defining reasonable doubt for jurors are based on the principle that "[j]urors know what is 'reasonable' and are quite familiar with the meaning of 'doubt.'" *Glass*, 846 F.2d at 387. That is, the words are to be given their plain and ordinary meaning. Telling judges not to "muddy the waters" with further explanation, see *id.*, is quite different from allowing judges to suggest that the term lacks a fixed meaning. Rather than being open to interpretation, as the trial judge suggested here, "the phrase 'reasonable doubt' is well understood and certainly is neither confusing nor ambiguous when used, and needs no further explanation or explication." *United States v. Hernandez*, 39 Fed.Appx. 365, 371 (7th Cir. 2002); see *United States v. Langer*, 962 F.2d 592, 600 (7th Cir. 1992) ("reasonable doubt" is "self-explanatory and is its own best definition") (quoting Seventh Circuit Pattern Criminal Jury Instruction 2.07).

Appendix D

Order of the Illinois Supreme Court
(September 25, 2013)

SEPTEMBER TERM, 2013

|

September 25, 2013

996 N.E.2d 16 (Table)
(The decision of the Court is referenced
in the North Eastern Reporter in a table
captioned “Supreme Court of Illinois
Dispositions of Petitions for Leave to Appeal”.)
Supreme Court of Illinois

People
v.
Miguel Adorno

NO. 116316

|

Synopsis

Lower Court: No. 1–11–0028

Opinion

Disposition: Denied.

All Citations

996 N.E.2d 16 (Table), 374 Ill.Dec. 569

End of Document

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Appendix E

Order of the Illinois Appellate Court
(June 14, 2013)

2013 IL App (1st) 110028-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

NOTICE: This order was filed under [Supreme Court Rule 23](#) and may not be cited as precedent by any party except in the limited circumstances allowed under [Rule 23\(e\)\(1\)](#).

Appellate Court of Illinois,
First District, Fifth Division.

The PEOPLE of the State of
Illinois, Plaintiff–Appellee,

v.

Miguel ADORNO, Defendant–Appellant.

No. 1–11–0028.

|

June 14, 2013.

Appeal from the Circuit Court of Cook County. No. 10
CR 2831(01), [Vincent M. Gaughan](#), Judge Presiding.

ORDER

Justice [HOWSE](#) delivered the judgment of the court:

*1 ¶ 1 *HELD*: Defendant was not entitled to a jury instruction for the lesser offense of reckless conduct when he knowingly fired a weapon in the direction of his victim; defendant's due process right to a fair trial was not violated by the trial court's comments to the jury during *voir dire*; the trial court properly denied defendant's motion *in limine* after applying the factors established in [People v. Montgomery](#), 47 Ill.2d 510 (1971).

¶ 2 This appeal arises from defendant Miguel Adorno's convictions for attempted first degree murder and aggravated battery with a firearm following a jury trial. He was sentenced to a 15–year prison term for attempted murder and a mandatory consecutive 15–year prison term for personally discharging a firearm. On appeal, defendant contends that: 1) the trial court should have instructed the jury on the offense of reckless conduct as a lesser included offense of attempted first degree murder and aggravated battery with a firearm based on his conduct in relation to the offense; 2) that the trial court violated his due process right to a fair trial

when it attempted to define reasonable doubt during *voir dire*, thus inviting the jury to convict him using a constitutionally deficient standard; and 3) the trial court erred by denying his motion *in limine* to exclude his prior conviction for conspiracy to commit murder without proper consideration of the factors required by [People v. Montgomery](#), 47 Ill.2d 510 (1971). For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The evidence presented at trial established that defendant fired a weapon during a disturbance at a party which occurred in the early morning hours of January 23, 2010. As a result of the shooting, Shannon Fanning was shot in the arm.

¶ 5 Prior to trial, defense counsel filed a motion *in limine* to bar evidence of defendant's prior conviction for conspiracy to commit murder on the basis that it would be more prejudicial than probative. The trial court denied the motion, stating:

“Relying on the standard in *People vs. Montgomery*, certainly it's within that purview. The next step is to find out if it's material and relevant. I do find that out. The next step is the balancing step to see if it's more probative than prejudicial. I determined that it would be more probative than prejudicial, so your motion *in limine* is denied.”

¶ 6 During *voir dire*, while questioning the prospective jurors on the *Zehr* principles, the trial court stated the following:

“Then the other thing is, the State has the burden of proof, and that burden of proof is proof beyond a reasonable doubt, and that lasts throughout each and every stage of the trial.

Does anybody have any qualms about the State has the burden of proof or the proof being proof beyond a reasonable doubt? Raise your hand either in the inner or outer part of the courtroom.

Nobody has raised their hand.

Illinois does not define reasonable doubt, but any of you who may have sat on a civil jury there's a preponderance of the evidence, reasonable doubt is the highest burden of proof in our country and in our State. Those of you who may have sat on civil cases, preponderance of the evidence, if you look at this like a scale, all you have to do is tilt it. So the definition of preponderance of the evidence is, it's more likely than not that the event occurred.

*2 Again, Illinois doesn't define reasonable doubt. That's up for you to decide in words, but in analogy to the scale thing, you would have to tip it like this, so that would be some insight into what proof beyond a reasonable doubt would be."

¶ 7 There was no objection made by defense counsel to the trial court's comments regarding reasonable doubt during *voir dire*.

¶ 8 At trial, Jasmine Nagamine testified that she was a 24-year old nurse who lived in the basement apartment at 2026 North Karlov in Chicago on January 22, 2010, with her then roommate, Melissa West (Missy). Missy has since joined the Army. Jasmine hosted a small party at her apartment with her brother, Jeffrey, and his friends: Shannon Fanning, the victim, Sharall, John, Billy, Ashlee and Alex. Defendant, whom she knew through a friend, arrived with two males and three females that she did not know. She knew defendant both as Miguel and as K-Oz. Everyone in the apartment was drinking except Jasmine and one of the girls who had come with defendant because she was "passed out."

¶ 9 Jasmine saw her roommate Missy engage in an argument with defendant, and Missy told her to get defendant and his group to leave. Jasmine told them to leave and looked for Missy's laptop computer in the living room, but could not find it there. Jasmine heard a horn beeping outside. She subsequently went outside and retrieved Missy's laptop from the backseat of a car parked outside and went back into the apartment.

¶ 10 Jasmine further testified that her brother stood in the doorway telling defendant and his group that they had to leave. Everyone inside exited the apartment and arguments ensued between defendant's friends and her brother's friends. Defendant then pushed Jasmine, but her brother grabbed her before she could push him back.

Defendant then hit her brother, and they began to fight. The fight eventually ended up on the ground before it broke up. After the fight, defendant went to the trunk of the car from which the laptop was retrieved and started pounding on it, saying "open the trunk." Jasmine's brother then told everyone to get back inside and everyone began rushing towards the door. Jasmine heard three to five gunshots and Shannon entered the apartment, bleeding. The police were called and Jasmine told them what happened. She subsequently identified defendant in a lineup.

¶ 11 Jeffrey Nagamine testified that on the night of the shooting, he and some of his friends went to his sister Jasmine's apartment at approximately 10:15 p.m. for a small gathering. When they arrived, only Jasmine and her roommate Missy were present. Sometime later, defendant, whom Jeffery knew by his nickname K-Oz, arrived with two other men and three women. They appeared to have been drinking and one of the women was throwing up. Everyone at the party was drinking.

¶ 12 According to Jeffrey, approximately an hour and a half after defendant's arrival, he saw defendant walk into the bathroom, which was connected to Missy's bedroom, and stay there for an extended period of time. Jeffrey saw Missy knock on the bathroom door, but defendant did not answer. Missy then went into her bedroom and Jeffrey heard her yelling. Missy and defendant came out of her bedroom arguing and went out of the front door. They then argued in front of the apartment. Subsequently, Jeffrey saw Jasmine and Missy walk over to a silver Chevrolet Impala which was double parked near the apartment with its engine running and remove Missy's computer from the back seat. Missy walked back into the apartment and defendant followed her. Jeffrey stood by the door and when defendant asked to be let inside to speak to Jasmine, Jeffrey told him that he and his friends had to leave. Everyone inside then exited the apartment. Once Jasmine and Missy were back outside, they argued with defendant over an Ipod. Defendant pushed Jasmine, Jeffrey pulled her behind him and as he turned back around, defendant hit him in his left jaw. A fight between defendant and Jeffrey ensued, with Jeffrey punching defendant three to four times. Defendant ended up on the ground before Jeffrey retreated. However, defendant got up and yelled to Jasmine, "Your brother doesn't know me. Your brother's going to die tonight."

*3 ¶ 13 As all of the people from the party began walking back to the apartment, defendant ran over to the Chevrolet Impala and started banging on the trunk saying, “Open the trunk, I have to get my banger.” Jeffrey testified that he took that to mean that defendant had a gun, and he began pushing people back into the apartment. He heard defendant demand that his friend who was standing next to the car “pop the trunk.” The friend reached into the car and did so; defendant then reached into the trunk. Jeffrey then heard six to eight gunshots. Once back inside the apartment, Jeffrey saw that Shannon was bleeding from his inside right forearm. The paramedics were called, and Jeffrey later identified defendant from a lineup.

¶ 14 Shannon Fanning testified that he was friends with Jeffrey and Jasmine and also knew Missy. On January 22, 2010, he went to Jasmine and Missy's apartment with some other friends for a gathering and defendant, whom he did not know, arrived approximately 40 minutes later with a group of people. Shannon noticed people “pacing”—going in and out of rooms, “looking suspicious.” Shannon saw defendant enter the bathroom and later saw Missy and defendant having a conversation with raised voices. Missy and Jasmine then left the apartment and asked defendant to leave once they were just outside the apartment.

¶ 15 Shannon was standing behind Jeffrey and defendant during their fight, and saw one of the men who had come with defendant approach the fight. Shannon grabbed the person by the jacket and pulled him back. Shannon did not punch, kick or injure the person. The fight between defendant and Jeffrey ended with defendant on the ground; Jeffrey did not hit defendant once he was on the ground. People from the party were standing around, separating the two, until defendant said he was going to get a gun. At that point, everyone started walking back to the apartment. Meanwhile, defendant walked to the rear of a Chevrolet Impala that was parked in the middle of the street with its engine running. Defendant was banging on the trunk, asking for someone to open the trunk. Shannon and the others were going back inside the apartment when he heard gunshots. He was the last one in, and turned around to see defendant moving forward as he fired the last few shots. Shannon felt a hit in his arm before getting the license plate to the car and going inside. Paramedics were called and he was subsequently taken to the hospital where he was treated for a broken arm. Shannon identified

defendant from a photo array while he was being treated in the hospital.

¶ 16 Ernest Alexander, who testified pursuant to subpoena, stated that he had known defendant for a few months prior to the shooting. Earlier that evening, Ernest was at Serbio Urbino's house drinking with defendant and three girls he just met that evening: Ashley, Monika and one whose name he did not know. Defendant showed him a gun and said something like “I don't go out without the banger.” Ernest identified the gun at trial as the one defendant showed him that night. The group left Serbio's and went to the store for more liquor in someone's car. Defendant got separated from the group before they left because he was stopped by the police. Ernest put defendant's gun in the trunk after defendant left. Defendant rejoined the group after calling for someone to come pick him up. The group then went to the basement apartment on Karlov where there was a party in progress. Ernest knew one of the girls there from high school. Ernest testified that everyone was drinking and talking; however at some point, the girl who lived there made a commotion over someone stealing something. She went to the car that Ernest and the group had come in and grabbed a laptop computer and an Ipod. When she got back to the apartment, everyone was yelling for Ernest and his group to leave. Ernest testified that he turned around to say that he was sorry for what happened and then leave, but he saw that a fight had started behind him. He did not see who started the fight, and saw someone beating defendant up. Ernest ran towards the fight to try and break it up, but someone grabbed him and pulled off his vest. When Ernest got to the fight, it was over. He pushed Jeffrey off of defendant and told Jeffrey and Shannon to just go inside because they were going to leave.

*4 ¶ 17 Ernest testified that he saw defendant go to the trunk of the car they arrived in and heard defendant say, “Give me my banger, give me my banger,” meaning “give me my gun.” Ernest did not remember if the trunk was open and was walking to retrieve his vest when he heard gunshots. Ernest saw defendant shooting the gun towards the group of people and heard five to six shots. Ernest eventually got back in the car, followed by defendant, and the group went to defendant's house. Ernest then called a friend to pick him up and later voluntarily turned himself in to police.

¶ 18 Chicago police officer Vincent Stinar testified that he and other police officers went to an apartment at 5626 West Grand, where they were allowed entry after knocking. They were directed to a rear bedroom and knocked for access. Defendant came out and was taken into custody. A gun was in plain view under a radiator in the room, and there was a magazine in the handle.

¶ 19 Chicago police department evidence technician Sheila Caldwell testified that she took photos of the scene on Karlov, defendant's bedroom, and the Chevrolet Impala. She recovered four shell casings from the ground in front of 2026 North Karlov and recovered a gun from defendant's bedroom.

¶ 20 The parties stipulated that the gun recovered from defendant's bedroom, People's Exhibit No. 6, was a FIE–Titen Model .25 caliber semi-automatic pistol and that the four fired cartridges recovered at the scene were fired from that gun.

¶ 21 Defendant testified in his own defense, admitting that he was a convicted felon, having pled guilty to conspiracy to commit murder in 2008. In January 2010, he lived at 5626 West Grand with his family, and on the night of the shooting, he went to Serbio's house with Ernest, Ashley, Monika and Marlene. Everyone there was drinking. Defendant stated that they all left together to attend a party on Cicero and Addison. Because that was a known “bad area,” defendant took his gun for protection, which Ernest put in the trunk. According to defendant, Jasmine texted him while they were out, so they went to her house instead.

¶ 22 After being at Jasmine's house for an hour and a half, defendant went to the bathroom. He heard Jasmine and Missy running through the room connected to the bathroom laughing, and he decided to “scare them to the back door.” Instead, they opened the door and asked defendant what was going on. Missy said to him, “could you please get the f*ck out of my room.” Defendant denied stealing anything from that room. A verbal confrontation took place before Jasmine and Missy went outside and retrieved a laptop computer from the back seat of the car defendant and his friends had arrived in. The car was not where they left it; instead it was running in the middle of the street with Serbio inside.

¶ 23 Jasmine then said that everyone had to leave. Defendant tried to apologize to Jasmine, but her brother Jeffrey started saying, “b**** a** n***** stealing.” Defendant stated that this is when the fight began and Jeffrey hit him first. Defendant acknowledged that Jeffrey had the upper hand during the fight, so he ran away. However, Jeffrey caught up to him and hit him again. The crowd started running towards them, which scared defendant so he kneeled down and put his hands over his head. While he was on the ground, defendant could see a lot of feet around him and testified that “people” continued to hit him while he was on the ground. He managed to push someone out of his way and run to the car. Defendant's initial plan was to get inside, but he was being chased by people who were saying, “grab him, we're going to kill him.” Defendant, fearing for his life, started yelling, “pop the trunk, I got a gun in the trunk,” thinking that the people chasing him would be scared and stop. When he reached the trunk however, people who were chasing him were right on his heels. Defendant testified he reached into the trunk, grabbed the gun and fired it from under his arm without turning around first. He fired the weapon several more times into the air. After that he went home, put the gun in his bedroom and went to sleep. Shortly thereafter, he was arrested.

*5 ¶ 24 On cross-examination, defendant admitted that the gun recovered by police belonged to him and that he called it a “banger .” He further stated that he fired the first shot without turning around first, from under his arm. After that, he turned around and shot, although the people were now running back towards the apartment. Defendant stated that he fired into the air from behind the trunk on the sidewalk, but did not remember how many shots he fired. He denied chasing the group back towards the house, denied that based on where the shell casings were recovered from, that he would have had to walk towards the house from the trunk of the car. Defendant did admit that once he fired the gun at the group, no one came near him and that everyone was inside the gate at that point.

¶ 25 Defendant also entered the stipulated testimony of Melissa West into evidence, which was as follows: Melissa was at her apartment with her roommate Jasmine on January 22, 2010, and some other friends. During the gathering, three males and three females whom she did not know came into her apartment. Defendant was one of those males. After a period of time, defendant went into

the bathroom and remained a long time; when Melissa went to check on him, she found him in her bedroom going through her things. Melissa told Jasmine to have defendant leave. Melissa then noticed that her Ipod was missing from her bedroom and her laptop computer was missing from the living room. Melissa went outside and recovered her laptop computer from the car that defendant arrived in. She demanded that her Ipod be returned. Defendant then punched Jeffrey and a fight ensued. Jeffrey was getting the best of defendant and she stepped in and protected defendant. Defendant said, "I'll kill you, Jeff." Defendant then banged on the trunk of the car he came in and said, "I got a banger," the trunk opened and Melissa heard numerous shots.

¶ 26 The State entered evidence in rebuttal: a certified copy of defendant's May 20, 2008, conviction for conspiracy to commit murder; the testimony of Chicago police detective Brian Tedeschi who interviewed defendant on January 23, 2010, at 2:20 a.m., during which defendant stated that he knew nothing about what happened at 2026 North Karlov because he was home with his mother all day; and the testimony of Monika Herrera, one of the women who went with defendant to the party at Jasmine's apartment. Monika's testimony was substantially similar to that of the other State's witnesses, except she stated that when defendant came to the car to get his gun from the trunk, Marlene, the driver, would not open the trunk. Defendant then pounded on the window, went in through the back, fought his way to the front, and opened the trunk. Defendant then got out of the car, walked around to the back of it, while the other group was walking back to the apartment. Monika then heard five to six gunshots.

¶ 27 The jury found defendant guilty of attempted first degree murder and that he was armed with a firearm. The trial court then sentenced him to 15 years for attempted first degree murder while armed with a firearm and a consecutive 15-year sentence. This timely appeal followed.

¶ 28 ANALYSIS

*6 ¶ 29 On appeal, defendant contends that: 1) the trial court should have instructed the jury on the offense of reckless conduct as a lesser included offense of attempted first degree murder and aggravated battery with a firearm; 2) that the trial court violated his due process right to a

fair trial when it attempted to define reasonable doubt during *voir dire*, thus inviting the jury to convict him using a constitutionally deficient standard; and 3) the trial court erred by denying his motion *in limine* to exclude his prior conviction for conspiracy to commit murder without proper consideration of the factors required by *People v. Montgomery*, 47 Ill.2d 510 (1971).

¶ 30 Reckless Conduct Instruction

¶ 31 Defendant contends that the trial court should have instructed the jury on the offense of reckless conduct as a lesser included offense of attempted first degree murder. Defendant alleges that his testimony supports the giving of the reckless conduct instruction because his testimony is evidence that defendant acted recklessly in firing his gun and injuring Shannon. Therefore, defendant argues that the trial court erred in refusing defense counsel's request for a reckless conduct instruction. Defendant requests that his convictions be reversed and a new trial granted with proper jury instructions.

¶ 32 A trial court's refusal to issue a specific jury instruction is reviewed under an abuse of discretion standard. *People v. Douglas*, 362 Ill.App.3d 65, 76 (2005). Where some credible evidence exists to support an instruction for a lesser offense, it is an abuse of discretion to fail to give that instruction. *People v. DiVencenzo*, 183 Ill.2d 239, 249 (1998). Whether a defendant has met the evidentiary minimum for a certain jury instruction is a matter of law, and thus, our review is *de novo*. *People v. Tijerina*, 381 Ill.App.3d 1024, 1030 (2008).

¶ 33 An instruction on a lesser included offense will be given upon a defendant's request if there is slight evidence in support of the offense. *People v. Scott*, 256 Ill.App.3d 844, 850 (1993). A trial court's " 'refusal to give an instruction is harmless error and does not warrant reversal where the evidence is so clear and convincing that the jury could not have reasonably found that the defendant was not guilty.' " *People v. Blan*, 392 Ill.App.3d 453, 459 (2009) (quoting *People v. Taylor*, 233 Ill.App.3d 461, 465 (1992)).

¶ 34 A person commits reckless conduct when he or she, by any means lawful or unlawful, recklessly performs an act or acts that: 1) cause bodily harm to or endanger the safety of another person; or 2) cause great bodily harm or permanent disability or disfigurement to another person.

720 ILCS 5/12–5 (West 2010). On the other hand, a person commits aggravated battery with a firearm by knowingly or intentionally by means of discharging a firearm causing injury to another person while committing a battery. 720 ILCS 5/12–4.2(a) (West 2010). To sustain a conviction for attempted murder, it must be shown that the accused acted with specific intent to kill, but intent is a state of mind which, if not admitted, can be shown by surrounding circumstances, and the intent to take a life may be inferred from the character of the assault, the use of a deadly weapon, and other circumstances. *People v. Anderson*, 108 Ill.App.3d 563, 566 (1982). Furthermore, specific intent to take a human life is a material element of the offense of attempted murder, but the very fact of firing a gun at a person supports the conclusion that the person doing so acted with the intent to kill. *People v. Seats*, 68 Ill.App.3d 889, 895 (1979).

*7 ¶ 35 Defendant cites to *People v. Williams*, 293 Ill.App.3d 276 (1997) in support of his contention. In that case, the defendant was convicted of unlawful use of a weapon by a felon, four counts of aggravated discharge of a firearm and involuntary manslaughter. *Williams*, 293 Ill.App.3d at 278. On appeal, defendant contended that the trial court erred in refusing to instruct the jury on the offense of reckless conduct. *Williams*, 293 Ill.App.3d at 278. In that case, defendant and the victim were involved in a confrontation, after which the victim fired a shot at him. *Williams*, 293 Ill.App.3d at 278. According to the defendant, he then turned around and fired his gun six times into the air above their heads with his eyes closed; one of the bullets struck and killed the victim. *Williams*, 293 Ill.App.3d at 278. Each of the remaining witnesses had a different version of events. *Williams*, 293 Ill.App.3d at 278. In finding that the defendant was entitled to an instruction on reckless conduct, the court noted that defendant never stated that he knowingly fired his gun directly at the other men. The court held that whether his firing of the gun in the air, over the heads of the men with his eyes closed constituted firing the gun in the direction of another person was a factual question to be resolved by the finder of fact. *Williams* 293 Ill.App.3d at 282.

¶ 36 The evidence presented here is distinguishable from that presented in the *Williams* case. Defendant testified at trial that he was beaten up by Jeffrey following a misunderstanding at the party; as the crowd of people approached him, he knelt to the ground and was hit by “people” as he was on the ground; he pushed his way

through the crowd and ran towards the car; the group chased him to the car hot on his heels. When he got to the car, defendant reached into the trunk, got his gun and fired the first shot from under his arm without looking. He then fired the remaining shots into the air. In *Williams*, the defendant testified he fired all of the shots in the air with his eyes closed.

¶ 37 According to defendant's testimony, the people chasing him were right on his heels, therefore defendant knew he was firing the weapon in their direction when he reached into the trunk and fired the gun under his arm without looking.

¶ 38 Illinois courts have clearly and consistently held that when a defendant points a firearm in the direction of an intended victim and fires the weapon, he has not acted recklessly. *People v. Sipp*, 378 Ill.App.3d 157, 166 (2007). Because defendant knowingly fired his gun in the direction of the crowd, a reckless conduct instruction was not appropriate. We do not find the court abused its discretion in refusing to instruct the jury on reckless conduct.

¶ 39 Defendant argues the trial court refused to so instruct the jury because it mistakenly believed that an argument of self-defense was inconsistent with and negated a reckless conduct instruction. However if a decision of the trial court is correct, we may affirm the decision on any basis in the record, regardless of the rationale. *People v. Dinelli*, 217 Ill.2d 387, 403 (2005).

*8 ¶ 40 Arguendo, if the court did commit error when it refused to give the reckless conduct instruction, the error was harmless because the evidence in this case is overwhelming. Five eyewitnesses, two of whom were defendant's friends who came to the party with him, contradicted his version of events. They testified defendant fired his weapon in the direction of the partygoers, not straight up in the air as defendant testified. After yelling words to the effect of “open the trunk, I'm going to get my banger,” and “your brother is going to die tonight,” all the witnesses testified that defendant went to the car after the fight was over, retrieved the gun, and repeatedly fired at the group that was retreating to the apartment. The evidence elicited in this case shows that defendant knew the victim and others were present in the general vicinity of the apartment building, and defendant fired his weapon multiple times in their direction. Because the evidence is overwhelming, any error in failing to

give the instruction was harmless. *People v. Stewart*, 406 Ill.App.3d 518, 539 (2010). Accordingly, the trial court did not err in refusing to instruct the jury as to reckless conduct.

¶ 41 Judicial Comments during *Voir Dire*

¶ 42 Next, defendant contends that the trial court violated his due process right to a fair trial when it attempted to define reasonable doubt during *voir dire*, thus inviting the jury to convict him using a constitutionally deficient standard. In his argument, defendant equates the trial court's comments during *voir dire* with jury instructions, and requests a new trial.

¶ 43 We first note that the record contains no contemporaneous objection to the court's comments nor did defendant include this issue in his motion for new trial. The waiver rule governs alleged errors made during *voir dire*. *People v. Campbell*, 264 Ill.App.3d 712, 728 (1992). The record shows that defendant neither objected to the trial court's comments when made during *voir dire* nor mentioned any objection in his post-trial motion. Both a contemporaneous objection and a written post-trial motion are required to preserve an issue for appellate review, otherwise the issue is waived. *People v. Enoch*, 122 Ill.2d 176, 186–88 (1988). Because defendant did not preserve the issue for review, we cannot review the merits of the trial court's error unless the alleged error constitutes plain error. *Campbell*, 264 Ill.App.3d at 729.

¶ 44 Defendant, while apparently conceding that the issue is procedurally waived, nonetheless argues that we should review the merits of the issue under the plain error doctrine. He contends that both prongs of the plain error analysis are met because the evidence was closely balanced and the integrity of the trial was challenged because the error gave the jury permission to convict based on a lesser standard.

¶ 45 Fairness is the foundation of our plain error jurisprudence. *People v. Herron*, 215 Ill.2d 167, 177 (2005). A fair trial, however, is different from a perfect trial. *Herron*, 215 Ill.App.3d at 177. The plain error doctrine is a not a general savings clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court; rather, it is a narrow and limited exception to the general waiver rule

whose purpose is to protect the rights of the defendant and the integrity and reputation of the judicial process. *Herron*, 215 Ill.2d at 177.

*9 ¶ 46 Under the plain error doctrine, a reviewing court may consider a forfeited error if 1) the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence and 2) where the error is so serious that the defendant was denied a substantial right and thus a fair trial. *Herron*, 215 Ill.2d at 178–79. Under a plain error analysis, the defendant bears the burden of persuasion with respect to prejudice. *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 1778 (1993).

¶ 47 We must first determine whether error occurred at all before proceeding to consider whether either prong of the doctrine has been satisfied. *People v. Brewer*, 2013 IL App (1st) 07281, ¶ 21. The ultimate question of whether a forfeited claim is reviewable as plain error is a question of law that is reviewed *de novo*. *Brewer*, 2013 IL App (1st) 07281, ¶ 21.

¶ 48 Here, we do not believe that the evidence is so closely balanced to permit us to reach the merits of the claimed error under the first prong of plain error. Five witnesses for the State testified to substantially the same sequence of events: defendant and his friends went to a party at Jasmine's house; a laptop and Ipod came up missing after defendant was discovered in Missy's room; both items were retrieved from the car that defendant and his friends arrived in; there were multiple arguments between those present and then a physical fight ensued between defendant and Jeffrey, during which Jeffrey bested defendant; defendant then went to the car that they arrived in to retrieve a gun to shoot Jeffrey; when his friends would not aid him in retrieving the gun, he went inside the trunk himself, retrieved the gun and began shooting at the people who were attempting to go back into the apartment. He was also identified in a lineup by several witnesses. In contrast, defendant's evidence suggested that the argument between he and Missy was merely a misunderstanding; that he was not upset when Jeffrey called him a b*tch nor was he upset that he had gotten beaten up; he retrieved the gun in fear of his life and he fired his gun once without looking then several times in the air. In summary, our review of the evidence leads us to conclude that it is not closely balanced.

¶ 49 Turning to the second part of the plain error analysis, we note that a less rigid application of the waiver rule prevails when misconduct of the trial judge is involved. *People v. Barrow*, 133 Ill.2d 226, 260 (1989). Because of this relaxed standard, and because the judge's comments deal with a most serious subject matter—the State's burden of proof—we elect to resolve the plain error issue in defendant's favor and address the merits of the issue. *People v. Berry*, 244 Ill.App.3d 14, 25 (1991).

¶ 50 It is well established that the concept of reasonable doubt needs no definition and that it is improper for the court or counsel to attempt to define reasonable doubt to the jury. *People v. Thomas*, 191 Ill.App.3d 187, 196–97 (1989). We must therefore consider whether these comments require reversal of defendant's conviction. For comments by a trial judge to constitute reversible error, the defendant must show that the remarks were prejudicial and that he was harmed by the comments. *People v. Heidorn*, 114 Ill.App.3d 933, 937 (1983).

*10 ¶ 51 In this case, we conclude that reversal is not required. Not all improper comments constitute reversible error. *Heidorn*, 114 Ill.App.3d at 937. The verdict will not be disturbed unless the judge's remarks constituted a material factor in the conviction or unless prejudice to the defendant appears to be their probable result. *Heidorn*, 114 Ill.App.3d at 937.

¶ 52 As previously stated, the trial judge made the following statements during *voir dire*:

“Then the other thing is, the State has the burden of proof, and that burden of proof is proof beyond a reasonable doubt, and that lasts throughout each and every stage of the trial.

Does anybody have any qualms about the State has the burden of proof or the proof being proof beyond a reasonable doubt? Raise your hand either in the inner or outer part of the courtroom.

Nobody has raised their hand.

Illinois does not define reasonable doubt, but any of you who may have sat on a civil jury there's a preponderance of the evidence, reasonable doubt is the highest burden of proof in our country and in our State. Those of you who may have sat on civil cases, preponderance of the evidence, if you look at this like a scale, all you have

to do is tilt it. So the definition of preponderance of the evidence is, it's more likely than not that the event occurred.

Again, Illinois doesn't define reasonable doubt. That's up for you to decide in words, but in analogy to the scale thing, you would have to tip it like this, so that would be some insight into what proof beyond a reasonable doubt would be.”

¶ 53 We note that the trial court made subsequent pre- and post-trial admonishments to the jury that its comments were to be disregarded as well as anything except the evidence received in the case. Specifically regarding the burden of proof, during the jury instructions phase of the trial, the trial court admonished the jury as follows:

“The defendant is presumed to be innocent of the charges against him. This presumption remains with him throughout every stage of the trial and during your deliberations on the verdict and is not overcome unless from all the evidence you are convinced beyond a reasonable doubt that he is guilty.

The State has the burden of proving the guilt of the defendant beyond a reasonable doubt and this burden remains on the State throughout the case. The defendant is not required to prove his innocence.”

¶ 54 We do not believe that the court's comments during *voir dire* could reasonably be construed as inviting the jury to convict defendant based on less than the reasonable doubt standard. Moreover, the subsequent remarks cured any possible error. Defendant has not shown that he was prejudiced by the comments, thus reversal is not required. See *Berry*, 244 Ill.App.3d at 26; *Heidorn*, 114 Ill.App.3d at 937. We conclude, in view of the overwhelming evidence of defendant's guilt, that the trial court's comments, while improper and should not have been made, had no effect on the verdict of the jury and constituted harmless error.

*11 ¶ 55 Alternatively, defendant raised trial counsel's ineffectiveness for the failure to preserve this issue. However, we have considered the merits of this issue and have determined that any error in the comments made during *voir dire* were cured by subsequent instructions to the actual jury and the evidence against the defendant was overwhelming. To get a new trial on the basis of ineffective assistance of counsel, a defendant alleging ineffective assistance must not only show an error but

he must show that but for the alleged error there is reasonable probability the outcome of the trial would have been different but for the error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). Here the evidence against the defendant is overwhelming and there is no reasonable probability the outcome of the trial would have been different absent the alleged error. Therefore, defendant cannot satisfy the prejudice prong of *Strickland*. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

¶ 56 Admission of Defendant's Prior Conviction

¶ 57 Finally, defendant contends that the trial court erred by denying his motion *in limine* to exclude his prior conviction for conspiracy to commit murder without proper consideration of the factors required by *People v. Montgomery*, 47 Ill.2d 510 (1971).

¶ 58 Evidence of past crimes which do not relate to testimonial credibility may be admitted if they are relevant for some proper purpose other than impeachment. *People v. Williams*, 161 Ill.2d 1, 39 (1994). It is a fundamental tenet of our criminal justice system, however, that the introduction of evidence of other crimes to show or suggest a propensity to commit crime is an improper purpose and is prohibited. *Williams*, 161 Ill.2d at 39–40.

¶ 59 In *Montgomery*, our supreme court held that evidence of a witness' prior conviction is admissible to attack the witness' credibility where: 1) the prior crime was punishable by death or imprisonment in excess of one year, or involved dishonesty or false statement regardless of the punishment; 2) less than 10 years has elapsed since the date of conviction of the prior crime or release of the witness from confinement, whichever is later; and 3) the probative value of admitting the prior conviction outweighs the danger of unfair prejudice. *Montgomery*, 47 Ill.2d at 516. The last factor requires a judge to conduct a balancing test, weighing the prior conviction's probative value against its potential prejudice. *People v. Mullins*, 242 Ill.2d 1, 14 (2011).

¶ 60 *Montgomery* further explained that in performing this balancing test, the trial court should consider the nature of the prior conviction, the nearness or remoteness of that crime to the present charge, the subsequent career of the person, the length of the witness' criminal record, and whether the crime was similar to the one charged.

Montgomery, 47 Ill.2d at 518; *Mullins*, 242 Ill.2d at 14–15. If the trial court determines that the prejudice substantially outweighs the probative value of admitting the evidence, then the evidence of the prior crime must be excluded. *Montgomery*, 47 Ill.2d at 518; *Mullins*, 242 Ill.2d at 15. The determination of whether a witness' prior conviction is admissible for purposes of impeachment is within the sound discretion of the court. *Montgomery*, 47 Ill.2d at 517–18; *Mullins*, 242 Ill.App.2d at 15.

*12 ¶ 61 In this case, we note that defendant's testimony was essentially his entire defense, thus his credibility was a central issue before the jury. Accordingly, his prior convictions were crucial in measuring his credibility. “ ‘Similarity alone does not mandate exclusion of a prior conviction.’ ” *Mullins*, 242 Ill.2d at 16 (quoting *People v. Atkinson*, 186 Ill.2d 450, 463 (1999)). This is especially so when the jury is instructed to consider the evidence of the defendant's prior convictions for the limited purpose of impeachment, which ensures that the jurors understood the narrow reason for which the prior convictions were admitted. See *Atkinson*, 186 Ill.2d at 463.

¶ 62 Additionally, in *Atkinson*, our supreme court specifically rejected the notion that the *Montgomery* balancing test is not properly performed unless the trial court explicitly states that it is doing so on the record. *Atkinson*, 186 Ill.2d at 462–63; see also *People v. Williams*, 173 Ill.2d 48, 83 (1996) (trial court did not disregard *Montgomery* rule simply because it did not explicitly state for the record that it was balancing the opposing interests).

¶ 63 Here, defense counsel sought to exclude evidence of defendant's prior conviction for conspiracy to commit murder. In denying defendant's motion *in limine*, the trial court specifically stated that it was applying the *Montgomery* rule and further that in conducting the balancing step, it concluded that the prior conviction was more probative than prejudicial. Contrary to defendant's argument, the record does not demonstrate that the trial court failed to weigh the probative value of the impeachment against its possible prejudicial effect. Rather, the record reflects that the trial court was very much aware of the *Montgomery* standard and gave proper consideration to the relevant factors as part of its balancing process. Thus the trial court's decision to admit defendant's prior conviction was not error.

¶ 64 CONCLUSION

¶ 65 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 66 Affirmed.

Presiding Justice [McBRIDE](#) and Justice [PALMER](#) concurred in the judgment.

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