STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
(K.F. KELLY, P.J., and BORRELLO and SERVITTO, JJ.)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEANDRE TERREL AUSTIN,

Defendant-Appellant.

Supreme Court No. 161092

Court of Appeals No. 344703

Circuit Court No. 17-010362-01 FC

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURIDICTION

The Court of Appeals affirmed Deandre Austin's convictions in his appeal by right. (9a). The defense timely applied for leave to appeal in this Court. This Court ordered supplemental briefing and oral argument on the application. *People v Austin*, ___ Mich ___; 951 NW2d 913 (2020). Jurisdiction is proper. Const 1963, Art 6, § 4; MCR 7.303(B)(1); MCR 7.305(H)(1).

STATEMENT OF QUESTIONS INVOLVED

This Court has asked the parties for supplemental briefing on

> (1) whether the defendant was denied a fair trial by virtue of the trial judge's instructions to the jury regarding reasonable doubt;
>
> (2) whether trial counsel was constitutionally ineffective for failing to object to the trial judge's instructions on reasonable doubt; and
>
> (3) whether the evidence presented at trial was sufficient to support the defendant's conviction of felony-murder.

INTRODUCTION

". . . the instruction had a tendency to disarm their caution rather than to put them upon their guard against being led astray by a plausible but doubtful case."

— *Carver v People*, 39 Mich 786, 789 (1878) (opinion by COOLEY, J.).

The victim in this case, a limousine driver, shuttled three young men from Toledo to Detroit for a concert. Afterward, the driver took the three concertgoers to a bar he knew. There, the driver met up with two other men—one in a Chicago Bears jacket, the other dressed in all black—who sold the driver cocaine. Eventually, the driver, the concertgoers, and the two men from the bar all ended up in the limousine together. The man in black and the driver argued over the quality of the cocaine that the man in black had sold the driver. At some point, the driver attacked the man in black, who then shot and killed the driver. Immediately after, the man in black robbed the three concertgoers and fled into the night. Deandre Austin was later identified as the man in black. He was convicted at trial of felony-murder, armed robbery, and attendant crimes.

But Austin's trial was marred by significant errors. First, the trial court judge, in a freewheeling explanation of the reasonable-doubt standard, compared the decision

whether to convict to calling up a friend and asking her opinion about a personal matter. "We do this all the time," the judge said. But more than 100 years ago, this Court held that a trial court cannot compare a jury's task in applying the reasonable-doubt standard to "the judgment which you use in the ordinary affairs of life." *People v Albers*, 137 Mich 678, 690–691; 100 NW 908 (1904). "It may be said," the Court explained, "that in the ordinary affairs of life most men never require evidence which convinces them beyond a reasonable doubt." *Id.* at 691 (cleaned up).

Second, the facts of this case did not support a felony-murder conviction. In *People v Gillis*, 474 Mich 105, 117; 712 NW2d 419 (2006), this Court held that for felony-murder to apply, the killing must (1) be committed during the res gestae of the felony and (2) be causally connected to the felony. Here, neither prerequisite was met.

This Court should reverse and remand for a new trial.

STATEMENT OF FACTS

At a jury trial in the Wayne Circuit Court, Judge Vonda R. Evans presiding,[1] Deandre Austin was found guilty of felony-murder, MCL 750.316; three counts of armed robbery, MCL 750.529; felon-in-possession of a firearm, MCL 750.224f; and felony-firearm, MCL 750.227b. The court sentenced Austin to spend the rest of his life in prison without the possibility of parole. He appealed by right in the Court of Appeals, which affirmed his convictions in an unpublished per curiam opinion. *People v Austin*, unpublished per curiam opinion of the Court of Appeals, issued January 14, 2020 (Docket No. 344703) (K.F. KELLY, P.J., BORRELLO AND SERVITTO, JJ.) (9a). Austin then applied for leave to appeal in this Court. This Court has ordered supplemental briefing and oral argument on the application. *People v Austin*, ___ Mich ___; 951 NW2d 913 (2020).

The leadup

On the evening of April 14, 2017, friends Jameson Sheely, Scott Zaborowski, and Thomas Stover took a limousine from Toledo to Detroit to attend a Gucci Mane concert at the Fox Theatre. (204a-205a, 259a, 302a). Sheely's

[1] Judge Evans has since resigned.

father had chartered the limousine, which was driven by Devin Lowe. (204a-205a).

The three friends gave consistent accounts of events early in the night. On the way from Toldeo to Detroit, all three were drinking, and Zaborowski and Stover were also smoking marijuana. (206a, 260a-261a, 302a). At the concert, the three had more drinks. (206a, 260a-261a, 303a). The concert ended at about midnight. (206a). Afterward, Sheely tried calling Lowe to pick them up, but Sheely couldn't reach Lowe. (206a, 262a, 304a-305a). The three friends decided to go to a nearby bar, where they had more drinks. (206a-207a, 262a, 304a).

About thirty to forty-five minutes later, Lowe picked them up at the bar. (208a, 262a, 304a-305a).[2] Lowe suggested that he take them to Delux Lounge in Detroit, and they all agreed. (210a-211a, 263a-264a, 305a).[3]

At Delux, the three friends drank more and danced. (211a, 264a, 306a). Lowe also came into the bar. (211a, 306a). Lowe met up with two other men, one wearing a Chicago Bears jacket and one wearing all black. (221a-223a,

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[2] Lowe's whereabouts during this interlude were not ascertained on the record.

[3] There was also testimony that three women accompanied them into the limousine. Zabrowski and Stover each made out with one woman and smoked marijuana with them. The women then left the limousine. (208a-209a, 262-264a).

264a-265a, 307a). As explained below, one or both men likely sold Lowe cocaine at the bar.

Sheely, Zambrowski, and Stover left the bar at approximately 3:00 a.m. and returned to the limousine. (211a, 264a-265a, 306a). The two men that Lowe had been talking to came with them. (221a-222a; 265a, 306a-307a). Lowe said that he was going to drop the two men off at a gas station. (225a, 265a, 307a). Zaborowski recalled seeing the man in black smoking cigarettes in the limousine. (294a).

The shooting

Although their accounts diverged on some details, Sheely, Zaborowski, and Stover were mostly consistent on the events leading to the shooting.

After they drove away from Delux, an argument began over cocaine. Sheely recalled that it was between Lowe and both unknown men. (224a, 226a). Sheely testified that the argument was about the "quality of the product" (226a), as Lowe was not happy with the cocaine he had bought (227a). Sheely also testified that there were "countless attempts to try and sq—squelch the argument" (225a) by the three friends (227a).

As they pulled into a gas station, the argument continued. (228a). Lowe got out of the driver seat and came to the

back of the limousine. (228a, 265a-266a).[4] There was some discussion of a "trade." (229a). Zaborowski testified that Lowe bought cocaine from one of the men and snorted it. (266a-267a). Lowe was not happy with the quality of the cocaine according to Zaborowski. (268a). Stover recalled Lowe and the man in black arguing over $50. (310a). Lowe eventually returned to the driver seat. (230a).

Stover and the man in the Bears jacket then went into the gas station together. (230a). When Stover and the man in the Bears jacket later exited the gas station, Lowe got out of the driver seat and Stover got back into the limousine. (232a). Lowe followed behind him. (232a, 310a).

Lowe then lunged at the man in black. (251a-252a). Zaborowski testified that Lowe "seem[ed] to rush" the man in black. (270a). Zaborowski also described it as a "dive" (271a), with Lowe lunging forward with his hands extended (272a). Stover testified that Lowe had been pulling away from the gas station but got upset, put the limousine in park, and came to the back. (312a). Lowe confronted the man in black, saying, "Oh, you played me. How can you do this to me?" (318a-319a). Stover testified that Lowe then came inside and "looked as if he was trying to reach into the pockets of the gentleman in all black." (319a).

As Lowe attacked the man in black, the man in black pulled out a gun and shot and killed Lowe. (232a-233a,

[4] Stover did not recall this point. (310a).

235a, 280a). Zaborowski estimated that he heard five to seven gunshots. (280a). Stover estimated eight or nine. (320a).

The robbery

After Lowe was shot, the man in black turned to Sheely, put the gun to his head, and said, "Give me your shit, motherfucker." (233a). Sheely gave the man his watch, a gold wrist bracelet, and a gold chain necklace. (234a). The man then put the gun to Zaborowski's head. (284a). Zaborowski offered his watch, but the man didn't want it. (284a). The man next put the gun to Stover and took his necklace chains. (321a-322a). The man then ran away. (236a, 285a, 327a). The man in the Bears jacket had also fled by this point. (236a).

After their ordeal, Sheely, Zaborowski, and Stover went inside the gas station and called the police. (237a, 286a, 329a).

The police investigation

Police obtained security camera video from several of the locations involved in this case. (184a-199a). The video generally corroborated the story of the three young men.

(312a-328a). The identity of the shooter was not definitively established through the video evidence.

A man named Jovan McDade quickly became a suspect after a tip came in. (621a-622a). Police prepared a lineup to present to Sheely, Zaborowski, and Stover. (623a). Zaborowski and Stover identified McDade as the shooter. (624a). Sheely identified another person. (623a-624a). McDade was eventually excluded as a suspect, though, because police could find no other evidence linking him to the crime. (625a-626a). Austin was not yet a suspect at this point. (624a).

The medical examiner found that Lowe had cocaine in his system when he died. (657a).

The man in the Bears jacket comes forward

The day after the shooting, Donta Etchen walked into a Detroit police precinct and told police that he was the man who had been with the shooter. (513a-514a, 594a). He explained, "[P]eople were tellin' me they seened [sic] it on the news, and this and that; my family members, and stuff. So, I wanted to turn myself in and clear my name on the situation." (514a).

Etchen testified that he had been bar hopping in Detroit before the shooting. (484a). At some point he ran into an acquaintance he knew as "Black." (485a). Etchen's

testimony on his relationship with Black was, in a word, confusing. Etchen testified that he knew Black because "we all hang downtown." (488a). But in his very next answer, he said, "I never hung out with him." (488a). "[Y]ou get familiar with people," Etchen added, " 'cuz some of the same people be around." (488a). Still, he testified that he had seen Black "numerous" times. (489a). He also testified that he knew Black's name "from people" and "from bein' around." (489a).

Etchen testified that he and Black eventually went to Delux that night. (486a). There, he ran into "three white guys and one black guy," meaning Lowe, Sheely, Zaborowski, and Stover. (487a). According to Etchen, he got into the limousine with Black because "they"[5] wanted to get high on cocaine and marijuana. (491a). Black sold Lowe cocaine "a couple times" both at Delux and after they all left Delux. (496a). Etchen also admitted selling Lowe cocaine about four times at Delux. (536a-539a). Etchen claimed that Black "barged in behind [his] back" to sell cocaine to Lowe. (538a). According to Etchen, Lowe snorted the cocaine both at Delux and in the limousine. (497a).

Etchen testified that when Lowe first came to the back of the limousine, he expressed dissatisfaction with the cocaine he had bought from Black. (496a-498a). Black ignored Lowe. (504a-505a). Etchen recalled then going into

[5] Who "they" referred to isn't clear from the context.

the gas station with Stover. (498a-499a). Etchen later got back into the limousine but had to get out so Lowe could get in. (500a). Etchen recalled going into the gas station a second time. (501a). At some point, Lowe "was askin' for a better quality or his money back." (502a). Black ignored Lowe, but Lowe "kept pressin' the issue." (503a). Etchen testified that "both started gettin' word aggressive, you know." (503a). Etchen also said that Lowe and Black were getting "angry." (503a).

According to Etchen, Black then pulled a gun out. (504a). Etchen did not see where Black pulled the gun from. (504a). Etchen testified, "Well, when I seen the gun, I got my wallet out and I kinda' like dropped it and hit the door," meaning he "left the car." (504a-505a, 512a). He explained that he had "just got shot, twice," and when he saw the gun, "I just figured he wanted the money, so I gave him my wallet, with the money, and I hit the door; like left from the limo driver's car." (505a). Etchen testified that Black had not asked for his wallet. (582a). Sheely denied seeing the man in black point the gun at the man in the Bears jacket. (253a). Sheely likewise denied seeing the man in the Bears jacket throw his wallet and get out of the limousine. (254a).

Etchen testified that as he was walking away from the limousine, he heard about six or seven gunshots and took off. (505a-506a).

At trial, Etchen identified Austin as "Black." (486a-487a). He had also identified Austin in a photo array. (514a-517a).

But Etchen's testimony was far from flawless. He was in jail on unrelated charges at the time of trial, although he claimed that no promises had been made to him in exchange for his testimony. (483a). On cross-examination, he was largely uncooperative. For instance, when questioned about his prior criminal record, he was extraordinarily unforthcoming. (524a-527a). His testimony also did not line up with Sheely's, Zaborowski's, and Stover's on some points. For example, he testified that he accompanied the three men to "about four" different bars that night. (536a).

The forensic evidence

Police also conducted a forensic investigation in the limousine. McDade's DNA was not found on any of the items tested, nor was Etchen's. One cigarette butt that was found in the limousine likely contained DNA from both Sheely and Austin. (479a-480a). But this was the only piece of forensic evidence connecting Austin to the crime. Also, DNA from a third contributor on the cigarette butt was unidentified. (472a-473a). And DNA evidence from an unidentified person was found on a water bottle. (466a). The other results of the forensic investigation were unremarkable. For example, Lowe's DNA was found on several items.

In-court identifications

At trial, Sheely and Stover could not positively identify Austin as the shooter. (234a, 321a). Zaborowski, though, testified that he had no doubt that Austin was the shooter. (292a-293a).

ARGUMENT

I. The trial court's flippant instructions on the reasonable-doubt standard were plainly erroneous.

Issue Preservation

Trial counsel neglected to object to the erroneous reasonable-doubt instructions, so this issue is unpreserved and reviewable for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Standard of Review

Under the plain error standard of review, a defendant is entitled to relief if he can show "(1) that the error occurred, (2) that the error was 'plain,' (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Vaughn*, 491 Mich 642, 654; 821 NW2d 288 (2012).

Analysis

In instructions before voir dire, the trial court gave the prospective jurors the standard instruction on reasonable doubt:

> A reasonable doubt is a fair and honest doubt, growing out of the evidence or lack of evidence. It is not merely an imaginary, or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that: a doubt that is reasonable after a careful and considered examination of the facts and circumstances of this case. [36a-37a; M Crim JI 1.9; M Crim JI 3.2.]

During voir dire, the trial court asked the prospective jurors if they had "ever had to make a decision, but if you were given more information you would have made a different decision?" (65a). All the prospective jurors in the jury box affirmed that they had. (65a-66a). The court then said, "It's not about absolute certainty, it's about using your reason and common sense to determine whether or not the People have produced evidence that convinces you, the jury, that the defendant has committed the crime." (66a). The court added, "And the standard is beyond a reasonable doubt, as to each and every element. That's the standard." (66a-67a). The court concluded, "I didn't say no any doubt, did I?" (67a). The court reemphasized that it did not say "any doubt," instead, "I just said beyond a reasonable doubt." (67a).

Returning to reasonable doubt later in voir dire, the court reiterated, "I didn't say any doubt, or a shadow of a doubt." (75a-76a). The court continued,

> Beyond any doubt, I'm a black female, I got two kids, I'm gonna' die one day, and as long

> as I got a job, I'm gonna' pay taxes. That's any doubt. I said beyond a reasonable doubt, okay? [76a.]

Next, the court addressed intent, "a secret of the mind." (76a). The court explained that "the law says that you can infer a person's secret of the mind by their actions, by what they do, or what they say." (76a). The court then gave the hypothetical of one of the prospective jurors going to a casino, putting "his debit card in there" and feeling "like a metal object at the back of his head." (76a). "What are you going to infer, from the feeling of that metal object, that that person wants?" the court asked the prospective juror. (77a). "He wants my money," the prospective juror answered. (77a). The court asked if it was possible that the person with the metal object was writing a dissertation on "response[s] to a perceived fearful event." (77a). The prospective juror agreed it was possible but doubtful. (77a). The court continued questioning the prospective juror, trying to have him concede that it was possible but not reasonable:

> THE COURT: Is it reasonable?
>
> JUROR EIGHT: It's reasonable.
>
> THE COURT: No, reasonable. Is that reasonable?
>
> JUROR EIGHT: Well—
>
> THE COURT: (Interposing) But is it possible?

> JUROR EIGHT: It's possible, yes.
>
> THE COURT: Okay, very good. [77a.]

Continuing in the same vein, the court elicited from one prospective juror that she had an 11-year-old daughter. (78a). The court asked, "If she were to come in the house, crying, could you infer she was sad?" (78a). "Yes," the juror said. (78a). The court replied, "The law says that you can infer, from a person's actions, their state of mind." (78a). The court added,

> We're not looking for absolute certainty. But, the—the standard is proof beyond a reasonable doubt. Not any doubt, not a shadow of a doubt, but beyond a reasonable doubt, okay? [78a.]

Later in voir dire, the court once again turned to the reasonable-doubt standard, saying, "Now, let's talk a little bit about this last concept of beyond a reasonable doubt." (80a). The court repeated the standard instruction, interspersed with some commentary:

> A reasonable doubt is a fair—a reasonable doubt is a fair and honest doubt, growing out of the evidence or lack of evidence. And, you know what that is, what evidence is. It's not merely an imaginary, or a possible doubt, but a doubt based on reason and common sense. There go that word, again—those words. A reasonable doubt is just that: a doubt that is reasonable, after a careful and considered

> examination of the facts and circumstances of the case—of this case. [80a-81a.]

The court then launched into what the defense has referred to as the fiancée hypothetical. Occupying about seven pages of the transcript, the defense does not endeavor to reproduce it verbatim. (81a-88a). To summarize, the court gave an example of a bride planning her wedding, casting one prospective juror—juror fourteen—in the role of the bride. (81a-82a). The bride envisions "a fairytale wedding on a shoestring budget." (82a). She becomes obsessive. (83a). One day, she's out driving and receives a call from her fiancé. (83a-84a). He tells her that he can't have dinner with her that night because he has to pick his friend up from the airport after his flight was delayed. (83a-84a). The fiancé and his friend plan on having dinner together afterward. (83a-84a). Later, the bride sees what looks to be her fiancé's car with a passenger in it. (84a). She follows the car until it stops at a hotel, where the fiancé gets out with another woman. (85a). The bride waits thirty minutes and calls the fiancé's phone, which goes straight to voicemail. (85a). Roughly two hours later, the fiancé and the other woman walk out of the hotel, hug, and get back in the car together. (85a). When the bride calls the fiancé later, he says that he had dinner with his friend. (86a).

The court asked two jurors if there was a reason to believe that the fiancé was not being truthful. (86a). Both indicated that there was. (86a-87a). Both also indicated, at

the court's prompting, that it only took them seconds to reach this conclusion. (86a-87a). "Follow along," the court said. (87a). The court then recited the standard reasonable-doubt instruction and said, "It don't take long." (87a). The court added, "That's what this—reasonable doubt." (87a).

The trial court then continued with the hypothetical, proposing that the bride confronts the fiancé, saying that she saw him with the other woman. (88a). The fiancé tells the bride that she has become a "Bridezilla" and that the other woman was a wedding planner. (88a). "It was a surprise," he says. (88a). "I wanted to relieve you of your responsibilities in planning this wedding, because you became someone I didn't know." (88a). The court then asked, "Is that possible, juror number fourteen?" (88a). "It's possible," she answered. (88a). "Is it reasonable," asked the court. (88a). "No," she replied. (88a). It appears that the juror may have been hesitant, and the court added jokingly, "Juror number fourteen says: 'Look, I'm tryin' to get married, I'm not comin' up with no conclusions.'" (88a). The court then affirmed, "It's not reasonable." (88a).

Immediately after, as its final point on the matter, the court compared the reasonable-doubt standard to calling up a friend and asking her opinion about something:

> That's what we're talkin' about. *We do this all the time.* We'll call somebody: "You got a minute? Girl, let me tell you what happened, today," da, da, da, da, da, da, da. "What you

> think?" We're asking someone's opinion, who we're giving the facts and circumstances, to use their reason and common sense to come up with a decision about whether or not that person is being truthful, or not. That's all we're asking you to do. It's simple. That's the burden of proof, okay." [88a (emphasis added).]

The jurors nodded collectively. (89a).

After the jury was selected, the court again gave the standard reasonable-doubt instruction. (153a). The court also instructed the jury, "You should consider all of my instructions as a connected series; taken all together, they are the law that you must follow." (152a). In its final instructions, the court again gave the standard instruction. (722a). The court also told the jury once more to consider all its instructions together:

> At various times, I have already given you some instructions about the law. You must take all of my instructions together as the law you are to follow. You should not pay attention to some instructions and ignore others. [721a.]

* * *

"The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure." *In re Winship*, 397 US 358, 363; 90 S Ct 1068; 25 L Ed 2d 368 (1970). The Due Process Clause of the Fourteenth Amendment and

Article I, § 20 of the Michigan Constitution guarantee that no person can be convicted of a crime unless his guilt is proven beyond a reasonable doubt. *Id.* at 364; *People v Cook*, 285 Mich App 420, 422; 776 NW2d 164 (2009).

"The Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." *Victor v Nebraska*, 511 US 1, 5; 114 S Ct 1239; 127 L Ed 2d 583 (1994) (cleaned up). If a court does venture to define reasonable doubt, the definition must be correct. *Id.* And when a court incorrectly instructs a jury on the reasonable-doubt standard, the defendant is entitled to a new trial. *Sullivan v Louisiana*, 508 US 275, 281-282; 113 S Ct 2078; 124 L Ed 2d 182 (1993); *People v Allen*, 466 Mich 86, 90-91; 643 NW2d 227 (2002).

Where a trial court mingles proper with improper instructions on reasonable doubt, the question is whether the instructions taken as a whole created a reasonable likelihood that the jury misapplied the reasonable-doubt standard. *Victor*, 511 US at 5-6.

Here, the trial court laced the standard reasonable-doubt instruction with its improper ad-lib instructions, producing a reasonable likelihood that the jury applied a less exacting standard than our constitutions demand. The error was plain and affected Austin's substantial rights.

A. The trial court's instructions clearly and obviously misstated the reasonable-doubt standard.

1. "Beyond a reasonable doubt" demands certitude.

What does "beyond a reasonable doubt" mean? Neither this Court nor the United States Supreme Court has undertaken to conclusively define the phrase. See, e.g., *People v Cox*, 70 Mich 247, 257; 38 NW 235 (1888) ("It is not easy to define a 'reasonable doubt.'"). That said, the United States Supreme Court has offered some guidance.

Modern caselaw begins with *In re Winship*, 397 US 358. There, the Court explained that for the prosecution to meet its burden, a jury must be "convinced" of the defendant's guilt. *Id.* at 364 (cleaned up). "To this end," the Court added, "the reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." *Id.* (cleaned up). See also *id.* (demanding "utmost certainty"); *Jackson v Virginia*, 443 US 307, 315; 99 S Ct 2781, 2787; 61 L Ed 2d 560 (1979) (referencing "the need to reach a subjective state of near certitude of the guilt of the accused").

The need for certainty was echoed in *Cage v Louisiana*, 498 US 39; 111 S Ct 328; 112 L Ed 2d 339 (1990), overruled in part on other grounds as recognized by *Estelle v McGuire*, 502 US 62; 112 S Ct 475; 116 L Ed 2d 385 (1991). There, the trial court gave an instruction on reasonable

doubt that inserted, among other things, concepts of "grave uncertainty" and "actual substantial doubt":

> "If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty,* raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty.*" [*Cage*, 498 US at 40 (cleaned up; emphasis in *Cage*).]

In a brief per curiam opinion, the Court found it "plain" that "the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard." *Id.* at 41. The Court added that "when those statements are then considered with the reference to 'moral certainty,' rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the

instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Id.* (cleaned up).

That said, the term "moral certainty," properly defined, adequately conveys the concept of reasonable doubt. In *Victor*, the Court equated the two phrases. *Victor*, 511 US at 12.[6] The Court also examined the history behind the terms "moral evidence" and "moral certainty." The Court contrasted "demonstrable evidence" about abstract concepts from "moral evidence," which is "based on general observation of people." *Victor*, 511 US at 10-15 (cleaned up). Using this distinction, "moral certainty" refers to "certainty with respect to human affairs." *Id.* at 15.[7] As Professor Barbara Shapiro—a scholar who has extensively studied the reasonable-doubt standard[8]—has explained, two ideas convey the meaning behind "moral certainty" and "beyond a reasonable doubt":

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[6] Michigan cases from the nineteenth century also promulgated the "moral certainty" instruction. See, e.g., *People v Finley*, 38 Mich 482, 483 (1878). And it appears that the use of "moral certainty" continued well into the twentieth century. See, e.g., *People v Jackson*, 167 Mich App 388, 390-391; 421 NW2d 697 (1988).

[7] The Court also discouraged the continued use of "moral certainty" given that it is no longer a part of the modern lexicon and its meaning may have changed. *Id.* at 16-17.

[8] Professor Shapiro's scholarship has been cited by the United States Supreme Court. See *Victor*, 511 US at 10, 11.

> The first idea is that there are two realms of human knowledge. In one it is possible to obtain the absolute certainty of mathematical demonstration, as when we say that the square of the hypotenuse of a right triangle is equal to the sum of the squares of the other two sides. In the other, which is the empirical realm of events, absolute certainty of this kind is not possible. The second idea is that, in this realm of events, just because absolute certainty is not possible, we ought not to treat everything as merely a guess or a matter of opinion. Instead, in this realm there are levels of certainty, and we reach higher levels of certainty as the quantity and quality of the evidence available to us increases. The highest level of certainty in this realm in which no absolute certainty is possible is what traditionally has been called moral certainty. [Shapiro, *'To a Moral Certainty': Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 Hastings LJ 153, 192-193 (1986).]

In short, jurors must be as certain as humanly possible to be persuaded of a defendant's guilt "beyond a reasonable doubt." See Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 Harv L Rev 1329, 1374 (1971) (explaining that "beyond a reasonable doubt" "insists upon as close an approximation to certainty as seems humanly attainable in the circumstances."); Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 Texas L Rev 105, 133 (1999) (explaining that "the juror has to be able to say to herself, 'the

government's proof is so strong that I can't reasonably imagine that he didn't do it.' ").[9]

2. *People v Albers* prohibits comparing the reasonable-doubt standard to "the judgment which you use in the ordinary affairs of life."

Although this Court had not endeavored to definitively elucidate the meaning of "beyond a reasonable doubt," the

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[9] Professor Shapiro offered the following proposed instruction for reasonable doubt:

> We can be absolutely certain that two plus two equals four. In the real world of human actions we can never be absolutely certain of anything. When we say that the prosecution must prove the defendant's guilt beyond a reasonable doubt, we do not mean that you, the jury, must be absolutely certain of the defendant's guilt before finding the defendant guilty. Instead, we mean that you should not find the defendant guilty unless you have reached the highest level of certainty of the defendant's guilt that it is possible to have about things that happen in the real world and that you must learn about by evidence presented in the courtroom. [*'To a Moral Certainty*,' 38 Hastings LJ at 193.]

Also worth noting, English courts have moved away from reasonable doubt, preferring instead to tell jurors that they must be "sure" of the defendant's guilt to convict. See *Regina v Majid*, [2009] EWCA Crim 2563.

Court has drawn at least one line in the sand—the decision whether to convict cannot be compared to jurors' everyday decisions.

In *People v Albers*, 137 Mich 678; 100 NW 908 (1904), the trial court instructed the jury thus: " 'Whatever would convince you beyond a reasonable doubt, in the judgment which you use in the ordinary affairs of life, is all that is necessary to convince you as jurors sitting in a criminal case.' " *Albers*, 137 Mich at 690-691. Finding the instruction erroneous, Justice CARPENTER, writing for a unanimous Court, explained, "I think it may be said that in the ordinary affairs of life most men never require evidence which convinces them beyond a reasonable doubt." *Id.* at 691. He added that the instruction "tells such men to act on an impossible assumption, and it is likely to lead to the notion—a notion that all will concede to be erroneous—that they may convict a person charged with crime on such evidence as would convince their judgment in the ordinary affairs of life." Instead, any analogy should be to the judgment used in "the most important affairs of life":

> "The absence of doubt or guilt, when the measure and limit of scrutiny is that which reasonable men would exercise in the ordinary affairs of life is not sufficient; for it does not necessarily result therefrom that the evidence, properly considered, would leave no such doubt. If the circuit judge desired to make use of such analogy, he should have told the jury that it was their duty to scrutinize

> the evidence with the utmost caution and care, bringing to that duty the reason and prudence they would exercise in the most important affairs of life." [*Id.* (cleaned up), quoting *Anderson v State*, 41 Wis 430 (1877).]

This Court has had only one occasion to apply the rule from *Albers*. In *People v Davis*, 171 Mich 241; 137 NW 61 (1912), the trial court instructed the jury that a reasonable doubt is "a doubt which would cause you to hesitate in the ordinary affairs of life." *Davis*, 171 Mich at 247 (cleaned up). This Court held that although the instruction was "questionable considered alone," no error occurred because the challenged phrase was nested within proper instructions:

> The court instructed the jury that the defendant was presumed innocent until proven guilty, and that the presumption of innocence was with him all through the case until the testimony tore it away, and then said: "No man can be convicted of crime in this jurisdiction until his guilt is established beyond a reasonable doubt. A 'reasonable doubt' is what the word implies; a doubt founded in reason; a doubt for which you can give a reason; a doubt growing out of the testimony in the case, or the lack of testimony; a doubt which would cause you to hesitate in the ordinary affairs of life. It is not a flimsy, fanciful, fictitious doubt which you could raise about anything and everything. It means a reasonable doubt. If, when all is said and done, you have

> such a doubt about the guilt of the accused, it is your duty to acquit him." [*Id.* at 248.]

The Court concluded, "This, taken as a whole, is very different from instructing the jury that a doubt which they use in the ordinary affairs of life is all that is necessary to convince them sitting as jurors in any criminal case." *Id.*

Still, courts have denounced comparing the reasonable-doubt standard to quotidian decision-making. Consider *United States v Colon-Pagan*, 1 F3d 80 (CA 1, 1993). There,

> the court told the jury that the government must prove guilt beyond a "reasonable doubt," which, it said, did not mean guilt "beyond all possible doubt." Rather, that proof meant "proof of such a convincing character that *a person would be willing to rely and act upon it*." Earlier, it had said that in order to convict, "the evidentiary scales would have to tip more to the government's side" than in a civil case, where "the plaintiff will prevail if he makes the scale tip just a little bit to the side." It mentioned the presumption of innocence. And, it also said that a "reasonable doubt" is a "doubt based upon reason and common sense." [*Colon-Pagan*, 1 F3d at 81 (cleaned up; emphasis in original).]

The court, in an opinion by future-Justice BREYER, held that the pertinent language was erroneous. *Id.* "The instruction may give the jury the incorrect impression that it can convict a defendant in a criminal case upon the basis of evidence no stronger than might reasonably support a

decision to go shopping or to a movie or to take a vacation," the court explained. *Id.* Accordingly, the instruction was plainly erroneous. *Id.* at 81-82.

Consider, too, *People v Johnson*, 119 Cal App 4th 976; 14 Cal Rptr 3d 780 (2004), a case with noticeable parallels to this one. In *Johnson*, during voir dire, the trial court "equated proof beyond a reasonable doubt to everyday decision-making in a juror's life." *Johnson*, 119 Cal App 4th at 979-983. Through a Socratic colloquy, references were made to the decision whether to have children, whether to leave home for college, where to go for lunch, and whether to drive through a green light. *Id.* When "one prospective juror acknowledged difficulty in passing moral judgments on others," the court said that the juror would not be making a moral judgment; instead, "the thing that you're doing is kind of decisions you make every day in your life, figuring out what happened, whether the defendant is guilty or not guilty." *Id.* at 982-983 (cleaned up). When another prospective juror similarly "expressed an inability as a matter of conscience and religion to participate in a jury trial, the court instructed that jurors who find an accused person guilty or not guilty engage in the same decision-making process they 'use every day.' " *Id.* at 983 (cleaned up). The court added, " 'When you get out of bed, you make those same decisions.' " *Id.* (cleaned up). Although the defense had neglected to object to the instructions, the California Court of Appeal reversed, holding that the reasonable-

doubt standard cannot be compared to everyday decision-making and that "the court's tinkering with the statutory definition of reasonable doubt,[10] no matter how well intentioned, lowered the prosecution's burden of proof below the due process requirement of proof beyond a reasonable doubt." *Id.* at 985.[11]

3. Courts have generally tolerated "hesitate to act" instructions while condemning "willing to act" instructions.

One thread running through reasonable-doubt jurisprudence is a dichotomy between instructions phrasing the

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[10] Cal Penal Code § 1096 defines reasonable doubt thus: "It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

[11] The court in *Johnson* relied on *People v Brannon*, 47 Cal 96 (1873), which had held, like *Albers*, that the reasonable-doubt standard cannot be compared to "the judgment of a reasonable man in the ordinary affairs of life." *Brannon*, 47 Cal at 97. The Court of Appeal had then-recently "confirmed *Brannon*'s enduring vitality" in *People v Johnson*, 115 Cal App 4th 1169; 9 Cal Rptr 3d 781 (2004), where the Court of Appeal ordered a new trial given the trial court's allusions to decisions whether to take a vacation or get on an airplane. *Johnson*, 119 Cal App 4th at 985.

standard in terms of hesitating to act versus willing to act. This caselaw throws into relief some of the problems with the instructions in this case (although the instructions here technically used neither formulation).

"The most widely used explanation, especially favored in most federal courts, is the brief advice that a reasonable doubt is 'a doubt which would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life.' " Newman, *Beyond "Reasonable Doubt,"* 68 NYU L Rev 979, 982 (1993). The United States Supreme Court has "repeatedly approved" this language. *Victor*, 511 US at 20. That said, the hesitate-to-act formulation has not been without detractors. In a concurring opinion in *Victor*, Justice GINSBURG called hesitate-to-act instructions "unhelpful." *Id.* at 24 (GINSBURG, J., concurring). Quoting commentary from the Federal Judicial Center, she wrote:

> In the decisions people make in the most important of their own affairs, resolution of conflicts about past events does not usually play a major role. Indeed, decisions we make in the most important affairs of our lives—choosing a spouse, a job, a place to live, and the like—generally involve a very heavy element of uncertainty and risk-taking. They are wholly unlike the decisions jurors ought to make in criminal cases." [*Id.*, quoting Federal Judicial Center, Pattern Criminal Jury Instructions

> 18–19 (1987) (commentary on instruction 21).[12]]

Contrast hesitate-to-act formulations with similar analogies using "willing to act." In *Holland v United States*, 348 US 121; 75 S Ct 127; 99 L Ed 150 (1954), the trial court instructed the jury that reasonable doubt means "the kind of doubt which you folks in the more serious and important affairs of your own lives might be willing to act upon." *Holland*, 348 US at 140. The Court said that the instruction "should have been in terms of the kind of doubt that would make a person hesitate to act, rather than the kind on which he would be willing to act." *Id.* Still, the Court found that the instructions, taken as a whole, adequately

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[12] Justice GINSBURG likewise quoted Judge Newman's criticism of hesitate-to-act instructions:

> Although, as a district judge, I dutifully repeated the 'hesitate to act' standard to juries in scores of criminal trials, I was always bemused by its ambiguity. If the jurors encounter a doubt that would cause them to 'hesitate to act in a matter of importance,' what are they to do then? Should they decline to convict because they have reached a point of hesitation, or should they simply hesitate, then ask themselves whether, in their own private matters, they would resolve the doubt in favor of action, and, if so, continue on to convict? [*Id.* at 24-25, quoting Newman at 982-983 (cleaned up).]

conveyed the reasonable-doubt standard, as "a definition of a doubt as something the jury would act upon would seem to create confusion rather than misapprehension." *Id.* (cleaned up).

Several courts have disapproved of willing-to-act language. Consider *Scurry v United States*, 347 F2d 468, 470; 120 US App DC 374 (1965), an oft-cited case on this point. In *Scurry*, the trial court instructed the jury "that 'in order to establish proof beyond a reasonable doubt, the evidence must be such that you would be willing to act upon it in the more important affairs of your own life,' and that 'if you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters in your own affairs, then you have no reasonable doubt.'" *Scurry*, 347 F2d at 469-470 (cleaned up). The court held that this instruction was "not in accord with the law," explaining:

> Being convinced beyond a reasonable doubt cannot be equated with being 'willing to act in the more weighty and important matters in your own affairs.' A prudent person called upon to act in an important business or family matter would certainly gravely weigh the often neatly balanced considerations and risks tending in both directions. But, in making and acting on a judgment after so doing, such a person would not necessarily be convinced beyond a reasonable doubt that he had

> made the right judgment. Human experience, unfortunately, is to the contrary. [*Id.* at 470.]

Other courts have held likewise. See, e.g., *United States v Baptiste*, 608 F2d 666, 668 (CA 5, 1979) (disapproving "proof beyond a reasonable doubt is the kind of proof that you would be willing to rely and act upon in the management of your own personal affairs") (cleaned up); *United States v Dunmore*, 446 F2d 1214, 1221-1222 (CA 8, 1971) (disapproving a description of "beyond a reasonable doubt" as "willing to act upon in the more weighty and important matters relating to your own affairs").[13]

This Court has also disapproved of willing-to-act instructions. In *People v Marble*, 38 Mich 117 (1878), the trial court instructed the jury thus:

> What I mean by a reasonable doubt is, that it must be such evidence as would satisfy you—as you would be willing to act upon in any of your own important concerns—your own business—such evidence as would satisfy you it would be proper for you to act upon in any of your own private concerns; that would be evidence that would satisfy you beyond a reasonable doubt. That is what this means. [*Marble*, 38 Mich at 124-125.]

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[13] These cases did not result in reversal given that the courts were addressing nonpreserved errors before the United States Supreme Court more fully explicated the structural-error and plain-error doctrines.

With little discussion, the Court held that the instruction was erroneous. See also *People v Steubenvoll*, 62 Mich 329, 333; 28 NW 883 (1886) (discussing *Marble*).

Two principles emerge from the hesitate-to-act/willing-to-act dichotomy. First, *reasonable doubt* can tolerably be couched in terms of hesitation to act in important affairs (although some still credibly look askance at this formulation). Second, *beyond a reasonable doubt* should not be phrased in terms a willingness to act, even in the most important affairs of life.

4. Courts have castigated hypothetical illustrations of the reasonable-doubt standard.

In several cases, rather than using abstract or oblique analogies, courts have used more concrete comparisons or colorful hypotheticals to try to illuminate the reasonable-doubt standard. The results, in many cases, have been disastrous.

Consider *United States v Pinkney*, 551 F2d 1241; 179 US App DC 282, 284 (1976). There, the trial court gave the following hypothetical about a young couple deciding whether to buy a new car:

> Take a young couple who are working, they have two or three children and they have a little apartment or home. They don't have too much money in the bank, but they have an

automobile that is running pretty well. One day a salesman finds out the wife of this young man might be interested in a new automobile. So he gets her number and calls her up and says I would like to have you drive this new Chevrolet, I hear you might be interested in a new car.

Well, he came around the house and they went out for a ride and she fell in love with this automobile. She is ready to buy it right away, but the husband comes home at night and while having dinner, they start talking and she tells him about this automobile she had driven and would like to go and get it right away. She is just crazy about it.

The husband listens to her and he says: wait a minute, sweetheart, listen. How much money do we have in the bank? We have four or five hundred dollars, something like that; the children have to go to school this fall and they need new clothes and books and all that business.

And we haven't had a vacation for five years, you see, and she starts listening and he says, don't you think we could spend this money for some other purpose or save it for a rainy day?

You see, they are hesitating, talking about it, pausing. The husband says: Look, we have a nice automobile, it's running pretty well. Of course, we would like to have a new car but let's think about this.

> You see, they are hesitating, communicating with each other. It is a reasonable doubt they have. You can take that on through a thousand examples, whether you take a trip or not, whether you get a new job or not. [*Id.* at 1243.]

Finding the hypothetical improper, the court in *Pinkney* reasoned that "the jurors might well believe that for the defendant to prevail he must make out as strong a case against conviction as there was against buying the car." *Id.* at 1244. The court found that the trial court's example "overstated the degree of uncertainty required for reasonable doubt." *Id.* (cleaned up). The court also found that the trial court's comparison to the decision whether to buy "this clearly unnecessary new car" tended to "denigrate the 'graver, more important transactions of life' concept." *Id.* Likewise, the court took umbrage with the trial court's "stereotyped portrayal of the practical husband's patronizing attempt to talk sense into his flighty wife," which "trivializes the entire matter of conviction." *Id.*

Courts in Massachusetts—apparently more so than other jurisdictions—have had frequent occasion to confront similar hypotheticals. See Power, *Reasonable and Other Doubts: The Problem of Jury Instructions*, 67 Tenn L Rev 45, 79 (1999). For example, in *Commonwealth v Ferreira*, 373 Mass 116; 364 NE2d 1264 (1977), the trial court compared the reasonable-doubt standard to the degree of certainty needed to make an everyday "important decision":

> You must be as sure as you would have been any time in your own lives that you had to make important decisions affecting your own economic or social lives. You know, any time that you had to make an important decision, you couldn't be absolutely, mathematically sure that you were doing the right thing you weigh the pros and the cons; and unless you were reasonably sure beyond a reasonable doubt. [*Ferreira*, 373 Mass at 128-129 (cleaned up).]

The trial court gave examples of such important decisions, such as "whether to leave school or to get a job or to continue with your education, or to get married or stay single, or to stay married or get divorced, or to buy a house or continue to rent, or to pack up and leave the community where you were born and where your friends are, and go someplace else for what you hoped was a better job." *Id.* at 129 (cleaned up). In the Supreme Judicial Court's opinion, such examples "understated and tended to trivialize the awesome duty of the jury to determine whether the defendant's guilt was proved beyond a reasonable doubt." *Id.* The court provided the following unassailable explanation, worthy of quotation in full:

> The degree of certainty required to convict is unique to the criminal law. We do not think that people customarily make private decisions according to this standard nor may it even be possible to do so. Indeed, we suspect that were this standard mandatory in private

> affairs the result would be massive inertia. Individuals may often have the luxury of undoing private mistakes; a verdict of guilty is frequently irrevocable. [*Id.* at 130.]

Other decision from Massachusetts are in accord. See, e.g., *Commonwealth v Bonds*, 424 Mass 698, 701; 677 NE2d 1131 (1997) (finding comparisons to "the decision to marry, to buy a new house, or leave a long held job" reversible error); *Commonwealth v Rembiszewski*, 391 Mass 123, 128-135, 128 n 1; 461 NE2d 201 (1984) (finding comparison to decisions on professions, marriage, houses, and surgery to be reversible error).[14]

This Court has confronted a pseudo-hypothetical explanation of the reasonable-doubt standard on at least one occasion. In *Carver v People*, 39 Mich 786 (1878), the trial court included the following in its instructions on reasonable doubt: "After looking over all this testimony, if these matters were concerning yourselves or your own families, or the members of your families, and you would be willing to act upon it, you should act upon it in this case." *Carver*, 39 Mich at 789. In a decision by Justice COOLEY, this Court

[14] In the context of a prosecution closing argument, one court found similar comparisons to require reversal. *State v Walker*, 164 Wash App 724, 732; 265 P3d 191 (2011) (finding erroneous the prosecutor's closing argument "that the reasonable doubt standard 'is a common standard that you apply every day' and compared it to having surgery and leaving children with a babysitter").

found that the instruction put the jury "into a position very unsuitable to a dispassionate consideration of the case." *Id.* "Naturally," the Court explained, "the jury from this instruction would assume that they might deal with the case as they would be likely to if they or their families had been the victims of the fraud; and the instruction had a tendency to disarm their caution rather than to put them upon their guard against being led astray by a plausible but doubtful case." *Id.* Accordingly, this Court reversed. *Id.*[15]

In a recent strand of Pennsylvania cases, the trial court used a hypothetical that—rather than easing the burden of reaching *beyond a reasonable doubt*—increased the burden of finding *reasonable doubt*. In *Brooks v Gilmore*, unpublished opinion of the United States District Court for the Eastern District of Pennsylvania, issued August 11, 2017 (Case No. 15-cv-5659); 2017 WL 3475475,[16] the trial court first gave the jury an approved hesitate-to-act

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[15] Our Court of Appeals has similarly disapproved of hypothetical explanations of the reasonable-doubt standard. *People v Adams*, 35 Mich App 408, 410; 192 NW2d 625 (1971) (warning that "the use of examples is not to be encouraged").

[16] Although unpublished, the rationale of *Brooks* was largely adopted in *Brown v Kauffman*, 425 Supp 3d 395 (ED Pa, 2019), a case involving an almost identical instruction given by the same trial court judge. What's more, *Brooks* has been cited favorably by 3 LaFave, Criminal Procedure (4th ed), § 11.10(d), n 282.15, a seminal treatise on American criminal procedure.

instruction: " 'A reasonable doubt is a doubt that would cause a careful, sensible person, a reasonably careful and sensible person, to hesitate or to refrain from acting upon a matter of the highest importance to their own affairs or to their own interests.' " *Brooks*, unpub op at *3. But then the court analogized reasonable doubt to the decision whether to go forward with an experimental surgery that was the only possible means of curing a life-threatening condition:

> "It's helpful to think about reasonable doubt in this manner. Let's say, and I know that each one of you does have someone that you love very much, a spouse, a significant other, a child, a grandchild. Each one of you has someone in your life who's absolutely precious to you. If you were told by your precious one's physician that they had a life-threatening condition and that the only known protocol or the best protocol for that condition was an experimental surgery, you're very likely going to ask for a second opinion. You may even ask for a third opinion. You're probably going to research the condition, research the protocol. What's the surgery about? How does it work? You're going to do everything you can to get as much information as you can. You're going to call everybody you know in medicine: What do you know? What have you heard? Tell me where to go. But at some point the question will be called. If you go forward, it's not because you have moved beyond all doubt. There are no guarantees. If you go forward, it is

> because you have moved beyond all reasonable doubt." [*Id.*]

The trial court then concluded with standard instructions telling the jury that a reasonable doubt is a "real doubt" and not an "imagined" or "manufactured" one and "must fairly arise out of the evidence presented or out of the lack of evidence presented with respect to some element of each of the crimes charged." *Id.*

The court in *Brooks*—considering the trial court's instructions in the context of federal habeas corpus review, 28 USC 2254—found the surgery analogy blatantly defective. As the court queried, "In a case involving a 'life threatening' condition affecting someone 'absolutely precious' to a juror, where there is only one 'known protocol' or 'best protocol,' what level of doubt would need to exist before a juror would deny them a chance at life?" *Id.* at 4. The court found that "one would need profound, if not overwhelming, doubt to deny a loved one their only or best opportunity for cure." *Id.* Especially problematic in the court's estimation was that the analogy was "structured in terms of the jury proceeding to take action." *Id.* (cleaned up). Relying on *Holland*, the court explained that "a charge on reasonable doubt should be expressed 'in terms of the kind of doubt that would make a person hesitate to act rather than the kind on which he would be willing to act.' " *Id.*, quoting *Holland*, 348 US at 140. The court concluded that the instruction was erroneous because it "required an excessively high

degree of doubt to reach an acquittal." *Brooks*, unpub op at *4 (cleaned up). What's more, "the court's hypothetical was structured in a way that would encourage the jury to *resolve* any doubt." *Id.* (cleaned up).

The court in *Brooks* also rejected the assertion that bookending the improper instruction with proper instructions cured the error. "The court's hypothetical was the centerpiece of the charge," the court observed. *Id.* at *5. "The hypothetical was not ancillary to the court's charge, but rather was conveyed to the jury as a model for understanding the very concept of reasonable doubt," the court added. *Id.* Another court addressing a nearly identical instruction given by the same trial court judge similarly reasoned that "the analogy served as the main example of reasonable doubt for the jury, and created an opportunity for the jury to resolve all doubts in favor of the Commonwealth." *Brown*, 425 F Supp 3d at 410.

5. Here, the trial court's hypothetical demeaned the reasonable-doubt standard, and its "We do this all the time" epexegesis flouted *Albers*.

Throughout voir dire, the trial court repeatedly downplayed the reasonable-doubt standard, saying the standard didn't require absolute certainty or mean beyond all doubt

or a shadow of a doubt. (66a-67a, 75a-76a, 78a).[17] The court also equated "beyond any doubt" with such absolutes as death and taxes. (76a). The court contrasted this with "beyond a reasonable doubt." (76a). But such references to the supposed needlessness of certainty contradict the United States Supreme Court's holding that the reasonable-doubt standard demands "utmost certainty." *In re Winship*, 397 US at 364.

Next, the court gave the metal-object-at-the-back-of-the-head hypothetical. (76a-77a). The court implied that any doubt about the assailant's motivation was not "reasonable." (77a). This hypothetical invited the jury to resolve any doubts in favor of finding the assailant guilty. *Brooks*, unpub op at *4; *Brown*, 425 F Supp 3d at 410.

Later, the court said, "Now, let's talk a little bit about this last concept of beyond a reasonable doubt." (80a). The court then repeated—with minimal commentary—the standard instruction and began the fiancée hypothetical. (80a-81a). By leading up to the fiancée hypothetical with a recitation of the standard instruction, the jury would have

[17] It deserves mention that at least one court has deemed such statements erroneous. *State v Aubert*, 120 NH 634, 636; 421 A2d 124 (1980) (holding that the trial court erred when it instructed the jury that "absolute positive certainty can almost never be attained" and that "the state is not required to establish guilt beyond all doubt").

understood that the hypothetical served to illuminate the standard instruction.

The court then gave the first half of the hypothetical, which established that the fiancé had lied about his whereabouts. (81a-86a). The court got two jurors to agree that there was reason to believe that the fiancé was not being truthful. (86a-87a).

Up to this point, without a defense objection, the court's instructions, while improper, might have been able to elude the *plain error* label. But then, the defense submits, the court undeniably crossed the line. At the court's prompting, the two jurors who said that there was reason to believe that the fiancé was not being truthful said that it only took them seconds to reach that conclusion. (86a-87a). The court then said, "Follow along," and it read the standard instruction once more. (87a). After, the court said, "It don't take long. That's what this—reasonable doubt." (87a).

This sequence is important for two reasons. First, by repeating the standard instruction, the trial court once more communicated to the jury that its hypotheticals explained the standard instruction. Second, the idea that "It don't take long" to reach the certitude necessary to convict betrays the entire concept of jury *deliberation*. See, e.g., Black's Law Dictionary (11th ed) (defining "deliberation" as "The act of carefully considering issues and options before making a decision or taking some action; esp., the process by which a jury reaches a verdict, as by analyzing,

discussing, and weighing the evidence"). "It don't take long" suggests the jury could simply rely on its gut reaction to the evidence.

Next, the court continued to the second half of the fiancée hypothetical, where the fiancé tells the bride that the woman he was with was a wedding planner. (88a). Through questioning of the prospective juror cast in the bride role, the court told the jury that it was *possible* that the fiancé was telling the truth but not *reasonable*. (88a). Once again, the court improperly structured the hypothetical to invite the jurors to resolve any doubts in favor of the fiancé's infidelity, i.e., guilt. *Brooks*, unpub op at *4; *Brown*, 425 F Supp 3d at 410. What's more, a possibility of innocence *is* enough for an acquittal. In *Cox*, this Court found no error in an instruction that told the jury "if there is any reasonable theory of innocence, as well as that of guilt, then the presumption is in favor of the innocence of the party, and not of his guilt." *Cox*, 70 Mich at 256. See also *People v Trudell*, 220 Mich 166, 172–73; 189 NW 910 (1922); *Hopt v People*, 120 US 430, 439; 7 S Ct 614; 30 L Ed 708 (1887) (approving an instruction that included the following: "That if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find him not guilty"). Similarly, our Court of Appeals found no error with an instruction—taken from a pattern instruction developed by the Federal Judicial Center—that informed the

jury that it must acquit if it finds "a real possibility" that the defendant is not guilty. *People v Bowman*, 254 Mich App 142, 149; 656 NW2d 835 (2002). The court noted that federal courts had repeatedly approved the instruction. *Id.*

Finally, the trial court ended with its "We do this all the time" exhortation, comparing the reasonable-doubt standard to calling up a friend to discuss a personal matter. (88a). "That's all we're asking you to do. It's simple," the court added. (88a). Crucially, the court closed its discussion by saying, "That's the burden of proof, okay." (88a). Clearly, "We do this all the time" doesn't jibe with *Albers*'s admonition that the reasonable-doubt standard cannot be compared to everyday decision-making. See also *Colon-Pagan*, 1 F3d at 81 ("The instruction may give the jury the incorrect impression that it can convict a defendant in a criminal case upon the basis of evidence no stronger than might reasonably support a decision to go shopping or to a movie or to take a vacation."); *Johnson*, 119 Cal App 4th at 985. And, importantly, "We do this all the time" was the apogee of the trial court's ad-lib instructions, the point to which all the preceding instructions had been leading. So the erroneousness of this instruction in particular was acutely harmful.

But the Court of Appeals held that no error occurred because, "although there were perhaps some unconventional elements in the trial courts explanations of" reasonable doubt, the court repeated the standard instruction

several times. (14a) (cleaned up). Respectfully, that's wrong. As explored above, at multiple points during its lengthy off-script instructions, the trial court read the standard instruction, telegraphing to the jury that its hypotheticals, analogies, and accompanying explanations clarified the standard instruction. In other words, the court adulterated the standard instruction with its improvised instructions. So the repeated incantation of the standard instruction was no cure at all.

And the court's problematic instructions cannot be dismissed as somehow negligible. Again, the fiancée hypothetical, in particular, comprises roughly seven pages of the transcript. And throughout voir dire, the trial court touched on the reasonable-doubt standard several times, intent on ensuring that the prospective jurors subscribed to its homespun interpretation. The jury likely would have given "undue weight" to the trial court's hypotheticals and analogies, "which because of their length and nonlegal character might have been more easily comprehended and remembered than the standard instruction, resonating in the jury room as a standard of their function and responsibility." *Pinkney*, 551 F2d at 1245 (cleaned up).

The fiancée hypothetical and phone-a-friend analogy also failed to impart the solemnity of the jurors' awesome duty. The salaciousness of a potentially cheating partner provided an "emotionally charged" example inconducive to the circumspection required in jury deliberations. *Brooks*,

unpub op at *4. And comparing the jury's task to calling up a friend to ask about a personal matter "tended to denigrate" the gravity of the occasion and "trivialize the entire matter of conviction." *Pinkney*, 551 F2d at 1244 (cleaned up). See also *Ferreira*, 373 Mass at 129.

In sum, at least by the time the trial court reached the second half of the fiancée hypothetical and crescendoed with the phone-a-friend analogy, the jurors' understanding of reasonable doubt had been corrupted. The trial court wrongly compared the reasonable-doubt standard to everyday decision-making and wrongly conveyed to the jury that this was all the standard instruction demanded. And through its glib comparisons, the court demeaned the gravity of sitting in judgment of a fellow citizen, in a capital case no less. Taken as a whole, the trial court's instructions lessened the prosecution's burden and "had a tendency to disarm [the jurors'] caution rather than to put them upon their guard against being led astray by a plausible but doubtful case." *Carver*, 39 Mich at 789. This Court should find that the trial court's reasonable-doubt instructions were plainly erroneous.

B. The erroneous instruction produced a structural error, which inevitably affected Austin's substantial rights.

A defective reasonable-doubt instruction is a structural error, and where an objection is preserved, automatic reversal follows. *Sullivan*, 508 US at 281-282; *Allen*, 466 Mich at 90. But what about where an objection is *unpreserved*? The United States Supreme Court has repeatedly declined to say whether structural errors automatically fulfill the third prong of the plain-error test. *Puckett v United States*, 556 US 129, 140; 129 S Ct 1423; 173 L Ed 2d 266 (2009). Yet the Court has left open the possibility. *United States v Marcus*, 560 US 258, 263; 130 S Ct 2159; 176 L Ed 2d 1012 (2010). This Court has suggested—though not explicitly held—that structural errors necessarily satisfy the third prong. *Vaughn*, 491 Mich at 666.

This Court's suggestions are correct. The third prong of the plain-error test is "the same kind of inquiry" as the harmless-error standard. *United States v Olano*, 507 US 725, 734; 113 S Ct 1770; 123 L Ed 2d 508 (1993). And structural errors "are so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect substantial rights') without regard to their effect on the outcome." *Neder v United States*, 527 US 1, 7; 119 S Ct 1827; 144 L Ed 2d 35 (1999). Accord *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000). See also *People v Cain*, 498 Mich 108, 141-143; 869 NW2d

829 (2015) (VIVIANO, J., dissenting).[18] And a defective reasonable-doubt instruction belongs to a select class of structural errors that "always result in fundamental unfairness." *Weaver v Massachusetts*, ___ US ___, ___; 137 S Ct 1899, 1908; 198 L Ed 2d 420 (2017) (cleaned up). "A misdescription of the burden of proof vitiates *all* the jury's findings." *Sullivan*, 508 US at 281 (cleaned up; emphasis in original). In other words, when the jury operates under a standard less demanding than reasonable doubt, "there has been no jury verdict within the meaning of the Sixth Amendment." *Id.* at 280 (cleaned up). See also *id.* ("There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless."). Accordingly, the error here automatically satisfies the third prong of the plain-error test. See also *Cain*, 498 Mich at 145 (VIVIANO, J., dissenting).

In the alternative, the defense submits that there's a reasonable probability that the outcome of the trial would have been different without the trial court's error. *People v Randolph*, 502 Mich 1, 10; 917 NW2d 249 (2018); (stating that Michigan has adopted the federal plain-error test); *United States v Dominguez Benitez*, 542 US 74, 81–82; 124

[18] The majority in *Cain* did not reach the third prong of the plain-error test, so Justice VIVIANO's well-reasoned opinion does not contradict the majority's opinion.

S Ct 2333, 2339; 159 L Ed 2d 157 (2004) (adopting the reasonable-probability standard for the third prong of the plain-error test).[19] *Reasonable probability* does not require the defense to show that trial counsel's error more likely than not affected the outcome of the trial. *Harrington v Richter*, 562 US 86, 111-112; 131 S Ct 770; 178 L Ed 2d 624 (2011). At bottom, the question is whether there is "a reasonable probability that at least one juror could have harbored a reasonable doubt" but for the error. *Buck v Davis*, ___ US ___, ___; 137 S Ct 759, 776; 197 L Ed 2d 1 (2017).

Here, the evidence left room for reasonable doubt. Sheely, Zaborowski, and Stover all positively identified other suspects in photo arrays. At trial, only Zaborowski positively identified Austin. Etchen proved to be a difficult witness on cross-examination, undermining his credibility as a whole. Finally, the forensic evidence was not dispositive. Austin's DNA was found on a cigarette butt—along with Sheely's—but not anywhere else in the limousine. There remained the possibility that Sheely and Austin had shared a cigarette at some other point in the night, perhaps at the bar that the three friends went to after the concert. What's more, there was an unidentified third DNA

[19] The Court in *Randolph* declined to explicitly address whether the prejudice standard for ineffective assistance and plain error is the same. *Randolph*, 502 Mich at 22 n 7. But the Court has indicated elsewhere that it is. *People v Smith*, 498 Mich 466, 487 n 15; 870 NW2d 299 (2015).

contributor on the cigarette butt as well as unidentified DNA on a water bottle, raising the possibility that someone other than Austin could have been the shooter. Although, to be sure, the prosecution put on a plausible case, if properly instructed, a juror might not have been convinced of Austin's guilt with "utmost certainty." See *Williams v State*, 60 P3d 151, 163; 2002 WY 184 (2002) (explaining that "probably" or even "very probably" "could not equate to guilt beyond a reasonable doubt"). But the jurors were discouraged from carefully weighing the evidence. Instead, they were told that they could base their verdict on their instinctual response to the evidence and that they could give the case as much consideration as they would to a friend calling to ask for an opinion on a personal matter. Without the trial court's erroneous instructions, it's reasonably probable that at least one juror could have harbored reasonable doubt.

C. The error seriously affected the fairness, integrity, and public reputation of the trial.

This Court cannot dismiss a defendant's claim under the fourth prong of the plain-error test because it finds that the defendant suffered no prejudice or "was guilty anyway." *Vaughn*, 491 Mich at 667 (cleaned up). Instead, the Court must determine whether Austin—regardless of his guilt or innocence—was deprived of his rights under the Sixth

Amendment and Article I, § 20 of the Michigan Constitution. *Id.* Again, structural errors "necessarily render a trial fundamentally unfair." *Neder*, 527 US at 8 (cleaned up). In other words, they "deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence and no criminal punishment may be regarded as fundamentally fair." *Id.* at 8-9 (cleaned up). See also *Dominguez Benitez*, 542 US at 81 (stating that structural errors "undermine the fairness of a criminal proceeding as a whole") (cleaned up).

Vaughn is instructive for applying the fourth prong of the plain-error test. In *Vaughn*, the trial court closed the courtroom during voir dire without any apparent cause. *Vaughn*, 491 Mich at 647. Neither party objected. *Id.* On appeal, the defendant argued that he had been deprived of his Sixth Amendment right to a public trial. *Id.* In assessing whether this error had seriously affected the fairness, integrity, or public reputation of the trial, the Court looked to the purposes served by the public-trial right, which "include (1) ensuring a fair trial, (2) reminding the prosecution and court of their responsibility to the accused and the importance of their functions, (3) encouraging witnesses to come forward, and (4) discouraging perjury." *Id.* at 667. This Court found that these purposes were not undermined by the temporary courtroom closure. The Court observed that both parties vigorously pursued voir dire and

expressed satisfaction with the jury that was chosen. *Id.* at 668. The Court also noted that the veniremembers essentially served as members of the public during voir dire. *Id.* The Court accordingly declined to award the defendant a new trial. *Id.* at 668-669.

Here, no countervailing considerations suggest that the "objectives served" by the reasonable-doubt standard were "achieved by other means." *Cain*, 498 Mich at 126. Again, "the reasonable-doubt standard plays a vital role in the American scheme of criminal procedure." *Winship*, 397 US at 363 (cleaned up). The standard is premised on "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 372 (HARLAN, J., concurring). See also *Coffin v United States*, 156 US 432, 456; 15 S Ct 394, 403; 39 L Ed 481 (1895) (noting the maxim "that it is better that ten guilty persons escape than one innocent suffer") (cleaned up). Also, it's "important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." *Id.* at 364 (opinion of the Court).

Here, these values were undermined. The trial court demeaned and trivialized the jury's task, comparing it to asking for a friend's opinion over the phone. The court also suggested that the jurors could base their verdict on their gut

reaction to the evidence. As a result, the jury in this case was not implementing the reasonable-doubt standard but a standard much less demanding. And, as already discussed, the recitation of the standard instruction failed to cure the court's error because the court signaled that its improvised instructions explained the standard instruction. "The instruction thus significantly weakened what is perhaps the law's greatest, and certainly its best known, safeguard against wrongly convicting an innocent person." *Colon-Pagan*, 1 F3d 80, 82 (CA 1, 1993). The fairness, integrity, and public reputation of the trial in this case were sullied.

The Court could also apply a different mode of analysis to reach the same result. Again, "a misdescription of the burden of proof vitiates *all* the jury's findings." *Sullivan*, 508 US at 281. When the jury is incorrectly instructed on the reasonable-doubt standard, "there has been no jury verdict within the meaning of the Sixth Amendment." *Id.* at 280 (cleaned up). This reasoning "applies with equal force in the plain error context: where the error consists of a misdescription of the reasonable doubt standard, the court cannot assess the impact of the error on the outcome of the trial because there has been no jury finding of guilt beyond a reasonable doubt in the first instance." *United States v Merlos*, 8 F3d 48, 51; 303 US App DC 395, 398 (1993).

This Court should reverse and remand for a new trial.

II. Trial counsel provided ineffective assistance by failing to object to the trial court's plainly erroneous reasonable-doubt instructions.

Issue Preservation

The defense filed a proper motion to remand in the Court of Appeals. MCR 7.211(C)(1). This issue is preserved for this Court's review. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

Standard of Review

"Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Findings of fact are reviewed for clear error, while determinations of constitutional law are reviewed de novo. *Id.*

Analysis

The Sixth Amendment of the United States Constitution and Article I, §20 of the Michigan Constitution guarantee the right to the effective assistance of counsel for criminal defendants. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v*

Pickens, 446 Mich 298, 338; 521 NW2d 797 (1994). To establish that his counsel did not render effective assistance and that he is entitled to a new trial, "defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). This Court presumes that trial counsel's decisions were "born from a sound trial strategy." *Id.* at 52.

"Yet a court cannot insulate the review of counsel's performance by calling it trial strategy." *Id.* at 52. Counsel's strategy must in fact be sound and decisions made in accordance with that strategy must be objectively reasonable. *People v Ackley*, 497 Mich 381, 389; 870 NW2d 858 (2015).

To establish prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694 (cleaned up). In other words, the defendant must show "a probability sufficient to undermine confidence in the outcome." *Id.* Stated yet another way, the defendant must show that without trial counsel's error, there's a reasonable probability that at least one juror could have harbored a reasonable doubt. *Buck*, 137 S Ct at 776. This does not require the defense to show that trial counsel's error more likely than not affected the outcome of the trial. *Harrington*, 562 US at 111-112.

In the alternative, reversal may be required if counsel's deficiency rendered the trial fundamentally unfair, without regard to whether there is a reasonable probability of a different outcome. *Weaver*, 137 S Ct at 1911. The Court in *Strickland* held that the prejudice inquiry is not to be applied "mechanical[ly]." *Strickland*, 466 US at 696. Rather, "the ultimate focus of inquiry must be on the fundamental fairness of" the trial. *Id.*

A. An objectively reasonable attorney would have objected to the trial court's defective reasonable-doubt instructions.

Counsel may be deemed ineffective if he fails to object to improper jury instructions. *People v Kowalski*, 489 Mich 488, 510 n 38; 803 NW2d 200 (2011); *Lobbins v United States*, 900 F3d 799, 802 (CA 6, 2018) ("A defense lawyer's failure to object to an erroneous jury instruction that, as here, materially lightens the government's burden of proof is typically deficient performance."). As explored at length already, the reasonable-doubt standard is a bedrock tenet of our criminal jurisprudence. But here, the trial court's instructions fatally undermined that standard. "There can be no reasonable explanation for failing to object to such a constitutionally infirm charge." *Brown*, 425 F Supp 3d at 411 (cleaned up). The trial court's instructions were "so problematic that any alert defense counsel should have immediately known that [they] raised serious constitutional

issues." *Bey v Superintendent Greene SCI*, 856 F3d 230, 239 (CA 3, 2017). "Because reasonable doubt is such a fundamental principle, particularly where the defendant does not testify, and the nature of the court's hypothetical was so instinctively problematic, it is difficult to fathom how any criminal defense lawyer could fail to object." *Brooks*, unpub op at *6. Here, trial counsel's failure to object—particularly by the time the trial court got to the second half of the fiancée hypothetical and followed with the "We do this all the time" phone-a-friend analogy—was "not strategy, but abdication." *Id.* at *7. "No purpose could be served by counsel's silence, and it stripped his client of vital protection." *Id.*

B. Trial counsel's failure to object prejudiced Austin.

As already mentioned, in *Strickland*, the Court held that the prejudice inquiry is not to be applied "mechanical[ly]" and that "the ultimate focus of inquiry must be on the fundamental fairness of" the trial. *Strickland*, 466 US at 696. In *Weaver*, the Court suggested—though did not explicitly hold—that prejudice will be presumed for some errors that result in a fundamentally unfair trial. *Weaver*, 137 S Ct 1908, 1911. See *id.* at 1907 (stating that "the reasons an error is deemed structural may influence the proper standard used to evaluate an ineffective-assistance claim premised on the failure to object to that error"). See

also *Weaver v Massachusetts*, ___ US ___, ___;137 S Ct 1899, 1916; 198 L Ed 2d 420 (2017) (BREYER, J., dissenting) (remarking that the majority opinion "assumes that *some* structural errors—those that 'lead to fundamental unfairness'—but not others, can warrant relief without a showing of actual prejudice under *Strickland*."). Neither this Court nor our Court of Appeals has addressed this issue.[20] At least one court has held that prejudice should be presumed when trial counsel fails to object to a defective reasonable-doubt instruction. *Brown*, 425 F Supp at 412. Other courts have also embraced fundamental unfairness as a means of fulfilling *Strickland* prejudice. See, e.g., *Newton v State*, 455 Md 341, 357; 168 A3d 1 (2017). But see, e.g., *Johnson v Raemisch*, 779 Fed App'x 507, 513 n 5 (CA 10, 2019) (finding that *Weaver* did not alter the traditional reasonable-probability requirement).

[20] This Court in *Vaughn*, in the context of a public-trial issue, held that *Strickland* prejudice is not presumed for structural errors. *Vaughn*, 491 Mich at 671-674. The defense reads *Vaughn* as making this holding only in the setting of public-trial violations. See *id.* at 674 (concluding "that an ineffective assistance of counsel claim premised on either counsel's waiver of or failure to object to the Sixth Amendment right to a public trial requires a showing of actual prejudice before the defendant is entitled to relief"). If this Court disagrees with that reading, then the pronouncement in *Vaughn* is, at best, stale in light of *Weaver* and ripe for reappraisal.

This Court should hold that where trial counsel fails to object to a defective reasonable-doubt instruction, prejudice is presumed. Again, where a jury is misinformed on the reasonable-doubt standard, "there has been no jury verdict within the meaning of the Sixth Amendment." *Sullivan*, 508 US at 280. And "there being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless." *Id.* (cleaned up). These observations apply just as aptly in the context of an ineffective-assistance claim. *Bloomer v United States*, 162 F3d 187, 194 (CA 2, 1998) ("While the *Sullivan* analysis originates in cases directly reviewing jury instructions, rather than in ineffective assistance cases based on a failure to object to defective jury instructions, the force of its reasoning and its conclusion apply equally here.").

In the alternative, there's a reasonable likelihood that the jury would have acquitted Austin if they had been correctly instructed on the reasonable-doubt standard. As explained above, although the prosecution had built a plausible case, there was room for reasonable doubt.

This Court should reverse and remand for a new trial.

III. The evidence did not support a felony-murder conviction.

Issue Preservation

A sufficiency-of-the-evidence challenge can be raised for the first time on appeal. *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987). Here, though, trial counsel did argue that the evidence failed to support a felony-murder charge. Before closing argument, trial counsel moved the court to dismiss the felony-murder charge. (Tr V, 4-5). He argued that the robbery occurred after the murder and so the killing was not committed in the course of a felony. (Tr V, 5). The trial court denied the motion, explaining that "in the course of" means "before, during, or after, until the completion of the crime." (Tr V, 5).[21]

Standard of Review

"In determining whether sufficient evidence exists to sustain a conviction, this Court reviews the evidence in the light most favorable to the prosecution, and considers

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[21] But the court also said that "in the course of" did not mean "before" or "prior to." (Tr V, 5). Given the court's ruling, the defense presumes that it misspoke.

And it appears that the trial court confused the "in the course of" element of the armed robbery charge with the felony-murder charge. See MCL 750.529; MCL 750.530; M Crim JI 18.1.

whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt." *People v Harris*, 495 Mich 120, 126; 845 NW2d 477 (2014).

Analysis

The due process clauses of the state and federal constitutions require that the prosecution in a criminal case introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *Jackson v Virginia*, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979). "The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Carines*, 460 Mich at 757 (cleaned up). But "some evidence" of guilt is not enough. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). "In quantitative terms, the fact that a piece of evidence has some tendency to make the existence of a fact more probable, or less probable, does not necessarily mean that the evidence would justify a reasonable juror in

reasonably concluding the existence of that fact beyond a reasonable doubt." *Id.*

"Murder committed in the perpetration of, or attempt to perpetrate" certain enumerated felonies is felony-murder. MCL 750.316. The statutory language "has its roots in the common law." *People v Gillis*, 474 Mich 105, 117; 712 NW2d 419 (2006) "Felony murder has never been a static, well-defined rule at common law, but throughout its history has been characterized by judicial reinterpretation to limit the harshness of the application of the rule." *People v Aaron*, 409 Mich 672, 689; 299 NW2d 304 (1980). And "the doctrine is of doubtful origin." *Id.* at 698. Courts have imposed several limitations, including narrowly construing "the period during which the felony is in the process of commission." *Id.* at 701 (cleaned up). This Court has said that the felony-murder doctrine "deserves no extension beyond its required application." *Id.* at 702.

In *Gillis*, this Court definitively explained the meaning of "in the perpetration of" as used in the felony-murder statute. The Court adopted the res gestae principle in felony-murder cases: "Where the homicide is committed within the *res gestae* of the felony charged, it is committed in the perpetration of, or attempt to perpetrate, the felony." *Id.* at 119 (cleaned up). The Court noted that this may comprise acts that precede the killing. *Id.* at 116 n 6.

The Court also held that the killing must be causally connected to the felony. The killing "must have been done

in pursuance of the unlawful act, and not collateral to it." *Id.* at 119-120, quoting Wharton, Law of Homicide (3d ed), § 126, pp 184-186. In other words, "the killing must have had an intimate relation and close connection with the felony, and not be separate, distinct, and independent from it." *Gillis*, 474 Mich at 120, quoting Wharton at 184-186 (cleaned up). At bottom, "there must have been such a legal relationship between the two that it could be said that the killing occurred by reason of, or as a part of, the felony." *Gillis*, 474 Mich at 120, quoting Wharton at 184-186 (cleaned up).

The Court in *Gillis* noted that four factors should be considered when determining whether the killing was in the perpetration of the felony: "(1) time; (2) place; (3) causation; and (4) continuity of action." *Gillis*, 474 Mich at 127, citing 2 LaFave, Substantive Criminal Law (2d ed), § 14.5(f), p 463. Ultimately, " 'more than a mere coincidence of time and place is necessary' for a murder to qualify as a felony murder." *Gillis*, 474 Mich at 120, quoting LaFave, Substantive Criminal Law (2d ed), § 14.5(f), p 465.

A. The killing was not committed during the res gestae of the robbery.

Most cases addressing the res gestae limitation involve the terminus of the res gestae. In *Gillis*, this Court held that the res gestae encompasses acts done in flight from

the crime scene. *Gillis*, 474 Mich at 116-117. But when does the res gestae *begin*? As far as the defense can tell, it does not appear that this Court has squarely answered that question. But other authorities have. At common law, the res gestae began at the point an "indictable attempt" was reached. Cadmus, *The Beginning and End of Attempts and Felonies Under the Statutory Felony Murder Doctrine*, 51 Dick L Rev 12, 13 (1946); Dressler, Understanding Criminal Law (5th ed), §31.06[C][3][b], p 530 (cleaned up), citing *Payne v State*, 81 Nev 503, 507; 406 P2d 922 (1965) ("The res gestae of the crime begins at the point where an indictable attempt is reached.") (cleaned up); 40A Am Jur 2d Homicide § 311 ("The res gestae of a crime underlying a felony-murder charge begins where an indictable attempt to commit a felony is reached and ends where the chain of events between the attempted crime or completed felony is broken."); *Moody v State*, 841 So 2d 1067, 1091 (Miss, 2003) ("The res gestae of the underlying crime begins where an indictable attempt is reached.") (cleaned up); *Berkeley v Commonwealth*, 19 Va App 279, 286; 451 SE2d 41 (1994) ("The *res gestae* of the underlying crime beings where an indictable attempt to commit the felony is reached." (cleaned up); *State v Anthony*, 427 So 2d 1155, 1158 (La, 1983) ("The res gestae of the crime begins at the point where an indictable attempt is reached.") (cleaned up); *Lisenby v State*, 260 Ark 585, 603; 543 SW2d 30 (1976) ("The res gestae of the crime begins when an indictable attempt is reached.") (cleaned up); *United States v Bolden*,

514 F2d 1301, 1307 n 10; 169 US App DC 60 (1975) ("It is necessary that the felony have progressed beyond mere preparation to an indictable attempt before the homicide occurs.").

The indictable-attempt threshold accords with the plain language of the statute. The statute distinguishes "in the perpetration of" from an "attempt to perpetrate." MCL 750.316(1)(b). It would make little sense if acts committed before an indictable "attempt to perpetrate" has been reached could otherwise be "in the perpetration of" the felony. See *Bolden*, 514 F2d at 1307 n 10 ("Even if appellants were 'casing' the store preparatory to a later attempt to rob, the requisite intent to rob would not yet have arisen since it is necessary that the felony (robbery here) have progressed beyond mere preparation to an indictable attempt before the homicide occurs.").

The standard jury instruction on felony-murder recognizes this point. For a murder committed during an attempted felony to qualify as felony-murder, "It is not enough to prove that the defendant made preparations for committing the crime." M Crim JI 16.4(6). "Things like planning the crime or arranging how it will be committed are just preparations; they do not qualify as an attempt." *Id.* Instead, "the action must go beyond mere preparation, to the point where the crime would have been completed if it had not been interrupted by outside circumstances." *Id.* Although the standard instruction does not have the force

of law, *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985); MCR 2.512(D), the defense submits that it encapsulates the correct reading of the law.[22]

The Court of Appeals erred in holding otherwise. The court held that the felony-murder doctrine is satisfied by a mere showing that the intent to commit the felony was formed before the murder. (15a). The court quoted *People v Orlewicz*, 293 Mich App 96, 111; 809 NW2d 194 (2011), for this point, saying that "the defendant need only have intended to commit the underlying felony when the murder occurred." (15a). The court in *Orlewicz* had relied on *People v Brannon*, 194 Mich App 121; 486 NW2d 83 (1992), for this proposition. Relying on this caselaw, the Court of Appeals panel found that "the jury could reasonably have inferred

[22] *People v Goddard*, 135 Mich App 128; 352 NW2d 367 (1984), which the prosecution relied on in the Court of Appeals and which this Court has cited in the past, does not require a contrary conclusion. In *Goddard*, right before breaking into a hunting lodge, the defendant killed the lodge's caretaker. *Goddard*, 135 Mich App at 131-132. The Court of Appeals upheld the lower court's determination that the defendant had killed the caretaker "immediately before" the break-in and "in order to enable defendant to proceed with the break-in without delay." *Id.* at 136-137. In other words, there was sufficient evidence to show "that a homicide had been committed in the perpetration of a felony, as opposed to during the attempted perpetration of a felony." *Id.* at 137-138. The court did not hold that intent and preparation, without more, falls within the res gestae. *Id.* at 135-136.

that defendant intended to steal from the limo's occupants when he got into the vehicle, and even when he began interacting with them at the Delux Lounge and identified them as robbery targets." (17a). But, as explained above, intent and preparation are not enough; there must be an indictable attempt.

"An attempt consists of: '(1) an intent to do an act or to bring about certain consequences which would in law amount to a crime; and (2) an act in furtherance of that intent which, as it is most commonly put, goes beyond mere preparation.'" *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993), quoting 2 LaFave & Scott, Substantive Criminal Law, § 6.2, p 18. "Mere preparation is distinguished from an attempt in that the former consists of making arrangements or taking steps necessary for the commission of a crime, while the attempt itself consists of some direct movement toward commission of the crime that would lead immediately to the completion of the crime." *Jones*, 443 Mich at 100. The acts done in furtherance of the attempt must be unequivocal. *Id.* "There must be at least some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter." *People v Coleman*, 350 Mich 268, 277; 86 NW2d 281 (1957) (cleaned up). In other words, "the act must reach far enough towards the accomplishment of the desired

result to amount to the commencement of the consummation." *Id.* (cleaned up).

Here, even assuming that an attempt to rob had been conceived well before the killing, nothing the shooter had done before the killing would have led immediately to the completion of the armed robbery.[23] It's not as if the shooter had made some movement toward three friends and was interrupted by Lowe. Instead, the evidence showed only that the shooter had sat in the back of the limousine smoking cigarettes and haggling with Lowe over cocaine. And the shooter pulled the gun and shot Lowe not as part of the robbery but because Lowe attacked him.[24] There was no evidence, for example, that the shooter had pointed the gun first at the three friends and then turned it on Lowe. And imagine if immediately after the shooting, a police officer had serendipitously arrived on the scene and arrested the shooter before he turned the gun on the three friends. Could the shooter have been charged with attempted armed robbery at that point? Of course not. See *People v*

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[23] Technically, the predicate felony was larceny. (733a). Throughout the proceedings, though, the parties have referred to the robbery as the predicate felony. (14a). The distinction is inconsequential given that armed robbery subsumes larceny. See M Crim JI 18.1.

[24] In the Court of Appeals, the prosecution did not argue that Etchen supposedly leaving his wallet in the car constituted a larceny or robbery. Nor would any such argument be supportable by the record.

Patskan, 387 Mich 701, 714; 199 NW2d 458 (1972) ("Intent alone is not enough to convict a person of a crime.").[25]

This Court should hold that there was insufficient evidence to establish felony-murder because the killing was not committed during the res gestae of the felony.

B. The killing was not causally connected to the robbery.

As discussed above, for the felony-murder doctrine to apply, the murder must be causally connected to the felony. This limitation is additional to the res gestae limitation. 2 LaFave, Substantive Criminal Law (3d ed), § 14.5(f); Cadmus, 51 Dick L Rev at 12 (describing the causal-connection requirement as a "further limitation") (cleaned up). Again, the causal-connection requirement looks at (1) time, (2) place, (3) causation, and (4) continuity of action. *Gillis*, 474 Mich at 127. The killing cannot be collateral to the felony, and a coincidence of time and place is not enough. *Id.* at 119-120.

Here, the evidence—even taken in the light most favorable to the prosecution—does not establish a causal connection between the killing and the felonies. In other words, the evidence did not show that the shooter killed

[25] In the Court of Appeals, the prosecution—correctly—did not argue that the shooter had reached an indictable attempt at the time of the shooting.

Lowe to accomplish the robbery. Sheely, Zaborowski, Stover, and Etchen all testified that Lowe and the shooter had been arguing over cocaine right before the shooting. Sheely, Zaborowski, and Stover—the only witnesses to the shooting—testified that Lowe lunged at the shooter, which prompted the shooting. In all, the evidence did not show beyond a reasonable doubt that the shooting was causally related to the robbery. Instead, the evidence showed that the shooting was collateral to and independent from the robbery.

In holding otherwise, the Court of Appeals said, "The jury could find that the evidence showed a 'causal connection' between the underlying felonies of the larcenies committed against the three friends and the murder of the limo driver." (17a). According to the panel, the jury could have found that the shooter planned the robbery before he got into the limousine. (17a). But this does not establish a *causal* connection. A coincidence of time and place is not enough. Again, there was no evidence that the shooter's desire to rob Sheely, Zaborowski, Stover led him to commit the killing. Instead, by all accounts, the shooter killed Lowe only after Lowe first attacked him, which was unrelated to the robbery.

This Court should hold that there was insufficient evidence to establish felony-murder because the killing was not causally related to the felony.

RELIEF REQUESTED

The defense asks this Court to reverse and remand for a new trial because the trial court's improvised reasonable-doubt instructions lowered the prosecution's burden of proof. The defense also asks this Court to hold that the evidence was insufficient to convict Austin of felony-murder, and consequently that he cannot be retried on that charge. *Burks v United States*, 437 US 1, 17-18; 98 S Ct 2141; 57 L Ed 2d 1 (1978). Finally, the defense asks for any different or further relief the Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH AO 2019-6

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