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Clearing the fog of 'reasonable doubt' important for due process

The Illinois Supreme Court has made it clear that in criminal cases "neither the court nor counsel should attempt to define the reasonable doubt standard for the jury." *People v. Speight*, 153 Ill.2d 365 (1992). Consequently, Illinois Pattern Jury Instruction 2.05 specifically does not provide for one. This is because "there is no better definition of reasonable doubt than the words themselves." *People v. Franklin*, 2012 IL App (3d) 100618.

Terrific. But what if the jury does not agree that the definition is so obvious?

Three recent Illinois cases present situations where deliberating juries have sent notes to the judge asking for help in understanding what "reasonable doubt" means. The divergent results in these cases illustrate the need to rethink this problematic area of the law.

The three cases come from the 1st and 2nd District Appellate Courts: *People v. Thomas*, 2014 IL App (2d) 121203; *People v. Downs*, 2014 IL App (2d) 121156; and *People v. Turman*, 2011 IL App (1st) 091019.

The jury in *Turman* sent the judge a note asking for a "more explicit, expansive definition of reasonable doubt." The judge responded, "Reasonable doubt is not defined under Illinois law. It is for the jury to collectively determine what reasonable doubt is."

The 1st District held that the judge committed plain error and reversed the conviction. It held that the judge's answer probably led the jury to use a standard below the threshold of reasonable doubt. Yet it never explained why, nor did it define just what that threshold was.

The deliberating jury in *Downs* sent the judge a note asking "What is your definition of reasonable doubt: 80 percent 70 percent 60 percent?" The judge

wrote back, "We cannot give you a definition ... it is for you to decide."

The 2nd District likewise reversed the conviction in *Downs* because "By asking if reasonable doubt was 80 percent, 70 percent or 60 percent, the jury clearly showed that it was already contemplating a standard less than the reasonable doubt standard required under the law." But, like *Turman*, *Downs* provides no suggestion of what the "standard" is; it simply concludes that the jury probably violated it.

Last month the 2nd District faced yet another jury note in *Thomas*. Here the jury sent the judge a note asking "What is the legal definition of 'reasonable doubt'?" The judge sent back a note stating "It is for you to determine."

However, this time the 2nd District affirmed. It did so first by distinguishing *Downs* because in that case the jury's use of numerical probabilities constituted

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concrete evidence that they perhaps used too low a standard for reasonable doubt.

More important, the 2nd District in *Thomas* refused to follow the 1st District's decision in *Turman*, which suggested that any attempt to define reasonable doubt was reversible per se. Instead, the 2nd District held that the judge's response "It is for you to determine" was "unquestionably correct" as a matter of law. *Thomas* said that unless there was a reasonable likelihood that the jury convicted the defendant pursuant to a standard less than "beyond a reasonable doubt," the verdict must stand.

CRIMINAL PROCEDURE

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So with the 1st and 2nd districts at loggerheads over how a judge should respond to a jury's request for a definition of "reasonable doubt," where do we go from here?

First, would you like to know the U.S. Supreme Court's definition of reasonable doubt?

Well, so would everyone else. A recent law review article by Miller W. Shealy Jr., castigates the Supreme Court because it "has inexcusably failed to give definition or substance" to the concept of reasonable doubt. "A Reasonable Doubt About 'Reasonable Doubt,'" 65 Oklahoma Law Review 225, 229 (2013). Like Illinois, the U.S. Supreme Court has found attempts to define reasonable doubt both proper and improper, but has never actually defined what reasonable doubt is. See, e.g., *Victor v. Nebraska*, 511 U.S. 1 (1994).

Of course, some argue that a jury instruction defining reasonable doubt is superfluous. As one court has said, "Reasonable doubt" must speak for itself. Jurors know what is 'reasonable' and are quite familiar with the meaning of 'doubt.'" *U.S. v. Glass*, 846 F.2d 386 (7th Cir. 1988).

Shealy argues that this is "laughable." He quotes philosopher Larry Laudan's observation

that "'Reasonable doubt,' like many other compound terms of art (think of 'civil servant' or 'black box'), carries a freight not implied by either of its constituents."

Creating a jury instruction defining "reasonable doubt" is not an easy task. The Supreme Court does not mandate that a jury be instructed on the definition, and both Illinois and the 7th U.S. Circuit Court of Appeals refuse to provide one. But the danger in refusing to define the term is creating the jury confusion found in *Turman*, *Downs* and *Thomas*.

For example, the lack of a definition of "reasonable doubt" led the 2nd District in *Thomas* to make this disturbing holding: "A trial court's instruction that the meaning of 'reasonable doubt' is for jurors to determine is a correct statement of Illinois law."

Obviously, this is wrong. If a criminal jury decides that evidence less than a preponderance suffices to meet the standard for "beyond a reasonable doubt," this would clearly be a violation of due process. Although jurors do have the right to determine whether the evidence proves guilt "beyond a reasonable doubt" (that is, to apply the standard), they have no right to make up the definition of the standard itself.

I cannot see Illinois simply rejecting years of precedent and suddenly adopting a jury instruction on reasonable doubt. But a more modest step would be for Illinois to create a pattern instruction to be used only if the jury requests assistance in defining the meaning of "reasonable doubt." It would have provided much needed help to the trial judges in *Turman*, *Downs* and *Thomas*.

These three cases in the last four years should forever dispel the illusion that juries need no help in defining reasonable doubt. It is now time for Illinois to find a remedy to assist understandably confused jurors.