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Steven W. Becker
Office of the State Appellate Defender, First District, Chicago, Illinois

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To Review or Not to Review: The Plain Truth About Illinois' Plain Error Rule

Steven W. Becker*

"[T]he plain error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence."

— People v. Herron

I. INTRODUCTION

On May 19, 2005, the Illinois Supreme Court issued two important decisions, People v. Herron² and People v. Durr.³ Both decisions confirmed the court's adherence to Illinois' traditional plain error test and defined the parameters of the rule's two prongs. Significantly, the court also explicitly rejected the institutional agenda of the State's Attorney's Office to abrogate Illinois' long-standing plain error test in favor of the prosecution-friendly federal plain error test.⁴ In so doing, the Illinois Supreme Court reaffirmed its role "as guardian[] of constitutional rights and the integrity of the criminal justice system."⁵

A correct understanding of the plain error rule—and how it differs from the federal rule—is essential because the question of the rule's

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* Assistant Appellate Defender, Office of the State Appellate Defender, First District, Chicago, Illinois; Adjunct Professor, DePaul University College of Law, Chicago, Illinois; Senior Fellow, International Human Rights Law Institute, DePaul University College of Law; Co-Rédacteur en Chef, REVUE INTERNATIONALE DE DROIT PENAL (France).


2. Id.
3. 830 N.E.2d 527, 527 (Ill. 2005).
4. Herron, 830 N.E.2d at 475–79.

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applicability arises in almost every criminal appeal in Illinois. It is a rare case indeed in which the State does not assert that a defendant has "waived" the right to raise an issue in front of the reviewing court on account of defense counsel's failure to properly preserve the error in the trial court for purposes of appeal. However, even among seasoned practitioners, the doctrine of "plain error" remains an enigma. Accordingly, the purpose of this Article is to clarify the plain error rule as it is applied in Illinois practice and to highlight its important role in ensuring the preservation of the integrity of the criminal appeal process in Illinois.

Part II of this Article will provide a general overview of plain error, discuss Illinois' plain error test as it developed historically, and explain the federal plain error standard, which is substantively different from Illinois' plain error formulation in that it incorporates a harmless error analysis. Part II will also examine the Illinois Supreme Court's reliance upon the federal plain error test in the context of alleged Apprendi errors, catalog how these decisions led to confusion in the appellate courts, and document how the State seized upon this confusion in an attempt to further its agenda to abrogate the Illinois rule in favor of the federal test. Part III will then describe the Herron and Durr decisions with respect to their clarification of the scope of Illinois' plain error rule. Part IV will argue that, although the Illinois Supreme

6. The only previous scholarly work to attempt an in-depth exploration of the parameters of Illinois' plain error rule was written twenty-five years ago. See Paul T. Wangerin, "Plain Error" and "Fundamental Fairness": Toward a Definition of Exceptions to the Rules of Procedural Default, 29 DEPAUL L. REV. 753 (1980) (describing an overall theory for defining previously undefined exceptions to the general rule that criminal defendants are required to make timely procedural motions and contemporaneous objections to pre-trial or trial errors to avoid losing the right to raise those errors on appeal).

7. See infra Part II.A.1 (defining the plain error doctrine and describing its application).


9. See infra Part II.B (describing the elements of the federal plain error test and the permissive nature of its application).

10. See infra Part II.D.1 (demonstrating the Illinois Supreme Court's application of Apprendi and the federal plain error test to Illinois decisions). See also Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (holding that any fact, other than a prior conviction, that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt).

11. See infra Part II.D.2 (detailing decisions that resulted in confusion among the Illinois appellate courts as to the definition of plain error in Illinois).

12. See infra Part II.E (discussing the arguments of the State's Attorney's Office for implementing the federal plain error rule in various cases and the Illinois Supreme Court's rejection thereof).

13. See infra Part III (outlining the Illinois Supreme Court's decisions in People v. Herron and People v. Durr).
Court reached the correct result in *Herron* by retaining Illinois' plain error test, the court's reasoning was flawed because it attempted to equate Illinois' plain error rule with the federal test.\(^\text{14}\) This Part will also analyze the *Durr* decision to reveal the important role that Illinois' plain error rule plays in preserving a defendant's right to a fair trial.\(^\text{15}\)

II. BACKGROUND

In order to best appreciate the importance of the Illinois Supreme Court's decisions in *Herron* and *Durr*, it is necessary to first understand the history and operation of the plain error rule in Illinois. This Part provides a brief introduction to the plain error rule in Illinois. It begins by defining the rule and contrasting it with the harmless error rule.\(^\text{16}\) It then offers a brief history of the rule in Illinois and an examination of the rule's two prongs.\(^\text{17}\) Next, it describes the federal plain error test and reveals important differences between the tests.\(^\text{18}\) This Part finally discusses how the Illinois Supreme Court's decision in *Crespo*\(^\text{19}\) led to confusion among the Illinois appellate courts regarding the proper application of the rule,\(^\text{20}\) thus opening the door for the State's Attorney's Office to argue for the total abrogation of the rule in Illinois.\(^\text{21}\)

A. Illinois' Plain Error Rule

1. Plain Error and Harmless Error

The Illinois Supreme Court most recently defined plain error as "a standard to help a reviewing court determine when to excuse

\(^{14}\) *See infra* Part IV.A (analyzing the Illinois Supreme Court's decision in *People v. Herron* and discussing how it aids in the prevention of convicting innocent persons and safeguarding the integrity of the criminal justice system).

\(^{15}\) *See infra* Part IV.B (analyzing the Illinois Supreme Court's decision in *People v. Durr* and discussing the importance of maintaining the Illinois rule).

\(^{16}\) *See infra* Part II.A.1 (defining the plain error rule and its relationship to the harmless error rule).

\(^{17}\) *See infra* Parts II.A.2-3 (explaining the evolution of the Illinois plain error rule and its underlying principles).

\(^{18}\) *See infra* Parts II.B-C (examining and contrasting the federal plain error test with the rule in Illinois).

\(^{19}\) *See infra* Part II.D.1 (analyzing the incorporation of the federal plain error rule in Illinois cases, including *People v. Crespo*).

\(^{20}\) *See infra* Part II.D.2 (reviewing other Illinois cases referencing the federal plain error rule following *People v. Crespo*).

\(^{21}\) *See infra* Part II.E (outlining efforts by the Illinois State's Attorney's Office to promote judicial adoption of the federal plain error test).
In other words, plain error is "[t]he principle that an appeals court can reverse a judgment because of an error in the proceedings even if the error was not objected to at the time." The plain error doctrine has been generally described as encompassing those errors "which are obvious, which affect the substantial rights of the accused, and which, if uncorrected, would be an affront to the integrity and reputation of judicial proceedings."

The application of the plain error rule arises in situations where the defense fails to properly preserve an issue for appellate review. In Illinois, "[b]oth a trial objection and a written post-trial motion raising the issue" are normally required to preserve issues for appeal. The reason for these procedural requirements is to limit the scope of appellate errors to those that are considered significant by the parties and to ensure that the trial judge has the opportunity to correct such errors at the trial court level. Those issues not properly preserved are deemed forfeited.

24. Id.
25. See People v. Thurow, 786 N.E.2d 1019, 1025 (Ill. 2003) (noting that a plain error analysis "applies where the defendant has failed to make a timely objection").
26. People v. Enoch, 522 N.E.2d 1124, 1130 (Ill. 1988). In Illinois, the requirement that defense counsel specify the grounds for a new trial in a written motion is statutory in nature. See 725 ILL. COMP. STAT. 5/116-1 (West 2004) (describing the process by which a defendant may be granted a new trial; the defendant must file a written motion within thirty days, specify the grounds for the new trial, and serve reasonable notice on the state).
27. People v. Caballero, 464 N.E.2d 223, 227, 231-32 (Ill. 1984); see also Herron, 830 N.E.2d at 472-73 (Ill. 2005) ("The so-called waiver principle encourages the defendant to raise issues before the trial court, allowing the court to correct its own errors before the instructions are given, and consequently disallowing the defendant to obtain a reversal through inaction.").
28. In common practice, courts and practitioners often refer to the plain error rule as an exception to the "waiver" doctrine. Yet, with respect to the general concept of "waiver," it should be noted that courts often incorrectly use the terms "waiver," "forfeiture," and "procedural default" interchangeably in criminal cases. People v. Blair, 831 N.E.2d 604, 615 (Ill. 2005). The Illinois Supreme Court is no exception. See id. (collecting cases). These terms, however, are not equivalent and have different technical meanings.

"Waiver" strictly means "the intentional relinquishment or abandonment of a known right." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). See Blair, 831 N.E.2d at 615 n.2 (distinguishing waiver, forfeiture, and procedural default). "Forfeiture," on the other hand, is "the failure to make the timely assertion of a right." United States v. Olano, 507 U.S. 725, 733 (1993). Similar to the latter term, the phrase "procedural default" relates to "a failure by counsel to comply with certain procedural requirements," which failure "results in the forfeiture of the defendant's right to raise that error on appeal." Blair, 831 N.E.2d at 615 n.2. Thus, certain rights may be forfeited by means short of waiver like the right to a public trial, but others may not like the right to counsel and the right to trial by jury. See Freytag v. Commissioner, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring in judgment) (giving examples of those instances where rights may be forfeited by means short of waiver and those where they may not).
Because of these procedural requirements, the plain error doctrine does not instruct a reviewing court to consider all forfeited errors.\textsuperscript{29} As such, it is not "a general saving clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court."\textsuperscript{30} Rather, plain error is a limited exception to the forfeiture rule that "protect[s] the rights of the defendant and the integrity and reputation of the judicial process."\textsuperscript{31} In addition, although plain error is not a constitutional doctrine, it "has roots in the same soil as due process"\textsuperscript{32} in that its purpose is to ensure that a defendant "is not denied his right to a fair and impartial . . . trial."\textsuperscript{33}

In contrast to the plain error rule, the harmless error rule applies where the defendant makes a timely objection.\textsuperscript{34} In general, "harmless error" is "an error committed in the progress of the trial below . . . which was not prejudicial to the rights of the party assigning it."\textsuperscript{35} "[T]he burden of persuasion with respect to prejudice" is on the State under a harmless error analysis.\textsuperscript{36} The test for a constitutional error is whether the error was "harmless beyond a reasonable doubt."\textsuperscript{37}

2. Historical Overview of Illinois' Plain Error Rule

Illinois Supreme Court Rule 615(a) contains Illinois' harmless error and plain error rules: "Any error, defect, irregularity, or variance which

\begin{itemize}
\item 29. \textit{Herron}, 830 N.E.2d at 474.
\item 30. People v. Precup, 382 N.E.2d 227, 231 (Ill. 1978).
\item 31. \textit{Herron}, 830 N.E.2d at 474.
\item 32. \textit{Id.}
\item 33. People v. Underwood, 378 N.E.2d 513, 516 (Ill. 1978).
\item 34. People v. Thurow, 786 N.E.2d 1019, 1025 (Ill. 2003).
\item 36. \textit{Thurow}, 786 N.E.2d at 1025 (quoting United States v. Olano, 507 U.S. 725, 734 (1993)).
\item 37. Chapman v. California, 386 U.S. 18, 24 (1967), overruled in part on other grounds by Brecht v. Abrahamson, 507 U.S. 619 (1993). The Illinois Supreme Court has identified three approaches for measuring constitutional error pursuant to \textit{Chapman}: (1) whether the error might have contributed to the conviction; (2) whether the other evidence in the case overwhelmingly supports a conviction; and (3) "whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence." People v. Patterson, No. 98641, 2005 Ill. LEXIS 2069, at *28-*29 (Dec. 15, 2005). \textit{See} People v. Brown, 842 N.E.2d 1141, 1150 (Ill. App. Ct. 2005) (applying the \textit{Chapman} test to confrontation clause errors and finding that errors were not harmless beyond a reasonable doubt).
\end{itemize}
does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.”

The precise language of the rule may be traced back to section 121-9(a) of the Illinois Code of Criminal Procedure of 1963. This provision was subsequently repealed and superseded by Rule 615(a). Since its introduction into the Supreme Court Rules in 1967, the wording of Rule 615(a) has remained unchanged.

It should also be noted that Illinois Supreme Court Rule 451(c), which pertains to jury instructions in criminal cases, provides that "substantial defects are not waived by failure to make timely objections thereto if the interests of justice require." Rule 451(c) offers a remedy for "grave errors," which parallels Rule 615(a)'s remedy for plain errors generally. Accordingly, courts construe Rule 451(c) and Rule 615(a) identically.

### 3. Two Prongs of the Illinois Plain Error Rule

The Illinois Supreme Court has repeatedly held that the plain error rule may be invoked to review alleged errors not properly preserved when "(1) the evidence in a criminal case is closely balanced or (2) the error is so fundamental and of such magnitude that the accused is denied the right to a fair trial and remedying the error is necessary to preserve the integrity of the judicial process." Thus, a disjunctive

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38. ILL. SUP. CT. R. 615(a).

39. See Ill. Rev. Stat. ch. 38 § 121-9(a) (West 1963) (stating that "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded [and] [p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court").


41. Cf. ILL. SUP. CT. R. 615(a) (stating the same rule as stated in § 121-9(a) of the Illinois Code of Criminal Procedure of 1963).

42. ILL. SUP. CT. R. 451(c). Rule 451(c) "is expressly addressed to the failure to make a timely trial objection" to a jury instruction. People v. Keene, 660 N.E.2d 901, 916 (Ill. 1995). Thus, where a defendant makes a timely objection to an instructional error at trial but fails to include the issue in a post-trial motion, plain error review is available under Rule 615(a) instead. See People v. Durr, 830 N.E.2d 527, 535 (Ill. 2005) (finding that even if no chance of excusing the bar exists under Rule 451(c), an avenue exists for plain error relief under Rule 615(a)).

43. People v. Armstrong, 700 N.E.2d 960, 969 n.3 (Ill. 1998).

44. People v. Herron, 830 N.E.2d 467, 473 (Ill. 2005) ("Rule 451(c) is coextensive with the 'plain error' clause of Supreme Court Rule 615(a) . . . .").

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approach is employed. Each prong of the plain error rule has a history that predates the adoption of Rule 615(a).

a. Closely Balanced Evidence Prong

The recognition of the principle underlying the closely balanced evidence prong can be traced back to Illinois Supreme Court decisions in the early 1920s. The first case in which the court appears to have relaxed the harsh sanction for forfeiture in a close case was People v. Gardiner. The court faulted the defense counsel for failing to properly preserve an error in the trial court but recognized a limited exception to the forfeiture rule:

The fact that a person charged with crime is poorly defended will not justify a reversal of the judgment where it is reasonably supported by the evidence, but where the evidence is close, . . . and it is clear that the prosecuting attorney has taken advantage of the accused because he was poorly represented, and the trial court has permitted such advantage to be taken, then we will consider the errors, notwithstanding the failure to properly preserve the questions for review.

Almost two decades later, the court repeated that “where the case is close, we will consider errors in the record notwithstanding the failure of counsel to save the questions for review, where it is clear that the court has permitted the prosecuting attorney to take advantage of the accused because he was poorly represented.” Yet, the court cautioned that “we will not reverse a judgment of conviction which is manifestly and unquestionably right simply because counsel did not try the case as well as he should have.”

More recently, the court noted that, even where an error does not affect “substantial rights,” “the threshold concern is just as often as not whether the evidence presented was ‘closely balanced.’ The reason: the strength or weakness of inculpatory evidence has long been seen as relevant to ignoring procedural defaults in remedying occasioned injustice.” In this regard, the court explained that, in cases where the evidence is closely balanced, the main purpose underlying the plain error rule is “to protect against the ‘possibility that an innocent person

46. Keene, 660 N.E.2d at 910.
47. See infra Parts II.A.3.a–b (analyzing the two prongs of the Illinois plain error test).
48. 135 N.E. 422, 423 (Ill. 1922).
49. Id. (emphasis added) (citations omitted).
51. Id.
may have been convicted due to some error which is obvious from the record, but not properly preserved' for appellate review."\(^5^3\) This rationale is based upon the realization that in closely balanced cases "the probability that a defendant's conviction was caused by even a minor trial error is greatly enhanced."\(^5^4\)

b. Fair Trial Prong

Although one can trace the court's concern for ensuring that a defendant "receive a fair and impartial trial" despite forfeited errors to an earlier period,\(^5^5\) the substantial rights rationale underlying the fair trial prong of the plain error rule clearly crystallized by the 1950s. For example, in People v. Burson, the Illinois Supreme Court observed:

The court may, as a matter of grace, in a case involving deprivation of life or liberty, take notice of errors appearing upon the record which deprived the accused of substantial means of enjoying a fair and impartial trial, although no exceptions were preserved[,] or the question is imperfectly presented.\(^5^6\)

Since that time, Illinois courts have identified a number of errors that so seriously undermine the integrity of judicial proceedings as to warrant reversal under the fair trial prong of the plain error rule. The Illinois Supreme Court most recently applied the fair trial prong of Rule 615(a) where the right to a jury trial was implicated.\(^5^7\) The court has also sanctioned reversals for serious prosecutorial misconduct in several watershed decisions.\(^5^8\) Other substantial errors that Illinois courts reviewed under this prong include: judicial absence during a felony jury trial,\(^5^9\) the admission of polygraph evidence,\(^6^0\) the denial of the right to

\(^{53}\) People v. Mullen, 566 N.E.2d 222, 226 (Ill. 1990) (quoting People v. Carlson, 404 N.E.2d 233, 238 (Ill. 1980)).

\(^{54}\) Id.

\(^{55}\) Nowak, 24 N.E.2d at 51, 52 (remarking on several occasions when defendants did not receive a "fair trial").

\(^{56}\) People v. Burson, 143 N.E.2d 239, 245 (Ill. 1957) (quoting 3 AM. JUR. Appeal and Error § 248 (1936)).

\(^{57}\) See People v. Bracey, 821 N.E.2d 253, 256–58 (Ill. 2004) (granting defendant a new trial where during a second trial he was not asked whether he wished to waive his right to a jury trial as he had done in his first trial).

\(^{58}\) See People v. Johnson, 803 N.E.2d 405, 412, 423–25 (Ill. 2003) (reversing the convictions of three defendants where prosecutors made improper remarks during closing argument); see also People v. Blue, 724 N.E.2d 920, 940–42 (Ill. 2000) (granting a new trial due to the State's improper suggestions to the jury and the introduction of a bloodied police uniform and editorialized objections).

\(^{59}\) See People v. Vargas, 673 N.E.2d 1037, 1041–43 (Ill. 1996) (finding plain error where the trial judge was absent during the Assistant State’s Attorney’s cross-examination of the defendant in which he read into evidence a statement, describing the crime, taken by him from the defendant).
a trial by jury,61 subjecting a defendant to double jeopardy;62 directing a verdict on lesser-included offenses;63 failing to provide the jury with verdict forms on all counts charged,64 and surplus convictions entered in violation of the one-act, one-crime doctrine.65

When applying Rule 615(a)'s fair trial prong, the reviewing court determines "whether a substantial right has been affected to such a degree that [the court] cannot confidently state that [the] defendant's trial was fundamentally fair."66 As Justice Howard Ryan explained in an oft-quoted special concurring opinion, the second prong of Illinois' plain error rule "concerns the protection and preservation of the integrity and reputation of the judicial process."67 Thus, where a defendant's right to a fair trial has been denied, the court "must take corrective action so that [it] may preserve the integrity of the judicial process."68

Significantly, a reviewing court will act on plain error under the fair trial prong "regardless of the strength of the evidence of defendant's guilt."69 As Justice Ryan noted, "Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a . . . crime are entitled to be tried by the standards of guilt which [the legislature] has prescribed."70

60. See People v. Baynes, 430 N.E.2d 1070, 1079 (Ill. 1981) (holding that admission of polygraph evidence was plain error because the evidence was not reliable and there was a risk of the jury construing the evidence as conclusive).
61. See People v. Bristow, 400 N.E.2d 511, 513-14 (Ill. App. Ct. 1st Dist. 1980) (reversing conviction and granting a new trial where defense counsel did not reply to the trial court's question of whether the defendant waived the right to a jury trial because the trial court has a duty to make sure that a defendant's waiver is expressly made in open court).
62. See People v. Largent, 786 N.E.2d 1102, 1106-07, 1109 (Ill. App. Ct. 4th Dist. 2003) (asserting that the court may consider a claim of double jeopardy even though the defendant failed to assert that claim by a post-trial motion after his second trial).
63. See People v. James, 626 N.E.2d 1337, 1345-47 (Ill. App. Ct. 1st Dist. 1993) (holding that the trial judge's failure to give the jury the option of acquitting the defendant of arson had the effect of directing a guilty verdict for that charge and was found to be plain error).
64. See People v. Scott, 612 N.E.2d 7, 9 (Ill. App. Ct. 1st Dist. 1993) (finding that the trial court committed reversible error where it submitted verdict forms to the jury for only one of the three counts charged in the indictment).
65. See People v. Quinones, 839 N.E.2d 583, 592-93 (Ill. App. Ct. 1st Dist. 2005) (finding that the defendant's multiple convictions based on the same act violated the one-act, one-crime doctrine and thus resulted in plain error).
68. Blue, 724 N.E.2d at 940 (emphasis added).
69. Id. at 941.
70. Green, 386 N.E.2d at 277 (Ryan, J., specially concurring) (quoting Screws v. United States, 325 U.S. 91, 107 (1945)).
B. The Federal Plain Error Test

1. Rule 52(b)

Although it contains language similar to the Illinois rule, the federal plain error rule has several significant differences that must be explored. The federal plain error test derives from Rule 52(b) of the Federal Rules of Criminal Procedure, which, in its present form, reads: "A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention." The most thorough explication of the federal plain error test can be found in the United States Supreme Court’s decision in United States v. Olano. Under that test, before an appellate court can correct an error not raised at trial, there must be (1) "error," (2) that is "plain," and (3) that "affect[s] substantial rights." The first element, "error," simply means a "[d]eviation from a legal rule," unless such rule has been waived. The second element, requiring that the error be "plain," refers to the fact that the error must be "clear" or "obvious." The third element under the federal rule is that the plain error must "affect[] substantial rights." This means that "the error must have been prejudicial: It must have affected the outcome of the district court proceedings." To determine whether an error is prejudicial for purposes of the plain error rule, the United States Supreme Court instructs that the reviewing court must engage in an inquiry similar to the traditional harmless error analysis required under Rule 52(a). There is one important difference, however, between a harmless error analysis under Rule 52(a) and a plain error analysis under Rule 52(b): namely, where a claim is procedurally defaulted, "[i]t is the defendant rather than the Government who bears the burden of persuasion with

71. FED. R. CRIM. P. 52(b). In 2002, the language of Rule 52(b) was amended "as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules." FED. R. CRIM. P. 52(b), advisory committee’s notes, 2002 amendments.
73. Id. at 732. See also Johnson v. United States, 520 U.S. 461, 466–67 (1997) (identifying the three conditions that must be met before a federal appellate court can correct an error not raised at trial).
74. Olano, 507 U.S. at 732–33.
75. Id. at 734.
76. Id. at 732.
77. Id. at 734.
78. See id. (noting that an analysis under Rule 52(b) normally requires the same kind of inquiry as a Rule 52(a) harmless error analysis).
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Furthermore, Rule 52(b) is permissive rather than mandatory. If the aforementioned three conditions of Rule 52(b) are met, the reviewing court may exercise discretion to correct an error only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." Initially, the United States Supreme Court utilized this language to describe the circumstances under which courts could sua sponte take cognizance of significant errors. Presently, however, this wording expresses "the standard that should guide the exercise of remedial discretion under Rule 52(b)." This distinction emphasizes the discretionary nature of plain error review in federal courts. As the Court explained, "a plain error affecting substantial rights does not, without more, satisfy the remedial discretion standard, for otherwise the discretion afforded by Rule 52(b) would be illusory."

2. Apprendi v. New Jersey

In the United States Supreme Court's landmark decision in Apprendi v. New Jersey, the prosecution indicted the defendant on charges that he fired several bullets into the home of a black family that recently moved into an all-white neighborhood. None of the counts alleged that the defendant acted with a racially motivated purpose. After the defendant pled guilty to, among other charges, possession of a firearm for an unlawful purpose, which carried a maximum sentence of ten years, the prosecution moved for an extended-term sentence under New Jersey's "hate crime" enhancement statute. Following a hearing, the trial judge found "by a preponderance of the evidence" that the defendant's actions were racially motivated and increased the defendant's sentence to twelve years.

Reversing the decision, the United States Supreme Court ruled that

79. Id. at 734–35.
80. Id. at 735.
81. Id. at 732 (quoting United States v. Young, 470 U.S. 1, 15 (1985)).
82. Id. at 736.
83. Id. at 737. In Olano, for example, the Court never reached the question of whether the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" because it held that the petitioners failed to demonstrate that the presence of alternate jurors during jury deliberations was prejudicial such that it "affect[ed] substantial rights." Id. at 737–41.
84. 530 U.S. 466 (2000).
85. Id. at 469.
86. Id.
87. Id. at 469–70.
88. Id. at 470–71.
New Jersey’s enhancement procedure ran afoul of constitutional notice and jury trial rights by removing such fact-finding duties from the jury. The Court uttered its now famous pronouncement that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”

3. United States v. Cotton

In United States v. Cotton, the United States Supreme Court addressed whether an Apprendi violation constituted plain error under the federal rule. In Cotton, the defendants were charged with a drug conspiracy, but the superseding indictment failed to allege the specific levels of drug quantity that would trigger enhanced penalties. After the jury found the defendants guilty, the district judge made findings as to the drug quantities and imposed sentences beyond the statutory maximums permitted by the jury’s verdict. The defendants did not object to the enhanced sentences on this ground in the district court.

On appeal, the United States Supreme Court held that the failure to allegation the drug quantities in the indictments did not rise to the level of plain error because such an omission “did not seriously affect the fairness, integrity, or public reputation of judicial proceedings” under the federal plain error test. The Court based its conclusion on the fact that the evidence as to drug quantity was overwhelming and “surely” would have been found by the grand jury.

C. A Comparison of the Illinois and Federal Plain Error Rules

As detailed above, Illinois’ plain error rule provides greater legal protections to defendants with respect to forfeited errors than its federal counterpart. This enables reviewing courts in Illinois, under both prongs of the plain error rule, to more effectively prevent the conviction of innocent persons and to safeguard the integrity of the criminal justice

89. Id. at 476–77, 491–92.
90. Id. at 490.
92. Id. at 627.
93. Id. at 627–28.
94. Id. at 628.
95. Id.
96. Id. at 632–33.
97. Id. at 633.
98. See supra Parts II.A–B (discussing the Illinois plain error test and the federal plain error test).
The most significant distinction between the federal plain error test and the Illinois rule is that the former incorporates a harmless error analysis into its determination of whether a forfeited error "affect[s] substantial rights," while the latter does not.\textsuperscript{99} Because the federal rule incorporates a harmless error analysis, it is, of course, much more "prosecution-friendly" in nature, which is why the State fought so vigorously to have it replace Illinois' traditional plain error rule.\textsuperscript{100} Although this conclusion may seem self-evident to seasoned appellate practitioners, it may not be readily apparent to those who are unfamiliar with this rather confusing area of the law and therefore merits further explanation.

Because the federal plain error rule incorporates a harmless error analysis, before the reviewing court will even decide whether to review an alleged forfeited error on the merits, the defendant must first meet his burden of demonstrating that the error was prejudicial.\textsuperscript{101} However, as the United States Supreme Court has noted, "[i]n most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial."\textsuperscript{102} For example, absent a jury note, it is a difficult burden to demonstrate that a particular error had a prejudicial impact on the deliberations of the jury.\textsuperscript{103} In cases in which the evidence against the accused is strong, the defendant will often be hard-pressed to show that the error had an adverse influence on the verdict. Moreover, even if a defendant satisfies his burden of showing prejudice, the reviewing court can still decline to review the error unless it "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings."\textsuperscript{104} And even then, the court is not required to do so.\textsuperscript{105} It is therefore little wonder why prosecutors laud the federal test, as it eliminates appellate review of most forfeited errors because of

\textsuperscript{99} See supra Parts II.A–B (explaining the different burdens of proof and analyses required under the Illinois and federal plain error rules).

\textsuperscript{100} See infra Part II.E (describing the efforts of the Illinois State's Attorney's Office to persuade the Illinois Supreme Court to adopt the federal plain error test).

\textsuperscript{101} See United States v. Olano, 507 U.S. 725, 734 (1993) (explaining that under Rule 52(b), the defendant has the burden of showing that the plain error was prejudicial before a court of appeals can correct the error).

\textsuperscript{102} Id.

\textsuperscript{103} See United States v. Young, 470 U.S. 1, 16 n.14 (1985) ("[F]ederal courts have consistently interpreted the plain error doctrine as requiring an appellate court to find that the claimed error . . . had an unfair prejudicial impact on the jury's deliberations.").

\textsuperscript{104} See Olano, 507 U.S. at 735–37 (articulating the standard for determining when a court of appeals should correct a forfeited error).

\textsuperscript{105} See id. at 736 (clarifying that Rule 52(b) is permissive rather than mandatory).
defendants' inability to demonstrate prejudicial error. In contrast, under Illinois' plain error rule, which does not incorporate a harmless error analysis, the court will review a forfeited error "where either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." This allows Illinois courts to correct forfeited errors that may have contributed to the conviction of an innocent defendant where the evidence was not overwhelming and to protect the integrity of the judicial process, regardless of the strength of the evidence against an individual defendant. As a result, reviewing courts in Illinois can ensure that the due process and fair trial rights of all defendants are honored, not just the rights of defendants who pass an exacting harmless error review.

Perhaps the most telling example of this distinction surrounds the issue of prosecutorial misconduct. In People v. Young, the United States Supreme Court addressed whether improper prosecutorial remarks constituted plain error under Rule 52(b)'s plain error formulation. In Young, the Court found that although the prosecutor's statements were "inappropriate and amount[ed] to error," they "were not such as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice." The Court further pointed out that there was "overwhelming evidence" of the defendant's intent to defraud, as well as his deliberate concealment of the fraudulent scheme. In short, the Court held that the strength of the evidence against the defendant eliminated "any lingering doubt that the prosecutor's remarks unfairly prejudiced the jury's deliberations ...." Thus, the Court held that the prosecutor's improper argument "did not constitute plain error warranting the Court of Appeals to overlook the failure of the defense counsel to preserve the point by timely objection."

On the other hand, the Illinois Supreme Court has taken a strong
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stand against the “‘alarming’ frequency”\(^\text{115}\) of prosecutorial misconduct and has found such behavior to be plain error “regardless of the strength of the evidence of defendant’s guilt.”\(^\text{116}\) Most recently, in *People v. Johnson*, the court declared that the type of prosecutorial misconduct that permeated the trials under review “undermine[d] the very foundations of our criminal justice system.”\(^\text{117}\) The court explained, “[o]ur system of justice requires that a defendant’s guilt or innocence be determined based upon relevant evidence and legal principles, upon the application of reason and deliberation by a jury, not the expression of misdirected emotion or outrage by a mob.”\(^\text{118}\) The Illinois Supreme Court further warned:

Misconduct on the part of prosecutors cannot be allowed to continue unchecked. To call it ‘error’ is to mischaracterize it, as it represents nothing less than an attempt to subvert a defendant’s fundamental right to a fair trial. Multiple instances of this kind of conduct in the course of a criminal trial threaten the trustworthiness and reputation of the judicial process, and this court will take corrective action to preserve the integrity of the process.\(^\text{119}\)

In *Johnson*, the court found that the pervasive pattern of prosecutorial misconduct constituted plain error “irrespective of the state of the evidence.”\(^\text{120}\)

This comparison makes clear the real and significant differences between the Illinois and federal plain error rules.

**D. Confusion in the Illinois Courts**

1. **Reliance on the Federal Plain Error Rule for *Apprendi* Cases**

In its 2003 Supplemental Opinion in *People v. Crespo*, the Illinois Supreme Court, without explanation, relied upon the federal plain error test in a case implicating the United States Supreme Court’s decision in *Apprendi v. New Jersey*.\(^\text{121}\)

In *Crespo*, a jury convicted the defendant of first-degree murder.\(^\text{122}\)

\(^{115}\) People v. Johnson, 803 N.E.2d 405, 425 (Ill. 2003).

\(^{116}\) People v. Blue, 724 N.E.2d 920, 941 (Ill. 2000).

\(^{117}\) *Johnson*, 803 N.E.2d at 425.

\(^{118}\) Id.

\(^{119}\) Id. at 425–26 (citation omitted).

\(^{120}\) Id. at 424.

\(^{121}\) People v. Crespo, 788 N.E.2d 1117, 1123–25 (Ill. 2001), as modified upon denial of rehearing (Ill. 2003); see also *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”).

\(^{122}\) *Crespo*, 788 N.E.2d at 1118.
The evidence established that the victim was stabbed with a large kitchen knife, that she had more than twenty stab wounds, that such force was used that the blade was bent to a 90-degree angle, and that a large clump of the victim's hair, with the scalp still attached, had been removed during the stabbing assault. The trial court imposed a seventy-five year extended-term sentence on the defendant based upon its post-trial finding that the defendant committed the crime in an exceptionally brutal or heinous manner.

On rehearing, the defendant in Crespo alleged that the Illinois Supreme Court should vacate this sentence because it violated the mandate of Apprendi. Although the State conceded that the defendant's sentence violated Apprendi, it contended that, under the facts of the case, the violation was harmless error. The defendant, in response, asserted that because the error was structural in nature harmless error review did not apply. The court determined that plain error analysis was appropriate because the defendant failed to object at trial.

Rather than applying the Illinois plain error rule, the court then turned to the federal plain error test, as it had been recently applied in Cotton. The Illinois Supreme Court reached "the same conclusion by the same reasoning" as the United States Supreme Court had in Cotton. Because overwhelming evidence had been produced that the crimes were committed in an exceptionally brutal or heinous manner, the Illinois Supreme Court refused to consider the issue as plain error because "the defendant failed to show that the error was prejudicial."

Also noteworthy is People v. Thurow, which was issued prior to the Supplemental Opinion in Crespo. In Thurow, the Illinois Supreme Court briefly discussed the federal plain error rule in the context of distinguishing harmless error analysis from that of plain error review in

123. Id. at 1125.
124. Id. at 1123.
125. Id.
126. Id. at 1123-24.
127. Id. at 1124.
128. Id.
129. Id.; see also United States v. Cotton, 535 U.S. 625 (2002) (holding that the indictment's failure to list the quantity of drugs that ultimately resulted in an enhanced sentence did not rise to the level of plain error). Cotton, in turn, relied upon the explication of the test as set forth in Olano. See Cotton, 535 U.S. at 631-32 (quoting United States v. Olano, 507 U.S. 725, 732 (1993)).
130. Crespo, 788 N.E.2d at 1124.
131. Id. at 1125.
an effort to discern whether Apprendi errors could be deemed harmless.\textsuperscript{133} In this regard, the court noted that where a timely objection is made, as in Thurow, the State bears the burden of persuasion with respect to prejudice, while in cases subject to plain error review, where a timely objection is not interposed, the burden of persuasion falls on the defendant.\textsuperscript{134} The court ultimately concluded that Apprendi violations were subject to harmless error review\textsuperscript{135} and that the error at bar was harmless because there was overwhelming evidence that the victim was a member of defendant’s household for sentencing enhancement purposes.\textsuperscript{136}

2. Confusion in the Illinois Appellate Courts Following Crespo

The Illinois Supreme Court relied upon the federal plain error test in Crespo only in the context of Apprendi sentencing errors and never utilized such test for forfeited errors outside of that limited context.\textsuperscript{137} Soon, however, references to the federal test in non-Apprendi contexts began to enter into certain Illinois appellate decisions and indicated a marked confusion on the part of various panels as to how to define plain error.\textsuperscript{138}

The first reported Illinois appellate case to apply the federal plain error rule in a non-Apprendi context appears to be People v. Tisley.\textsuperscript{139} In Tisley, a jury convicted the defendant of armed robbery.\textsuperscript{140} After the police received a description of the offender from the victim, the police apprehended the defendant and placed him in a show-up with four other individuals.\textsuperscript{141} The victim identified the defendant as the robber.\textsuperscript{142} On appeal, the defendant argued that the trial court erred in giving the jury a witness identification instruction that departed from the criminal pattern instructions.\textsuperscript{143} The defendant failed to object to the instruction

\textsuperscript{133} Id. at 1025; see supra Part II.A.1 (discussing the differences between plain error and harmless error analysis).

\textsuperscript{134} Thurow, 786 N.E.2d at 1025.

\textsuperscript{135} Id. at 1028.

\textsuperscript{136} Id. at 1030.

\textsuperscript{137} See supra Part II.D.1 (discussing the Illinois Supreme Court’s reliance on the federal plain error test only in the context of Apprendi sentencing errors); see also infra note 165 and accompanying text (noting four cases, decided after Crespo, in which the Illinois Supreme Court analyzed non-Apprendi forfeited errors under Illinois’ traditional plain error test).

\textsuperscript{138} See infra notes 139–158 and accompanying text (discussing appellate court’s application of the federal plain error test in the Apprendi and non-Apprendi contexts).


\textsuperscript{140} Id. at 183.

\textsuperscript{141} Id.

\textsuperscript{142} Id.

\textsuperscript{143} Id. at 184. The instructional error that the court considered is commonly known as a
In a two-to-one decision authored by Justice Patrick Quinn of the First District, the majority in Tisley applied the federal plain error test to determine whether the giving of the identification instruction constituted plain error. The majority relied specifically on Crespo, applied the federal test, and found that the instruction was not plain error because the defendant failed to show that he was prejudiced. More importantly, however, the majority concluded its decision by stating that "we also hold that when the issue is waived, as here, it is only reviewable under a plain error analysis, as explained in People v. Crespo." Justice Ellis Reid dissented, asserting that the Illinois plain error standard should have been applied. Justice Reid began his dissent as follows:

I believe this matter should be remanded for a new trial in order to protect the process . . . . While I understand that remanding the matter may seem to be a futile act, one that may only serve as instructive in terms of future cases with other defendants, I believe it is necessary because of the fundamental nature of the rights at stake when a body politic takes steps to deprive a citizen of his liberty.

After outlining the Illinois standard and highlighting its disjunctive nature, Justice Reid pointed out that "even in a case where the relative closeness of the evidence is not necessarily an issue, plain error review can still be proper where the asserted error is fundamental to the integrity of the judicial process." Justice Reid concluded by stating that, regardless of the evidence against the defendant, the accused did

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144. Tisley, 793 N.E.2d at 184.
145. Justice Quinn seemed to be the most zealous judicial advocate in favor of adopting the federal plain error test. See, e.g., Tisley, 793 N.E.2d at 185-87 (Quinn, J., authoring) (applying federal plain error test to jury instruction issue and making a judicial pronouncement that, in the future, forfeited errors were only reviewable under the federal plain error test); People v. Schickel, 807 N.E.2d 1195, 1204 (Ill. App. Ct. 1st Dist. 2004) (Quinn, J., specially concurring) (combining Rule 615(a) and the federal test and remarking that "I completely concur with everything in the majority's decision."); appeal denied, 823 N.E.2d 976 (Ill. 2004); cf. People v. Saraceno, 791 N.E.2d 1239, 1246-50 (Ill. App. Ct. 1st Dist. 2003) (Quinn, J., dissenting) (dissenting where the majority found plain error under the closely balanced evidence prong of Rule 615(a) and advocating for a harmless error analysis).
146. Tisley, 793 N.E.2d at 186-87.
147. Id. at 187 (emphasis added) (citation omitted).
148. Id. at 188 (Reid, J., dissenting).
149. Id.
150. Id.
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not receive a fair trial as a result of the trial court’s instructional error and, therefore, should be given a new trial.\footnote{151} After \textit{Tisley}, other Illinois courts likewise applied the federal plain error test to non-\textit{Apprendi} errors. For example, in \textit{People v. Durgan}, the Fourth District applied the federal plain error test to determine whether the trial court’s juror replacement procedure could be treated as plain error.\footnote{152} In \textit{People v. Sharp}, the same court, relying upon \textit{Crespo}, applied the federal test in refusing to address the defendant’s prosecutorial misconduct argument.\footnote{153} In \textit{People v. Schickel}, which involved the trial court’s alleged failure to inform the defendant of the possible penalties for involuntary manslaughter, the First District refused to find plain error.\footnote{154} The court referenced Rule 615(a) but engrafted the multi-step federal plain error test onto it rather than applying it as a free-standing test.\footnote{155} Somewhat similarly, in \textit{People v. Brooks}, the First District referred to both Rule 615(a) and the federal plain error test in finding that a prosecutor’s comment in closing argument was not a prejudicial error that affected the defendant’s substantial rights.\footnote{156}

Some Illinois courts limited the application of the federal plain error rule to \textit{Apprendi} errors while they maintained Rule 615(a)’s plain error rule for all other errors. In \textit{People v. Coleman}, the court considered a trial error regarding the scope of cross-examination under Rule 615(a)’s plain error rule while, in the same decision, it analyzed an alleged \textit{Apprendi} violation under the federal plain error test.\footnote{157} Likewise, in \textit{People v. Simmons}, the court analyzed defendant’s claims of prosecutorial misconduct and ineffective assistance of counsel pursuant to Rule 615(a) but considered the defendant’s argument that his extended-term sentence violated \textit{Apprendi} under the federal plain error rule.\footnote{158}

The foregoing cases demonstrate the chaos that prevailed in the

\begin{footnotes}
\item 151. \textit{Id.} at 189.
\item 155. \textit{Id.} at 1204.
\end{footnotes}
E. Efforts of the State’s Attorney’s Office to Abrogate Illinois’ Plain Error Test

The State’s Attorney’s Office seized upon this confusion to advance its support of the prosecution-friendly federal plain error test. In fact, these efforts began prior to the issuance of the Supplemental Opinion in Crespo. In People v. Johnson, for example, which was argued prior to the release of Crespo’s Supplemental Opinion, the Illinois Supreme Court highlighted the efforts by the State to persuade the court to abandon its traditional formulation of plain error analysis in favor of the federal rule:

The State in oral argument requested that we declare the plain error rule to be a standard of review rather than an exception to the “waiver doctrine.” The State also claims that “the closely balanced evidence test applied to Supreme Court Rule 615(a)’s plain error clause is... confusing and unworkable, it creates an internal conflict with Rule 615(a)’s harmless error clause, and should therefore be abandoned and replaced by the test used in the federal system to identify plain error.” The State urges us to abrogate our longstanding formulation of plain error analysis and adopt the “federal test,” as set forth in United States v. Olano...

But the Illinois Supreme Court declined to address the State’s contentions in Johnson. Instead, the court applied the traditional Illinois plain error rule to the errors at issue. Later in its decision, the court referred briefly to the federal test and stated, “[i]n passing, we note that our disposition would be the same had we applied the Olano standard.”

Following the issuance of the Supplemental Opinion in Crespo, the Illinois Supreme Court, in addition to the subsequent release of its opinion in Johnson, issued no less than four decisions involving non-

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159. People v. Johnson, 803 N.E.2d 405 (Ill. 2003). Oral argument in Johnson was conducted on November 13, 2002, more than four months prior to issuance of the Supplemental Opinion in Crespo. See People v. Crespo, 788 N.E.2d 1117, 1117 (Ill. 2001), as modified upon denial of rehearing (Ill. 2003) (explaining Apprendi violation was not prejudicial and therefore was not plain error).


161. Id.

162. Id.

163. Id. at 423. In its discussion, the Court expressed its view that pervasive prosecutorial misconduct would qualify as a “structural” defect under the federal rule. Id. at 423-24.

164. Johnson was decided on October 17, 2003, more than six months subsequent to the release of the Supplemental Opinion in Crespo. Id. at 405.
Apprendi issues in which the court analyzed the forfeited errors under Illinois' traditional plain error test.\textsuperscript{165} Undeterred by these decisions, the State's Attorney's Office inundated the appellate courts with arguments that all forfeited errors had to be analyzed under the federal plain error standard referred to in \textit{Crespo}.\textsuperscript{166}

III. SUBJECT OPINIONS

The State's campaign to abrogate Illinois' plain error rule ultimately found its way to the Illinois Supreme Court, which resolved the issue in \textit{People v. Herron} and \textit{People v. Durr}. \textit{People v. Herron} involved the State's challenge to the viability of the closely balanced evidence prong of the plain error test.\textsuperscript{167} In \textit{Herron}, the Illinois Supreme Court explicitly rejected the State's request to eliminate Illinois' traditional plain error rule and defined, in substantial detail, the parameters of Illinois' plain error standard. \textit{People v. Durr}, on the other hand, concerned Rule 615(a)'s fair trial prong.\textsuperscript{168} In \textit{Durr}, the court specifically enunciated the operation of Illinois' plain error rule in the context of instructional errors.\textsuperscript{169}

A. \textit{People v. Herron}

In \textit{People v. Herron}, the Illinois Supreme Court tackled the enigmatic question of what constitutes plain error.\textsuperscript{170} In \textit{Herron}, a jury convicted the defendant of first-degree murder and armed robbery.\textsuperscript{171} The sole issue raised on direct appeal was whether the trial judge erred by improperly instructing the jury concerning eyewitness identification

\textsuperscript{165} See People v. Bracey, 821 N.E.2d 253, 256 (Ill. 2004) (applying fair trial prong of Rule 615(a) where right to jury trial was implicated); People v. Evans, 808 N.E.2d 939, 956–57 (Ill. 2004) (involving alleged prosecutorial misconduct); People v. Graham, 795 N.E.2d 231, 238 (Ill. 2003) (regarding use of defendant's post-arrest silence); People v. Ceja, 789 N.E.2d 1228, 1242–43 (Ill. 2003) (concerning expert opinion testimony).

\textsuperscript{166} Prior to the Illinois Supreme Court's decisions in Herron and Durr, the Office of the State Appellate Defender was deluged with briefs from the State's Attorney's Office containing lengthy argument on this point. See, e.g., Brief for Appellee at 22–29, People v. Brice Leslie, No. 1-04-0950 (Ill. App. Ct. 1st Dist. Mar. 18, 2005) (analyzing alleged errors under federal test); Brief for Appellee at 27–36, People v. Melchor, 841 N.E.2d 420 (Ill. App. Ct. 1st Dist. 2005) (No. 1-03-3036) (arguing the federal plain error test).

\textsuperscript{167} People v. Herron, 830 N.E.2d 467 (Ill. 2005); see also infra Part III.A (discussing the scope of the plain error test as explained in People v. Herron).

\textsuperscript{168} People v. Durr, 830 N.E.2d 527 (Ill. 2005); see also infra Part III.B (explaining the court's analysis of the plain error rule for jury instruction errors).

\textsuperscript{169} Durr, 830 N.E.2d at 536.

\textsuperscript{170} Herron, 830 N.E.2d at 467. "The central issue in this case is what constitutes plain error, or more specifically, what standard a reviewing court should use in deciding whether to excuse procedural default of an issue on appeal." Id. at 469.

\textsuperscript{171} Id.
The defendant neither objected to the instruction at trial nor raised the issue in a post-trial motion. The defendant, however, asked the appellate court to address the issue under the plain error doctrine. The appellate court, after considering the alleged instructional error under the plain error rule, reversed the defendant's convictions and remanded the case for a new trial.

Before the Illinois Supreme Court, the State "challenge[d] the continued viability of the 'closely balanced evidence prong'" of Illinois' traditional plain error rule and asked the court to adopt the federal plain error rule. More specifically, the State argued that "the closely balanced evidence prong improperly shifts the burden of persuasion from the defendant to the State to show the error was not prejudicial, effectively rendering the failure to preserve the error inconsequential." Accordingly, the State asked the court to abandon its longstanding disjunctive test and to instead embrace the federal plain error test.

In addition, the State asserted that in People v. Thurow and People v. Crespo, the Illinois Supreme Court had already "adopted the federal test, but inexplicably retreated to the disjunctive test in later cases." The State also contended that Rule 615(a)'s harmless error and plain error clauses, when read in conjunction, "indicate[d] that both preserved and unpreserved errors must be prejudicial before a reviewing court may reverse." After tracing the history of Illinois' plain error rule, reviewing its Apprendi decisions in People v. Crespo and People v. Thurow, and noting the divergent treatment of plain error in the appellate courts as a result of its reliance on the federal plain error test in Crespo, the court emphasized the congruency between the federal and state tests,
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remarking that "[b]oth the texts of the federal and state plain-error rules, as well as their interpretation by the United States and Illinois Supreme Courts, are similar." With respect to the individual prongs of the federal plain error rule, the court explained that both the federal and state tests: (1) require error; (2) require that the error must be plain; (3) require that the error must affect substantial rights; and (4) take into account "the fairness, integrity, and public reputation of judicial proceedings." Therefore, the court dismissed the State's claim that the federal and state plain error tests were "diametrically opposed" or "fundamentally divergent," opining that "[u]ltimately, plain error involves the same considerations in federal and state court" and accounting for the differences as an outcome of the common law process. The court concluded its analysis on this point by noting that, "[o]ver time, different justices of different courts have added their idiosyncratic language to the case law, but changes in the language of plain error have not resulted in changes in the meaning of plain error."

Similarly, the court rejected the State's argument that the Court adopted the federal plain error test in its decisions in Thurow and Crespo. Instead, as explained by the Court, because a question of first impression was raised in the rehearing petition in Crespo, "we understandably sought guidance from a superior court that already had decided that issue." To avoid any future confusion, the court tersely declared: "We did not adopt Olano." Rather, the court stated that it only referred to the federal plain error test "because, at its core, it is the same standard we already use."

The court also rejected the State's characterization of plain error as a "standard of review." The court pointed out that the term "standard of review" denotes '[t]he criterion by which an appellate court . . . measures . . . the propriety of an order, finding, or judgment entered by a lower court." Thus, the "plain error test is not a standard of

183. Id. at 473–78.
184. Id. at 478–79.
185. Id.
186. Id.
187. Id.
188. Id.
189. Id.
190. Id.
191. Id. at 475 n.1.
192. Id. (quoting BLACK'S LAW DICTIONARY 1441 (8th ed. 2004)).
The standard of review "refers to the stance that a reviewing court takes with respect to a trial court error, and is thus the wrong label in the context of plain error, where there is no trial court order to review." According to the court, "[t]he plain error test . . . is more aptly described as a standard to help a reviewing court determine when to excuse forfeiture." The court then proceeded to reaffirm the disjunctive nature of Illinois' plain error test, which, according to the court, "does not offer two divergent interpretations of plain error, but instead two different ways to ensure the same thing—namely, a fair trial."

With respect to the closely balanced evidence prong, the court stated that "where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, a reviewing court may consider a forfeited error in order to preclude an argument that an innocent person was wrongly convicted." In such situations, the court noted that "the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him." For its part, the State may reply to the defendant by arguing that the evidence was strongly weighted against the defendant and thus not closely balanced.

In discussing the fair trial prong, the court stated that "where the error is so serious that the defendant was denied a substantial right, and thus a fair trial, a reviewing court may consider a forfeited error in order to preserve the integrity of the judicial process." In other words, "the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." Under the fair trial prong, "[p]rejudice to the defendant is presumed because of the importance of the right involved, 'regardless of the strength of the evidence'" against the defendant.

Yet, as to demonstrating plain error under either prong, the court

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193. Id.
194. Id.
195. Id.
196. Id. at 475.
197. Id.
198. Id. at 479.
199. Id.
200. Id. at 475.
201. Id. at 479–80.
202. Id. at 480.
emphasized that "the burden of persuasion remains with the
defendant."\textsuperscript{203} In sum, "the plain-error doctrine bypasses normal
forfeiture principles and allows a reviewing court to consider
unpreserved error when either (1) the evidence is close, regardless of the
seriousness of the error, or (2) the error is serious, regardless of the
closeness of the evidence."\textsuperscript{204}

Finally, the court turned to the merits of the defendant's argument
concerning the identification instruction at issue.\textsuperscript{205} The court noted
that although instructional errors rise to the level of plain error only
where they "create[] a serious risk" that a jury may have incorrectly
entered a guilty verdict against a defendant due to a lack of
understanding of the applicable law, "the seriousness of the risk
depends upon the quantum of evidence presented by the State against
the defendant."\textsuperscript{206} Significantly, the court emphasized that in a case
falling under the closely balanced evidence prong, "[t]he defendant need
not prove that the error in the instruction actually misled the
jury."\textsuperscript{207} Instead, the court declared that "[i]f the defendant carries the burden of
persuasion and convinces a reviewing court that there was error and that
the evidence was closely balanced, the case is not cloaked with a
presumption of prejudice. \textit{The error is actually prejudicial, not
presumptively prejudicial.}"\textsuperscript{208} Because there was only one eyewitness
who could identify the defendant, as well as a conflicting physical
description by another witness, the court found that the defendant, by
demonstrating that the evidence was closely balanced, proved that the
trial court's instructional error was prejudicial.\textsuperscript{209} Accordingly, the
court affirmed the appellate court's decision reversing the defendant's
convictions and remanding the case for a new trial.\textsuperscript{210}

\textsuperscript{203} \textit{Id.}

\textsuperscript{204} \textit{Id.} at 479.

\textsuperscript{205} \textit{Id.} at 480. In short, the Court concluded that the trial court's instruction, which, contrary
to the Illinois Pattern Jury Instruction (IPI) (Criminal) committee notes and sample set
instructions, included the disjunctive term "or" between each of the identification factors, was
plain error because it may have misled ordinary jurors into believing that they could find the
identification testimony of an eyewitness reliable based upon just one of the factors listed in the
instruction. \textit{Id.} at 480–82. Parenthetically, the Court ruled that the instruction constituted plain
error "regardless of any further comment on it by the State in its closing argument." \textit{Id.} at 482.

\textsuperscript{206} \textit{Id.} at 483.

\textsuperscript{207} \textit{Id.}

\textsuperscript{208} \textit{Id.} (emphasis added). In explaining this rationale, the Court eloquently stated, "We deal
with probabilities, not certainties; we deal with risks and threats to the defendant's rights. When
there is error in a close case, we choose to err on the side of fairness, so as not to convict an
innocent person." \textit{Id.}

\textsuperscript{209} \textit{Id.}

\textsuperscript{210} \textit{Id.} at 483–84.
B. People v. Durr

In People v. Durr, the court found that the trial court's non-pattern jury instructions constituted error. But the court held that such error did not rise to the level of plain error because the defendant failed to demonstrate that the instructions caused a "severe threat" to the fairness of his trial and compromised the integrity of the proceedings.

Following a jury trial, the defendant was convicted of three counts of predatory criminal sexual assault of a child and one count of aggravated kidnapping. On direct appeal, the defendant contended that the trial judge erred in giving non-Illinois Pattern Instructions (IPI) to the jury and thereby deprived the jury of the option of fully acquitting him on all the offenses, namely, both the greater- and lesser-included offenses. Although the defendant tendered the correct pattern instruction on greater- and lesser-included offenses at trial, the defendant failed to include the instructional issue in a post-trial motion. Still, the defendant asked the appellate court to address the issue under the fair trial prong of the plain error doctrine.

The appellate court, after considering the alleged instructional errors under the second prong of Rule 615(a)'s plain error rule, reversed the defendant's convictions and remanded the case for a new trial, finding that the trial court’s non-IPI instructions denied the jury "the opportunity to acquitted defendant of the lesser-included offenses." Yet, upon denying the State's ensuing petition for leave to appeal, the Illinois Supreme Court issued a supervisory order vacating the appellate court's judgment and remanding the case for reconsideration in light of its decisions in People v. Crespo and People v. Thurow. On remand,
the appellate court, as instructed, revisited the instructional issues under the federal plain error test and held “that the giving of the altered instruction by the trial court was not error and that defendant was not deprived of a fair trial.” The Illinois Supreme Court granted the defendant’s petition for leave to appeal. On appeal to the high court, the defendant alleged “that the appellate court ‘erred in applying the federal plain-error test to [his] case’” and that application of Illinois’ plain error test would have altered the outcome of the appeal.

In addressing the defendant’s claim, the Illinois Supreme Court pointed out that “we can review any question not otherwise properly preserved if we believe that plain error affecting a substantial right may have occurred.” Because the evidence was not closely balanced, the court reviewed the defendant’s assertion of error under Rule 615(a)’s fair trial prong.

The court began its discussion by noting that a defendant who raises a forfeited instructional error bears the burden of persuasion. In this regard, the court, borrowing from its recent decision in People v. Hopp, which involved a case under Rule 451(c), explained that that rule, which is analogous to Rule 615(a), “does not require that defendant prove beyond doubt that [his] trial was unfair because [an instructional error] misled the jury to convict [him]. It does require that [he] show that the error caused a severe threat to the fairness of [his] trial.” Accordingly, in order to demonstrate plain error, a defendant must show that the instructional error “creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial.”

Turning to the merits of the defendant’s claim, the court first addressed whether the trial court committed error in failing to accept the defendant’s tendered IPI charge instruction concerning greater- and

219. Durr, 830 N.E.2d at 529.
220. Id.
221. Id. Although the defendants in both Durr and Herron argued for the retention of Illinois’ traditional plain error standard and against the adoption of the federal plain error test, the Court chose to address the issue in its opinion in Herron. Id. at 534 (“[W]e note that the interrelation and consistency of federal and state plain error standards are matters this court has recently addressed in People v. Herron .... We need not do so here.”).
222. Id. at 536 (quoting People v. Shaw, 713 N.E.2d 1161, 1175 (Ill. 1998) (emphasis added)).
223. Id.
224. 805 N.E.2d 1190 (Ill. 2004).
225. Durr, 830 N.E.2d at 536 (quoting Hopp, 805 N.E.2d at 1197).
226. Id. (quoting Hopp, 805 N.E.2d at 1194).
The court first ruled that the trial court erred in refusing to give the defendant’s instruction. The court then held that the trial judge erred in giving non-IPI instructions on this subject because he did not find that the proffered instruction failed to accurately state the law, as is required by Illinois Supreme Court Rule 451(a).

Notwithstanding these errors, the court ruled that the trial court’s instructional errors were de minimus and did not result in “fundamental unfairness” or cause a “severe threat” to the integrity of the trial proceedings in defendant’s case. Although the correct IPI verdict forms were not given to the jury, the court found that “adequate verdict forms were read to the jury” and that the jurors were adequately apprised of their option of acquitting the defendant on all three of the offenses at issue, i.e., the greater- and two lesser-included offenses. As such, the court concluded that the defendant did not establish plain error. Yet, importantly for future cases, the court cautioned that if the instructions given the jury had denied the jury the option of returning a general “not guilty” verdict, as defendant contends, a significant structural error would have occurred for purposes of our rules, substantial rights would in fact have been violated, and the fairness and integrity of the trial process would have been compromised.

Because the defendant was unable to demonstrate plain error, the court held that “the procedural default must be honored.” Thus, the court affirmed the judgment of the appellate court.

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227. The issue at bar revolved around the application of Illinois Pattern Jury Instruction (Criminal), No. 2.01R (4th ed. 2000).
228. “That IPI instruction, along with a corresponding concluding instruction and verdict forms, would have encouraged the jury to examine the elements of each offense separately, and would have emphasized the need for independent consideration of each offense.” Durr, 830 N.E.2d at 537.
229. Id. See also ILL. SUP. CT. R. 451(a) (ordering that where the IPI does not accurately state the law, an instruction should be given that is “simple, brief, impartial, and free from argument”).
230. Durr, 830 N.E.2d at 537.
231. Id. at 541. In Durr’s case, the greater offense was predatory criminal sexual assault of a child, while the two lesser-included offenses were attempted predatory criminal sexual assault of a child and aggravated criminal sexual abuse. Id. at 531.
232. Id. at 538.
233. Id.
234. Id. at 541.
235. Id.
IV. ANALYSIS

A closer analysis of both cases reveals their significance for Illinois practitioners. In *People v. Herron*, the court strongly reaffirmed its commitment to Illinois' plain error rule and correctly refused to adopt the federal plain error rule.\(^{236}\) Although the court's scholarly opinion will greatly benefit practitioners in so far as it succinctly defines the parameters of Illinois' disjunctive test, the court's reasoning was flawed to the extent that it attempted to equate the state and federal plain error tests.\(^{237}\) An analysis of *People v. Durr* clearly exemplifies the continued importance of adhering to the traditional Illinois rule rather than allowing the abrogation of that rule in favor of the more prosecution-friendly federal rule.\(^{238}\)

A. Herron: An Improper Comparison to the Federal Rule

Contrary to the court's *dicta* in *Herron*, the federal plain error rule is not "the same standard we already use."\(^{239}\) Although the two tests share certain similar elements, the tests are substantively different, as the federal test includes a harmless error analysis and the state test does not.\(^{240}\) This distinction is critical and highlights the reason why the State campaigned so vigorously to abrogate Illinois' plain error rule in favor of the prosecution-friendly federal test.\(^{241}\) In addition, the rules are different with respect to their discretionary and ministerial natures, their scope, and their origin.\(^{242}\) Furthermore, an examination of the legal distinctions between the two tests is necessary to expose the State's newest efforts to undermine the court's holding through its advancement in the appellate courts of the argument that a harmless error analysis is required under Illinois' plain error rule.\(^{243}\)

\(^{236}\) *People v. Herron*, 830 N.E.2d 467, 470, 479 (Ill. 2005).

\(^{237}\) See infra Part IV.A (examining the error in comparing the state and federal plain error tests).

\(^{238}\) See infra Part IV.B (discussing Illinois' traditional plain error rule and its importance to Illinois' criminal justice system).

\(^{239}\) *Herron*, 830 N.E.2d at 479.

\(^{240}\) See supra Part II.C (comparing the Illinois and federal plain error tests).

\(^{241}\) See supra Part II.E (discussing the efforts of the Illinois' State's Attorney's Office to abrogate Illinois' plain error test).

\(^{242}\) See supra Parts II.A–C (examining the development and application of both the Illinois and federal plain error tests).

\(^{243}\) For example, in a post-*Herron* brief, the State contended that "under the plain error doctrine embodied in Illinois Supreme Court Rule 615(a), defendant bears the burden of establishing that the error was prejudicial." Brief for Appellee at 63, *People v. Donald Gordon*, No. 1-04-0167 (Ill. App. Ct. 1st Dist. Sep. 21, 2005). In support of its claim, the State cited to *People v. Thurow*, 786 N.E.2d 1019, 1025 (Ill. 2003). *Thurow*, however, was a harmless error, not a plain error, case. *Id.* at 1025. More importantly, the proposition proffered by the State is
With respect to the elements of the federal and state plain error tests, it is uncontested that, as construed by the courts, the respective tests employ similar terminology. Both federal and state tests require "error."\(^{244}\) Likewise, with regard to what is "plain," there seems to be no marked distinction between the federal and state tests.\(^{245}\)

The analysis of the third limitation under the federal test, however, is wholly distinct and highlights the significant, substantive differences between the federal and state plain error inquiries. The third and final element under Rule 52(b) of the Federal Rules of Criminal Procedure is that the plain error must "affect[] substantial rights," which has been construed to mean that the error must be prejudicial.\(^{246}\) Further, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice."\(^{247}\) Therefore, under Rule 52(b), the reviewing court must engage in a harmless error inquiry, just as if it was conducting a traditional harmless error analysis under Rule 52(a) of the Federal Rules of Criminal Procedure.\(^{248}\)

In direct contrast to the federal test, Illinois' plain error rule does not include a harmless error analysis under either prong.\(^{249}\) With respect to paraphrased from language quoted in Thurow that involved the federal plain error rule, which incorporates a harmless error analysis, not the Illinois test. Id. Moreover, in Herron, the Illinois Supreme Court explicitly rejected the notion that a defendant must demonstrate prejudice in cases falling under the fair trial prong of Illinois' plain error rule, which was at issue in Gordon. See Herron, 830 N.E.2d at 480 ("Prejudice is presumed because of the importance of the right involved . . . .").

244. Compare United States v. Olano, 507 U.S. 725, 732–33 (1993) (noting that a "deviation from a legal rule" is "error"), with People v. Sims, 736 N.E.2d 1048, 1064 (Ill. 2000) ("Before invoking the plain error exception . . . it is appropriate to determine whether error occurred at all."). (quoting People v. Wade, 546 N.E.2d 553, 555 (Ill. 1989)).

245. Compare Olano, 507 U.S. at 734 (holding that for an error to be "plain," it must be "clear" or "obvious"), with People v. Keene, 660 N.E.2d 901, 910 (Ill. 1995) ([S]hort of a conclusion that an asserted error is a 'plain' one, the so-called plain error doctrine offers no basis to excuse a procedural default.). In Illinois, "to determine whether a purported error is 'plain' requires a substantive look at it." Keene, 660 N.E.2d at 910. Moreover, "while all plain errors are reversible ones, not all reversible errors are also 'plain.'" Id.

246. Olano, 507 U.S. at 734. According to the United States Supreme Court, "affecting substantial rights" means, in most cases, that "the error must have been prejudicial: It must have affected the outcome of the district court proceedings." Id. The Court further explained that:

When the defendant has made a timely objection to an error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record—a so-called 'harmless error' inquiry—to determine whether the error was prejudicial. Rule 52(b) [the plain error rule] normally requires the same kind of inquiry . . . .

Id. (emphasis added).

247. Id.

248. "Normally, although perhaps not in every case, the defendant must make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong of Rule 52(b)." Id. at 735.

249. People v. Green, 386 N.E.2d 272, 276–78 (Ill. 1979) (Ryan, J., specially concurring). Under the Illinois rule, "[b]efore plain error can be considered as a means of circumventing the
the closely balanced evidence prong, more than a quarter-of-a-century ago, Justice Ryan wrote that, "the court will look at the record only to see if the evidence is 'closely balanced.' . . . There is no need to apply the harmless error test or, if the error involves a constitutional right, the harmless-beyond-a-reasonable-doubt test." Likewise, as to the fair trial prong of Illinois' plain error test, there is no harmless error analysis. With respect to the court's responsibility to consider "[p]lain errors or defects affecting substantial rights" under the second prong of Illinois' disjunctive test, Justice Ryan stated:

Thus I believe that under this second aspect of the plain error rule, the errors that will be considered as not having been waived, although not properly preserved, are those that are so fundamental to the integrity of the judicial process that they cannot be waived or forfeited by the failure to raise them in the trial court. I also believe that, being so fundamental to the integrity of the judicial process, they must be considered by the court regardless of the guilt of the defendant and therefore the harmless error test, even harmless error beyond a reasonable doubt, is not relevant.

Both of these principles were reaffirmed in Herron. With respect to the closely balanced evidence prong, the court explicitly rejected the State's argument that the defendant had to demonstrate actual prejudice: "The defendant need not prove that the error in the instruction actually misled the jury." Instead, the court made clear that "[i]f the defendant carries the burden of persuasion and convinces a reviewing court that there was error and that the evidence was closely balanced, the case is not cloaked with a presumption of prejudice. The error is actually prejudicial, not presumptively prejudicial." The court explained that "[w]hen there is error in a close case, we choose to err on general waiver rule, it must be plainly apparent from the record that an error affecting substantial rights was committed." People v. Precup, 382 N.E.2d 227, 231 (Ill. 1978). Errors "affecting substantial rights" are those that "reveal breakdowns in the adversary system," as distinguished from 'typical trial mistakes.' People v. Keene, 660 N.E.2d 901, 909-10 (Ill. 1995) (quoting Wangerin, supra note 6, at 778). Such errors must undermine the fairness of the trial or be something "fundamental to the integrity of the judicial process." Id. at 910 (quoting Green, 386 N.E.2d at 278 (Ryan, J., specially concurring)).

250. Green, 386 N.E.2d at 277 (Ryan, J., specially concurring).
251. Id. at 278 (emphasis added). More recently, the Illinois Supreme Court, relying extensively upon Justice Ryan's special concurring opinion in Green, declared that the Court will act on plain error under the fair trial prong "regardless of the strength of the evidence of defendant's guilt." People v. Blue, 724 N.E.2d 920, 941 (Ill. 2000).
252. People v. Herron, 830 N.E.2d 467, 483 (Ill. 2005). In Herron, the State contended that the defendant failed to demonstrate prejudice for purposes of plain-error review because he failed to demonstrate in what way the jurors in his case were actually misled by the erroneous identification instruction. Id. at 482-83.
253. Id. (emphasis added).
the side of fairness, so as not to convict an innocent person.”254 In other words, the court refused to engage in a harmless error analysis under the closely balanced evidence prong. Instead, a defendant need only demonstrate “that there was error and that the evidence was closely balanced”;255 he need not demonstrate that the error actually prejudiced the outcome of the proceedings, which is the hallmark of a harmless error inquiry.256

With respect to the fair trial prong, the court pointed out that “[p]rejudice to the defendant is presumed because of the importance of the right involved, ‘regardless of the strength of the evidence.’”257 This holding leaves no doubt that harmless error is not a component in the plain error analysis under Illinois’ fair trial prong. Rather, a defendant need only demonstrate that there was “plain error” and that such error “challenged the integrity of the judicial process.”258

Another substantive distinction between the federal and state plain error rules is that the federal test is discretionary, while, at least with respect to errors falling under the fair trial prong, the state test is mandatory.259 As explained by the United States Supreme Court, “Rule 52(b) is permissive, not mandatory. If the forfeited [‘error[’] is ‘plain’ and ‘affect[s] substantial rights,’ the court of appeals has authority to order correction, but is not required to do so.”260 If the aforementioned three conditions of Rule 52(b) are met, the reviewing court may exercise its discretion to correct the error only if it “seriously affects the fairness, integrity or public reputation of judicial proceedings.”261

Conversely, despite the language of Illinois’ plain error rule providing that “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court,”262 the Illinois Supreme Court pronounced that, in considering errors pursuant to the fair trial prong, “as guardians of the constitutional rights and the integrity of the criminal justice system, we must order a new trial when . . . we conclude that defendant did not receive a fair

254. Id.
255. Id.
256. See supra Part II.B.1 (discussing the federal plain error test).
257. Herron, 830 N.E.2d at 480 (first emphasis added) (quoting People v. Blue, 724 N.E.2d 920, 941 (Ill. 2000)).
258. Id. at 479–80.
259. See supra Parts II.A–B (discussing the Illinois and federal plain error tests).
261. Id. at 732 (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).
262. ILL. SUP. CT. R. 615(a).
Therefore, once a defendant demonstrates that there was a "plain" "error" that "affect[ed] substantial rights," reversal is mandated. In fact, the same conclusion may be drawn with respect to the closely balanced evidence prong in light of the court's opinion in Herron. Thus, in a case, like Herron, where the defendant persuades the reviewing court that there was plain error and the evidence was closely balanced, reversal is required.

In addition, the scope of relief granted under the fair trial prong of Illinois' plain error rule seems to be considerably broader than that under the federal rule. For example, after applying the fair trial prong, Illinois courts have ordered reversals in cases involving the right to a jury trial, serious prosecutorial misconduct, the admission of polygraph evidence, directing a verdict on lesser-included offenses, and other errors affecting substantial rights. In contrast, under federal jurisprudence, there is only a limited group of errors that have been found to be "structural" and, therefore, beyond the scope of harmless error, and thus federal plain error, review. These include the complete denial of counsel and trial before a biased judge.

Finally, in Herron, the court commenced its discussion of the interrelationship between the federal and state plain error rules by noting that "[b]oth the texts of the federal and state plain error rules . . . are similar." Although this observation is correct, it in no way

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264. See People v. Keene, 660 N.E.2d 901, 910 (Ill. 1995) (declaring that "all plain errors are reversible ones").
265. People v. Herron, 830 N.E.2d 467, 483 (Ill. 2005). "We deal with probabilities, not certainties; we deal with risks and threats to the defendant's rights. When there is error in a close case, we choose to err on the side of fairness, so as not to convict an innocent person." Id. (emphasis added).
266. Id. at 483–84.
267. See supra Part II.A.3.b (discussing Illinois courts' use of the fair trial prong of Rule 615(a)).
268. A "structural" error is defined as a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S. 279, 310 (1991).
269. Neder v. United States, 527 U.S. 1, 8 (1999); see Johnson v. United States, 520 U.S. 461, 468–69 (1997) (listing a limited class of cases in which structural errors have been found). The U.S. Supreme Court, however, has stated that "[t]he court of appeals should no doubt correct a plain forfeited error that causes the conviction or sentencing of an actually innocent defendant." United States v. Olano, 507 U.S. 725, 736 (1993).
implies that the rules are substantively the same.\textsuperscript{273} First, both prongs of Illinois' present-day plain error rule were already being defined in Illinois common law practice prior to the codification in 1946 of Rule 52 of the Federal Rules of Criminal Procedure and the subsequent enactment in 1963 of section 121-9(a), the precursor to Rule 615(a).\textsuperscript{274}

Second, because Rule 52(b) is a statutory creation of Congress, "federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions."\textsuperscript{275} In direct contrast, the Illinois Constitution provides that the "[g]eneral administrative and supervisory authority over all courts is vested in the Supreme Court and shall be exercised... in accordance with its rules."\textsuperscript{276} This judicial power encompasses the "application of the law" and "rulemaking authority."\textsuperscript{277} Thus, unlike the federal courts, which are constrained by the dictates of the legislature, the Illinois Supreme Court has full authority over the interpretation of its own rules.

Third, Illinois courts are under no obligation to grant comity to an interpretation given by the federal courts to the federal plain error rule.\textsuperscript{278} This is especially so where, as here, the federal test incorporates a harmless error analysis that would effectively undermine the ability of the Illinois judiciary to protect "the integrity of the criminal justice system," regardless of the weight of the evidence against a particular defendant.\textsuperscript{279}

In sum, although there are certain similarities between the federal and Illinois plain error tests, there are significant, substantive differences between the two rules. The most important distinction between the two tests is that the federal plain error rule incorporates a harmless error analysis whereas Illinois' plain error rule does not. It is this difference more than any other that permits reviewing courts in Illinois to ensure that the due process and fair trial rights of criminal defendants are...
preserved on appeal.

B. Durr: Demonstrating the Importance of Illinois’ Traditional Rule

The distinction between the Illinois and federal plain error rules can be clearly seen in the divergent rulings in the two appellate court decisions in People v. Durr, in which the application of the respective plain error rules was outcome determinative.

During the first appellate case in the First District, the reviewing court considered the alleged instructional error, which involved greater- and lesser-included offenses, under Rule 615(a)'s plain error test. The First District stated that "the instruction as given effectively denied the jury the opportunity to acquit defendant of the lesser-included offenses." The court noted that "the instruction conveyed the message to the jury that its only duty was to determine whether defendant was guilty or not guilty of predatory criminal sexual assault [the greater offense], in effect directing a verdict of guilty on the lesser included offenses...." The majority concluded as follows: "We believe the giving of the non-IPI instruction was an error of such magnitude that there is substantial risk that defendant was denied a fair and impartial trial." Accordingly, the majority found plain error and reversed and remanded the case for a new trial. However, one justice dissented, remarking: "Admittedly, the instructions could have been confusing. But the defendant made no objection to these instructions. I believe he forfeited his right to challenge them on appeal. The evidence against the defendant was strong. Given the severe circumstances of the case, the jury returned the proper verdicts."

Yet following a remand from the Illinois Supreme Court, the same panel reviewed the identical instructional errors under the federal plain error rule and found that the trial court's altered jury instruction was

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281. Id. at 12.
282. Id. at 13.
283. Id. at 15.
284. Id.
285. Id.
286. Id. at 17 (Wolfson, J., dissenting).
not plainly erroneous. The First District found that “defendant has likewise failed to demonstrate that he was prejudiced by the altered instruction.” The court also held that the instructional error at issue “did not seriously affect the fairness, integrity or public reputation of judicial proceedings.” Thus, under the federal plain error rule, the same panel reached the opposite conclusion the majority had reached in the first appeal, ruling that the trial court’s non-IPI instruction “was not error and that defendant was not deprived of a fair trial.”

The conflicting outcomes in the appellate court in Durr depending on which rule is applied demonstrate how Illinois’ plain error rule enables reviewing courts to protect the integrity of the judicial process for all defendants, regardless of whether the error at bar prejudiced the particular defendant. The role of the court as guarantor of constitutional rights not only ensures a greater uniformity of application but leads to a recognition of the equality of all accused persons before the law where errors impugn the fundamental fairness of the penal process.

V. CONCLUSION

The Illinois Supreme Court’s decisions in People v. Herron and People v. Durr will provide important guidance to practitioners in defining the parameters of Illinois’ plain error rule. In addition, the Court’s rejection of the State’s request to abrogate Illinois’ longstanding plain error test in favor of the federal test will help to end the confusion in the appellate courts about which plain error standard to apply. Moreover, in reaffirming its commitment to Illinois’ traditional plain error formulation, the court has demonstrated not only its independence but its adherence to the pursuit of substantive justice over the technicalities of legal procedure.

288. Id. at 11–13.
289. Id. at 14.
290. Id.
291. Id. at 14–15.
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