

No. 125091

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate
	)	Court of Illinois, No. 3-15-0556.
Plaintiff-Appellant,)	
	)	There on appeal from the
-vs-	)	Circuit Court of the Twenty-
	)	First Judicial Circuit, Kankakee
	)	County, Illinois, No. 09-CF-630.
JOSEPH A. HOLLAHAN)	
	)	Honorable
Defendant-Appellee,)	Susan S. Tungate,
)	Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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E-FILED
3/19/2020 9:34 AM
Carolyn Taft Grosboll
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POINT AND AUTHORITIES

The circuit court committed reversible error during deliberations when it had the jurors watch a video in the courtroom with the court, the attorneys, the defendant, and two alternate jurors present.

A. Defendants in criminal cases have a constitutional and statutory right to jury deliberations that are private, secret, and free from outside influence.....	3
705 ILCS 315/1 (2008)	4
725 ILCS 5/115-4(l) (2008).....	4
725 ILCS § 115-4(n) (2008)	4
<i>Turner v. Louisiana</i> , 379 U.S. 466 (1965).....	3
<i>Remmer v. United States</i> , 350 U.S. 377 (1956).....	4
<i>Clark v. United States</i> , 289 U.S. 1 (1933)	3
<i>Patterson v. Colorado</i> , 205 U.S. 454 (1907).....	4
<i>Nicholson v. Shapiro & Associates, LLC</i> , 2017 IL App (1st) 162551	3
<i>People v. Bensen</i> , 2017 IL App (2d) 150085.....	3
<i>State v. Magnano</i> , 181 Wash. App. 689 (2014)	3
<i>People v. Oliver</i> , 196 Cal. App. 3d 423 (Cal. Ct. App. 1987).....	3
Diane E. Courselle, <i>Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform</i> , 57 S.C.L. REV. 203 (2005)	4
B. The right to jury deliberations that are private, secret, and free from outside influence applies to a jury’s review of video and audio recordings because recordings are not treated any differently than other evidentiary exhibits.....	5
735 ILCS 5/2-1107(d) (2008)	5
<i>United States v. Olano</i> , 507 U.S. 725 (1993).....	6
<i>People v. Montes</i> , 2013 IL App (2d) 111132.	6

<i>People v. Reed</i> , 324 Ill. App. 3d 671 (5th Dist. 2001)	5
<i>People v. Manuel</i> , 294 Ill. App. 3d 113 (1st Dist. 1997)	5
<i>United States v. Chadwell</i> , 798 F.3d 910 (9th Cir. 2015).	5
<i>United States v. Hofer</i> , 995 F.2d 746 (7th Cir. 1993)	5
<i>State v. Cheloha</i> , 25 Neb. App. 403 (2018)	5
<i>Thorne v. State</i> , 174 So. 3d (Fla. Dist. Ct. App. 2015)	5, 6
<i>Flanagan v. State</i> , 368 Ark. 143 (2006).	5
<i>State v. Castellanos</i> , 132 Wash. 2d 94, 935 P.2d 1353 (1997)	6
<i>State v. Reyes</i> , 209 Or. 595, 308 P.2d 182 (1957)	6
<i>People v. Walker</i> , 150 Cal. App. 2d 594, 310 P.2d 110 (1957)	6
<i>People v. Gingles</i> , 2014 COA 163.	5
C. The examination of evidence during deliberations can be conducted in a closed courtroom, when necessary, because there is no requirement that jury deliberations be conducted only in the jury room.. . . .	6
<i>People v. Hollahan</i> , 2019 IL App (3d) 150556.	7
<i>People v. Gore</i> , 2018 IL App (3d) 150627.	7
<i>People v. Gleason</i> , 36 Ill. App. 2d 15 (1st Dist. 1962).	7
<i>Benna v. Reeder Flying Serv., Inc.</i> , 578 F.2d 269 (9th Cir. 1978)	7
<i>State v. Magnano</i> , 181 Wash. App. 689 (2014)	7
<i>Flanagan v. State</i> , 368 Ark. 143 (2006).	7
<i>Richey v. State</i> , 426 N.E.2d 389 (Ind. 1981)	7
<i>State v. Boag</i> , 104 Ariz. 362 (1969)	7

D.	Simple precautions can protect a deliberating jury’s secrecy and exposure to outside influence when deliberations are conducted in a closed courtroom.	7
	<i>United States v. Olano</i> , 507 U.S. 725 (1993)	8
	<i>People v. Hollahan</i> , 2019 IL App (3d) 150556	8
	<i>People v. Gleason</i> , 36 Ill. App. 2d 15 (1st Dist. 1962)	7
	<i>Benna v. Reeder Flying Serv., Inc.</i> , 578 F.2d 269 (9th Cir. 1978)	7, 8
E.	The decision to have a jury review recordings in the courtroom should never be based on administrative convenience.	9
	<i>Cleveland Bd. of Educ. v. LaFleur</i> , 414 U.S. 632 (1974)	9
	<i>Stanley v. Illinois</i> , 405 U.S. 645 (1972)	9
	<i>People v. Pacheco</i> , 2019 IL App (3d) 150880	9
	<i>People v. Hollahan</i> , 2019 IL App (3d) 150556	9
	44 AM. JUR. <i>Trials</i> 171, § 81 (2020)	10
F.	The decision to have a jury review recordings in the courtroom should never be based on the unlikely situation where at least one juror does not know how to operate the playback equipment, or cannot be taught to do so.	10
	725 ILCS 5/115-4(1) (2020)	11
	735 ILCS 5/8-1402 (2020)	11
G.	The State’s hypothetical scenarios are not persuasive because they are based on speculation and bear no relation to this case.	11
	<i>United States v. Olano</i> , 507 U.S. 725 (1993)	13
	<i>People v. Lewis</i> , 2019 IL App (4th) 150637-B	12
	<i>People v. Hollahan</i> , 2019 IL App (3d) 150556	14

H.	The unnecessary requirement that the deliberating jury in this case review the video recording in silence, and in the presence of non-jurors, was an intrusion into its deliberations that amounted to plain error.	14
	Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)	14
	<i>People v. Sebby</i> , 2017 IL 119445	14
I.	The State has forfeited its argument that the intrusion was not clear and obvious error under the first step of plain error review.	14
	<i>People v. Thompson</i> , 238 Ill. 2d 598 (2010).	14
	<i>People v. Whitfield</i> , 228 Ill. 2d 502 (2007).	15
J.	The intrusion into the jury’s deliberations was plain and obvious error because it was a violation of the Jury Secrecy Act.	15
	705 ILCS 315/1 (2008)	16
	<i>United States v. Olano</i> , 507 U.S. 725 (1993).	15, 16
	<i>People v. Sebby</i> , 2017 IL 119445	15
	<i>People v. Thompson</i> , 238 Ill. 2d 598 (2010).	15
K.	The intrusion into the jury’s deliberations was plain and obvious error because it was a violation of the defendant’s due process and sixth amendment rights to have the jury deliberate in private, to have the jury deliberate free from outside influence, and to have the jury’s deliberations remain secret.	16
	<i>United States v. Olano</i> , 507 U.S. 725 (1993).	16, 17, 18
	<i>Turner v. Louisiana</i> , 379 U.S. 466 (1965).	16
	<i>Clark v. United States</i> , 289 U.S. 1 (1933)	16
	<i>People v. Cloutier</i> , 178 Ill. 2d 141 (1997).	17
	<i>People v. Hollahan</i> , 2019 IL App (3d) 150556.	16

<i>State v. Magnano</i> , 181 Wash. App. 689 (2014)	16
<i>People v. Oliver</i> , 196 Cal. App. 3d 423 (Cal. Ct. App. 1987).	16
L. The intrusion into the jury’s deliberations was prejudicial error under the first prong of the plain error rule.	18
<i>People v. Sebbby</i> , 2017 IL 119445	18
<i>In re Veronica C.</i> , 239 Ill. 2d 134 (2010)	19
<i>People v. Herron</i> , 215 Ill. 2d 167 (2005)	18
M. The intrusion into the jury’s deliberations was prejudicial error under the second prong of the plain error rule.	19
<i>People v. Sebbby</i> , 2017 IL 119445	19
<i>People v. Herron</i> , 215 Ill. 2d 167 (2005)	19
N. The intrusion into the jury’s deliberations was prejudicial structural error under the second prong of the plain error rule because it affected the reliability of the guilt or innocence determination.	20
<i>United States v. Olano</i> , 507 U.S. 725 (1993).	20, 21
<i>People v. Clark</i> , 2016 IL 118845	20
<i>People v. Hollahan</i> , 2019 IL App (3d) 150556.	20, 21
<i>United States v. Hofer</i> , 995 F.2d 746 (7th Cir. 1993)	21
<i>United States v. Allison</i> , 481 F.2d 468 (5th Cir. 1973).	20
O. The intrusion into the jury’s deliberations was prejudicial second prong error because it affected the fairness of the defendant’s trial and the integrity of the judicial process.	21
<i>United States v. Olano</i> , 507 U.S. 725 (1993).	21, 22
<i>People v. Sebbby</i> , 2017 IL 119445	21
<i>People v. Hollahan</i> , 2019 IL App (3d) 150556.	22

<i>Manning v. Huffman</i> , 269 F.3d 720 (6th Cir. 2001)	21
<i>United States v. Ottersburg</i> , 76 F.3d 137 (7th Cir. 1996)	21
P. The fact that the jury could have deliberated upon returning to the jury room did not nullify the prejudice of the unnecessary intrusion into its review of the key evidence in the case.	22
<i>United States v. Olano</i> , 507 U.S. 725 (1993)	22
<i>People v. Sebby</i> , 2017 IL 119445	22
<i>People v. Hollahan</i> , 2019 IL App (3d) 150556	22, 23
<i>United States v. Hofer</i> , 995 F.2d 746 (7th Cir. 1993)	23
Q. The State’s suggestion that the jury was free to deliberate in front of non-jurors during its review of the recording is belied by the record, and would be a violation of the Jury Secrecy Act and the constitutional rights to have the jury deliberate in private and free from outside influence.	23
<i>Hollahan</i> , 2019 IL App (3d) 150556	24
R. Approving of deliberations in the presence of non-jurors will raise a host of problematic issues.	24
<i>Pena-Rodriguez v. Colorado</i> , ___ U.S. ___, 137 S. Ct. 855 (2017)	25

ISSUE PRESENTED FOR REVIEW

Is it fundamental error to require a deliberating jury to examine evidence in front of the court and non-jurors, and with restrictions, when there is no need for such an intrusion?

STATEMENT OF FACTS

The State's statement of facts adequately sets forth the main facts of this case. Any additional facts necessary to an understanding of the case will be included in the defendant's argument.

ARGUMENT

THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR DURING DELIBERATIONS WHEN IT HAD THE JURORS WATCH A VIDEO IN THE COURTROOM WITH THE COURT, THE ATTORNEYS, THE DEFENDANT, AND TWO ALTERNATE JURORS PRESENT.

The appellate court found that the trial court’s procedure in requiring the deliberating jury to review a videotape recording in the courtroom, in front of non-jurors, in silence, and only one-time constituted structural error requiring reversal. The appellate court’s holding should be affirmed because it is fundamental error to require a deliberating jury to examine evidence in front of the court and non-jurors, and with restrictions, when there is no need for such an intrusion.

A. Defendants in criminal cases have a constitutional and statutory right to jury deliberations that are private, secret, and free from outside influence.

Under the Due Process Clause of the Fourteenth Amendment, and the Sixth Amendment right to an impartial trial, jury deliberations are to be private and free from outside influence. *Turner v. Louisiana*, 379 U.S. 466, 471-72 (1965); *Clark v. United States*, 289 U.S. 1, 13 (1933); *State v. Magnano*, 181 Wash. App. 689, 699 (2014); *People v. Oliver*, 196 Cal. App. 3d 423, 429 (Cal. Ct. App. 1987).¹ The need for privacy and secrecy arises out of the danger that “[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.” *Clark*,

¹ While this Court is not bound by the decisions of other jurisdictions, it may look to other jurisdictions for guidance. *Nicholson v. Shapiro & Associates, LLC*, 2017 IL App (1st) 162551, ¶ 11; *People v. Bensen*, 2017 IL App (2d) 150085, ¶ 30.

289 U.S. at 13. The objective of preventing outside influences is to preclude the taint of a verdict that is not reached on the basis of the evidence introduced at trial. *Remmer v. United States*, 350 U.S. 377, 381-82 (1956). See also *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (“The theory of our system is that the conclusions to be reached in a case [by the jury] will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.”).

A defendant’s right to have the jury deliberate in private with no outside interference has existed since at least “the mid-1300s” and is, thus, a deeply rooted right. Diane E. Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C.L. REV. 203, 215-18 (2005). In Illinois, this right is set out in section 1 of the Jury Secrecy Act which provides that a non-juror who observes, listens to, or records a deliberating jury, or who attempts to do so, is guilty of a Class A misdemeanor. 705 ILCS 315/1 (2008). Similarly, section 115-4(l) of the Code of Criminal Procedure of 1963 provides that “[w]hen the jury retires to consider its verdict an officer of the court shall be appointed to keep them together and *to prevent conversation between the jurors and others[.]*” (Emphasis added.) 725 ILCS 5/115-4(l) (2008). Subsection (n) of the same statute provides that jurors are entitled to take notes, that such notes will remain *confidential*, and that the notes will be destroyed by the sheriff after the trial is over. (*Id.* § 115-4(n)). Thus, as a matter of constitutional and statutory law, defendants in Illinois have a fundamental right to jury deliberations that are private, that will remain secret, and that are free from outside influence.

B. The right to jury deliberations that are private, secret, and free from outside influence applies to a jury's review of video and audio recordings because recordings are not treated any differently than other evidentiary exhibits.

Aside from exceptions that do not apply in this case and that are discussed below, a defendant's right to jury deliberations that are private, secret, and free from outside influence applies to the review of recordings that were admitted into evidence. More specifically, a jury in a criminal case may consider tangible items admitted into evidence during its deliberations. 735 ILCS 5/2-1107(d) (2008). Thus, Illinois allows deliberating juries to privately review admitted video recordings without restrictions or supervision. *People v. Reed*, 324 Ill. App. 3d 671, 680 (5th Dist. 2001). Other states also allow deliberating juries to privately review admitted video recordings without restrictions or supervision. See, e.g., *State v. Cheloha*, 25 Neb. App. 403, 407-08 (2018); *Thorne v. State*, 174 So. 3d 477, 478-79 (Fla. Dist. Ct. App. 2015); *People v. Gingles*, 2014 COA 163, ¶¶ 9-18, 350 P.3d 968; *Flanagan v. State*, 368 Ark. 143, 162-65 (2006). Likewise, federal courts allow deliberating juries to privately review admitted video recordings without restrictions or supervision. See, e.g., *United States v. Chadwell*, 798 F.3d 910, 914 (9th Cir. 2015).

In the analogous situation of admitted audio recordings, such recordings may be privately reviewed by a deliberating jury without restrictions. *People v. Manuel*, 294 Ill. App. 3d 113, 126 (1st Dist. 1997). A rationale for allowing this procedure is that audio recordings should not be treated any differently than other evidentiary exhibits. *Manuel*, 294 Ill. App. 3d at 126. Under the same rationale, federal courts also allow private and unrestricted review of audio recordings by a deliberating jury. See, e.g., *United States v. Hofer*, 995 F.2d 746, 748-49 (7th

Cir. 1993). Other states likewise allow deliberating juries to privately review admitted audio recordings without supervision. See, e.g., *State v. Castellanos*, 132 Wash. 2d 94, 100-01, 935 P.2d 1353 (1997); *State v. Reyes*, 209 Or. 595, 636, 308 P.2d 182 (1957). The foregoing shows that when a deliberating jury's review of admitted video or audio recordings does not need to be supervised, the deliberating jury should be allowed, as with any other exhibit, to review the recordings in secret and without restrictions in the jury room.

Doing so avoids contravention of the "cardinal principle" that jury deliberations shall remain private and secret in order to protect deliberations from improper influence. *United States v. Olano*, 507 U.S. 725, 726 (1993). Thus, as long ago as 1957 playback devices were being brought to jury rooms to allow deliberating juries to review audio recordings in private and without restrictions. *People v. Walker*, 150 Cal. App. 2d 594, 602-03, 310 P.2d 110 (1957); *Reyes*, 209 Or. at 636. This practice is still being followed. See *People v. Montes*, 2013 IL App (2d) 111132, ¶ 47 (computer and the audio recording sent to deliberating jury, bailiff directed to instruct jury on how to use computer for playback); *Thorne*, 174 So. 3d at 478 (deliberating jury furnished with laptop computer containing defendant's videotaped statements).

C. The examination of evidence during deliberations can be conducted in a closed courtroom, when necessary, because there is no requirement that jury deliberations be conducted only in the jury room.

In addition, there is no requirement that jury deliberations, or jury examinations of evidence during deliberations, be conducted only in the jury room. Accordingly, in Illinois jury deliberations have been allowed in the courtroom.

People v. Gleason, 36 Ill. App. 2d 15, 17 (1st Dist. 1962). Other states have also allowed deliberations in a closed courtroom. See, e.g., *Richey v. State*, 426 N.E.2d 389, 397 (Ind. 1981); *State v. Boag*, 104 Ariz. 362, 368-69 (1969). In fact, when dealing with large exhibits that cannot be brought into the jury room, such as large engine and propeller parts, deliberation in the courtroom is the only available option when the jury wishes to examine the exhibit. *Benna v. Reeder Flying Serv., Inc.*, 578 F.2d 269, 271 (9th Cir. 1978). Further, jury deliberations in a closed courtroom do not violate the right to a public trial. *Hollahan*, 2019 IL App (3d) 150556, ¶ 28; *People v. Gore*, 2018 IL App (3d) 150627, ¶¶ 33-35; *Magnano*, 181 Wash. App. at 698-700; *Flanagan*, 368 Ark. at 166-67.

D. Simple precautions can protect a deliberating jury’s secrecy and exposure to outside influence when deliberations are conducted in a closed courtroom.

The main concerns that arise when a jury deliberates in the courtroom are lack of jury privacy and juror exposure to evidence that was not presented at the trial. For example, in *Benna*, the deliberating jury was allowed to examine, without restrictions or supervision, large engine and propeller parts in a closed courtroom. *Benna*, 578 F.2d at 271. However, an accident report that was not admitted into evidence was left in the courtroom and viewed by the jury. *Id.* The court of appeals, though, found the error was harmless because the report contained no conclusions about who was responsible for the accident at issue, and was cumulative to evidence that had been admitted at trial. *Id.* at 272.

In *Gleason*, the jurors deliberated in the courtroom. *Gleason*, 36 Ill. App. 2d at 17. However, two bailiffs remained in the courtroom during the deliberations. *Id.* Although the “bailiffs sat about ten rows of seats away from the jurors, and

did not communicate with them during their discussions[,]” the First District Appellate Court, after noting the Jury Secrecy Act, reversed since the “continuous presence of the bailiffs in the ‘jury room’ may have had an effect never accurately ascertainable because perhaps not consciously known to the jurors themselves.” *Id.* at 17-18.

Accordingly, when a jury needs to review a video recording privately and without restrictions, but the viewing equipment cannot be brought to the jury room, or where evidence can only be reviewed in the courtroom, as in *Benna*, the jury’s deliberations can be relocated to a courtroom that is closed to all non-jurors. *Hollahan*, 2019 IL App (3d) 150556, ¶ 28. As imparted by *Benna*, evidence that may be in the courtroom that was not presented at the trial, and other materials such as counsels’ files and notes, should be removed from the courtroom or secured so as to prevent the jury from inadvertently viewing that material. In addition, the deliberating jury, which is presumed to follow the court’s instructions (*Olano*, 507 U.S. at 740-41), should be instructed to only review the video recording, or the evidence that can only be reviewed in the courtroom, and to refrain from examining other materials in the courtroom such as law books. Simply put, where review of a video recording by a deliberating jury does not have to be restricted or supervised but must be carried out in the courtroom, the courtroom should be closed to non-jurors and deemed to be the jury’s relocated deliberation room.

On the other hand, where review of the recording must be restricted so the content of the video is not overemphasized, so the content of the video is not viewed out of context, so the jury does not inadvertently view matters it should not consider, so the defendant is not otherwise prejudiced, or so the jury does not

inadvertently damage or destroy the evidence, playback of the recording in the courtroom under court supervision with the parties present should be allowed in the court's discretion. However, due to the paramount importance of the right to deliberations that are private and free from outside influence, this procedure should only ever be utilized under these circumstances. It should never be utilized when the jury would have been able to review the recording in the jury room without supervision.

E. The decision to have a jury review recordings in the courtroom should never be based on administrative convenience.

Moreover, the decision to have the jury view the recording in the courtroom should never be based on administrative convenience. “[A]dministrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law.” *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 647 (1974). As also stated by the Supreme Court, “the Constitution recognizes higher values than speed and efficiency.” *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). Thus, if arrangements, even if inconvenient, can be made for bringing viewing equipment into the jury room so the jury can review the recording in a private and unsupervised environment, this should be done. If this cannot be done, the jury should be relocated to the a room where the review can be carried out in private without restrictions or supervision.

Concerning administrative convenience, a practical solution has been proposed by the appellate court to resolve the viewing problem that arose in this case, namely, the solution of having equipment available in the courthouse that will allow a jury to review recordings in the jury room. *Hollahan*, 2019 IL App (3d) 150556, ¶ 27; *People v. Pacheco*, 2019 IL App (3d) 150880, ¶ 47. This is a reasonable solution

given the relatively inexpensive cost of equipment that will play back video tape cassettes, and equipment, such as a laptop computer, that will play back digital videos stored in digital versatile discs (DVD), compact discs, and flash drives. In the unlikely event a county cannot budget the cost of video playback equipment, it should fall on the proponent of the video to furnish the playback equipment to be used in the jury room. See 44 AM. JUR. *Trials* 171, § 81 (2020) (The offering party “should also be prepared to provide easy-to-use equipment for the jury room if the videotape evidence is to be used during deliberations.”) Of course, if the playback device is a laptop computer it should not contain outside evidence or allow the jury to access the Internet. Similarly, the offering party should furnish a redacted copy of the recording that does not contain evidence that was not admitted or that should not be viewed by the jury.

F. The decision to have a jury review recordings in the courtroom should never be based on the unlikely situation where at least one juror does not know how to operate the playback equipment, or cannot be taught to do so.

In addition, the decision to have the jury view the recording in the courtroom should not be based on the unlikely situation where at least one juror does not know how to operate the video playback equipment or cannot be taught to do so. The solution to this problem should be to appoint a non-interested party to operate the equipment whether the equipment is located in the jury room or in a closed courtroom. There already exists guidance in Illinois law for allowing a non-juror to be present in the jury room to assist jurors without intruding into the deliberations. More specifically, section 115-4(l) of the Code of Criminal Procedure of 1963 provides that, “if any juror is deaf, the jury may be accompanied by and may communicate with a court-appointed interpreter during its deliberations.”

725 ILCS 5/115-4(l) (2020). Similarly, section 8-1402 of the Code of Civil Procedure allows court appointed sign-language interpreters to accompany deaf jurors during deliberations. 735 ILCS 5/8-1402 (2020). Thus, Illinois law recognizes that in unique circumstances a non-juror may be allowed to be present in the jury room to assist jurors without intruding into the deliberations.

Under the foregoing, defendant's right to have his guilt decided by an impartial jury free to secretly deliberate without outside influence was unnecessarily violated in this case. This is so because there is no showing that the video recording the jury requested to review during its deliberations needed to be reviewed under the court's supervision, in silence, only one time, and in front of non-jurors. It is true the jury needed to review the video recording in the courtroom because that is where the viewing equipment was located. However, having to review the video in the courtroom did not justify, in and of itself, the stripping away of defendant's right to have the jury deliberate in private and without supervision. Nor can denial of the right to have the jury deliberate in private and without supervision be justified on the ground that a party requested a supervised review of the recording because neither party requested it. There was simply no need shown for requiring the deliberating jury to review the video under supervision, in silence, one time, and in front of non-jurors. Instead, the jury should have been allowed to review the video in a closed courtroom with no non-jurors present.

G. The State's hypothetical scenarios are not persuasive because they are based on speculation and bear no relation to this case.

The State's hypothetical scenarios are not useful because they bear no to relation to this case. First, the State argues the court's decision was justified since

“defendant’s first trial had resulted in a mistrial because the deliberating jury had reviewed inadmissible portions of the video evidence.” (State’s Br. at 7-8). However, there is no indication in the record that this was a concern of the court here, nor could it have been a concern because the DVD the jury sought to review during its deliberations was redacted to omit the matters the jury should not have seen in the first trial.² Accordingly, the possibility that the jury might inadvertently see evidence it should not have seen in reviewing the recording did not exist in this case and therefore did not justify the court’s unnecessary decision to require the jury to view the recording with restrictions and in front of non-jurors.

The State next argues the court’s approach “avoided possible ‘problems with equipment and the skills necessary to operate the equipment’ and prevented potentially inexperienced jurors from inadvertently destroying or compromising the evidence.” (State’s Br. at 8) (citing *People v. Lewis*, 2019 IL App (4th) 150637-B, ¶ 97). However, there is no indication in the record that these were concerns of the court. For example, there is no indication in the record that none of the jurors knew how to operate a DVD player or a computer program for replaying a DVD. Likewise, there is no indication in the record of any concern the jury would destroy or compromise the DVD exhibit. In this regard, the jury could not have recorded over the redacted DVD-R used in this case because a DVD-R disc can be written only once.³ Even so, the DVD was not the original exhibit so inadvertent destruction of that redacted exhibit would have had no impact on the original exhibit (People’s

² The DVD is titled: “DUI redaction”

³

<https://www.pctechguide.com/dvd/dvd-r-write-once-recordable-dvds932311731> (last visited March 10, 2020).

Exh. 2). Accordingly, these concerns, which are based on speculation, did not justify the court's unnecessary decision to require the deliberating jury to review the video under supervision, in silence, one time, and in front of non-jurors.

Further, the solution to the unlikely problem of jurors not knowing how to operate equipment is to teach them how to operate the equipment, or, as noted above, to appoint an individual to operate the equipment, whether in the jury room or in a closed courtroom. The individual should be ordered to run the equipment as instructed by the jury while not giving any opinion as to the matter being reviewed through vocal expressions, through facial expressions, or through body language.

The State also speculates that allowing the jurors to review evidence on a laptop computer without supervision would allow them to access the Internet and consider matters not in evidence during deliberations. However, as noted previously, the solution to this problem is to provide the jury with a laptop computer that cannot access the Internet, or to instruct the jury not to access the Internet through the laptop. See *Olano*, 507 U.S. at 740-41 (deliberating jury is presumed to follow the court's instructions). Indeed, jurors can access the Internet through their cell phones but are presumed to follow the court's instructions to refrain from doing so. Accordingly, the concerns raised by the State, which were not raised in this case and are instead based on speculation, do not justify the circuit court's unnecessary decision in this case to require the deliberating jury to review the key evidence in the case under supervision, in silence, one time, and in front of non-jurors.

Defendant does not dispute that the circuit court possesses limited discretion to intrude into the jury's deliberative process. Under this limited discretion, and

as previously noted, the court may order a deliberating jury to examine evidence in the courtroom so the evidence is not overemphasized, so the evidence is not considered out of context, so the jury will not inadvertently view matters it should not consider, so the defendant will not be otherwise prejudiced, or so evidence is not inadvertently damaged or destroyed. However, as also previously noted, none of these justifications existed in this case. Therefore, the court abused its discretion when it improperly intruded into the jury's deliberations by unnecessarily requiring the jury to review the video under supervision, in silence, one time, and in front of non-jurors. In short, the circuit court committed error of constitutional magnitude when it unnecessarily ordered the jury to review the key evidence in the case in silence, one time, and in the presence of non-jurors. *Hollahan*, 2019 IL App (3d) 150556, ¶ 26.

H. The unnecessary requirement that the deliberating jury in this case review the video recording in silence, and in the presence of non-jurors, was an intrusion into its deliberations that amounted to plain error.

The circuit court's error was not preserved but may be reviewed as plain error. The plain error rule applies where clear or obvious error occurs and: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant, regardless of the seriousness of the error; or (2) the error is so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Sebby*, 2017 IL 119445, ¶ 48; Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967).

I. The State has forfeited its argument that the intrusion was not clear and obvious error under the first step of plain error review.

"The first step of plain-error review is determining whether any error occurred." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Here, the State argues

that no plain error occurred because the court's decision requiring the jury to view the video recording in the courtroom, in silence, and with non-jurors present was not clear or obvious error that prejudiced defendant (State's Br. at 5-13). However, the State has forfeited this argument because it did not claim in its petition for leave to appeal (PLA) that no clear error occurred in this case. Instead, the State's point for seeking review in this Court was that "[t]he appellate court erred in finding that the presence of any non-juror during any portion of deliberations is presumptively prejudicial and *per se* structural error." (State's PLA at 2). That is, the State sought review in this Court on the ground that the appellate court erred in finding reversible error occurred under the second prong of the plain error rule. Accordingly, the State has forfeited its argument that the court's decision was not clear and obvious error by failing to include the argument in its petition for leave to appeal. See *People v. Whitfield*, 228 Ill. 2d 502, 509 (2007) (this Court declines to address argument raised by State because argument was not included in petition for leave to appeal).

J. The intrusion into the jury's deliberations was plain and obvious error because it was a violation of the Jury Secrecy Act.

Even if the State's argument is considered, the State is wrong. In *Olano*, the Supreme Court stated that "[i]f a legal rule was violated during the district court proceedings, and if the defendant did not [affirmatively] waive the rule, then there has been an 'error' within the meaning of [the federal plain error rule] *** despite the absence of a timely objection." *Olano*, 507 U.S. at 733-34. *Cf. Sebby*, 2017 IL 119445, ¶ 49 (failure to comply with Rule 431(b) was clear error); *Thompson*, 238 Ill. 2d at 613 (same).

Under this principle, there was obvious error in this case because the circuit court's decision violated the Jury Secrecy Act's prohibition against intrusion on jury deliberations. 705 ILCS 315/1 (2008). More specifically, the court's decision caused an intrusion into the jury's secret deliberations and exposed it to outside influence by unnecessarily requiring the jury to examine the key evidence in the case in the presence of non-jurors, by unnecessarily stripping the jury of its discretion to control the scope of its' examination of the evidence during deliberations, and by unnecessarily stripping the jury of the ability to freely deliberate in private about the evidence. Notably, in *Olano*, the Government recognized the application of this principle and conceded that having alternates present during deliberations was obvious error. *Olano*, 507 U.S. at 733-34. Accordingly, clear and obvious error occurred under the first step of plain-error review because the intrusion in this case violated the Jury Secrecy Act.

K. The intrusion into the jury's deliberations was plain and obvious error because it was a violation of the defendant's due process and sixth amendment rights to have the jury deliberate in private, to have the jury deliberate free from outside influence, and to have the jury's deliberations remain secret.

In addition, under the principle that a violation of a rule is error, the circuit court's decision was clear and obvious error because it violated defendant's rights, under the due process clause and sixth amendment, to have the jury deliberate in private, to have its deliberations remain secret, and to deliberate free from outside influence. *Hollahan*, 2019 IL App (3d) 150556, ¶ 20 (citing *Olano*, 507 U.S. at 737-38); *Turner*, 379 U.S. at 471-72; *Clark*, 289 U.S. at 13; *Magnano*, 181 Wash. App. at 699; *Oliver*, 196 Cal. App. 3d at 429.

A hypothetical confirms that clear and obvious error occurred in this case. First, it is important to recall that the video recording had to be replayed in the courtroom *only* because there was no equipment available for replay of the video in the jury room. Suppose there would have been equipment available for the unrestricted and unsupervised review of the video recording in the jury room. Could the court and the parties have been present in the jury room during the playback of the video although review of the recording did not require restrictions or supervision? This would have been clear and obvious error. Suppose, further, that the court, in the jury room, would have instructed the jury to watch the video only once and in silence. This would have also been clear and obvious error. The foregoing is what occurred in this case because, as previously explained, the courtroom should have been deemed to be the jury room during the review of the video. Accordingly, the active intrusion into the jury's deliberation in its relocated jury room was clear and obvious error.

The State argues no clear or obvious error occurred in this case because it was within the circuit court's discretion to intrude into the jury's deliberations in the unnecessary and stifling manner of this case (State's Br. at 4-5). However, a court does not have discretion to unnecessarily intrude into jury deliberations in a manner that will "chill" the deliberations. See *Olano* 507 U.S. at 739-40 (an intrusion that affects a jury's deliberation may be presumed to be prejudicial). Similarly, although the circuit court had discretion to deny the jury's request to review the video (*People v. Cloutier*, 178 Ill. 2d 141, 173 (1997)), once it allowed the jury to review the recording it had to allow the jury to do so without a chilling intrusion just as it would have with any other sort of evidence allowed to go to

the jury room during deliberations. Intrusion would have been permissible, as with any other evidence a deliberating jury is allowed to review, if supervision was necessary so the content of the video would not be overemphasized, so the content of the video would not be viewed out of context, so the jury would not inadvertently view matters it should not consider, so the defendant would not otherwise be prejudiced, or so the jury would not inadvertently damage or destroy the evidence. However, since none of these factors were present in this case, they do not serve to justify the intrusion.

In short, since the intrusion into the jury's deliberations constituted clear and obvious error under the first step of plain-error review, the question narrows to whether defendant was prejudiced by the intrusion since an intrusion into the jury's deliberations will constitute reversible error only if the defendant was prejudiced by the intrusion. *Olano*, 507 U.S. at 739. Whether prejudice occurred is determined under the first and second prongs of the plain error rule. In this case, prejudice occurred under both prongs.

L. The intrusion into the jury's deliberations was prejudicial error under the first prong of the plain error rule.

Plain error occurs under the first prong where the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant, regardless of the seriousness of the error. *Sebby*, 2017 IL 119445, ¶ 48. If the defendant carries the burden of showing first-prong error occurred, "prejudice is not presumed; rather, '[t]he error is actually prejudicial.'" *Sebby*, 2017 IL 119445, ¶ 51 (quoting *People v. Herron*, 215 Ill. 2d 167, 193 (2005)).

Under these principles, the error in this case tipped the scales of justice against defendant because the evidence was closely balanced. More specifically,

the fact that the deliberating jury asked to review the key evidence in the case, *i.e.*, the video recording of the acts which constituted the offense, reveals that the evidence was closely balanced because, logically, there would have been no need to review the video had the evidence been overwhelming and not closely balanced.

Further, and contrary to the State's assertion, defendant's unsteadiness during the one-legged test, after telling Officer Davis he had a "bum knee" (DVD ~ 23:56), was apparently not overwhelming enough to eliminate the need for further review of the video by the jury (State's Br. at 13). Accordingly, defendant was prejudiced by the court's intrusion into the jury's deliberation because the evidence was closely balanced.

The State argues in a footnote that defendant has forfeited this argument because he did not raise a first prong argument in the appellate court (State's Br. at 14 n.6). However, an appellee may raise any argument supported by the record to show the correctness of the judgment below, even though he had not previously advanced such an argument. *In re Veronica C.*, 239 Ill. 2d 134, 151 (2010).

M. The intrusion into the jury's deliberations was prejudicial error under the second prong of the plain error rule.

Plain error occurs under the second prong where the error is so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *Sebby*, 2017 IL 119445, ¶ 48. If the defendant carries the burden of showing second prong error occurred, "[p]rejudice *** is presumed because of the importance of the right involved." *Sebby*, 2017 IL 119445, ¶ 50 (quoting *Herron*, 215 Ill. 2d at 187).

N. The intrusion into the jury’s deliberations was prejudicial structural error under the second prong of the plain error rule because it affected the reliability of the guilt or innocence determination.

In this case, the appellate court found the error in this case amounted to structural error under the second prong because “[a]nything that intrudes upon the privacy of jury deliberations and impedes or inhibits impedes the jurors’ freedom of expression and action during deliberations *** renders the trial an unreliable means of determining guilt or innocence.” *Hollahan*, 2019 IL App (3d) 150556, ¶ 29. See *People v. Clark*, 2016 IL 118845, ¶ 46. The appellate court’s reasoning is sound.

In *Olano*, the Supreme Court found that the presence in the jury room of a silent alternate during deliberations had not been prejudicial because the alternate had not participated in the deliberations, the alternate had not otherwise exerted a chilling effect on the regular jurors, and the alternate had not restrained the freedom of expression and action of the regular jurors. *Olano*, 507 U.S. at 739. The Court regarded the alternate’s presence in the jury room as being the same as “an unexamined book which had not been admitted into evidence.” *Id.* at 739 (quoting *United States v. Allison*, 481 F.2d 468, 472 (5th Cir. 1973)). Thus *Olano* was not actually or presumptively prejudiced by the presence of the passive alternate during deliberations. *Olano*, 507 U.S. at 740-41. The situation of a passive alternate addressed by the Court in *Olano* is a far cry from the situation in this case where the circuit court affirmatively and unnecessarily restrained the freedom of expression and actions of the deliberating jurors as to the key evidence in the case.

In *Olano*, the Court noted that the presence of alternate jurors during the jury deliberations might prejudice a defendant in two different ways: “either because

the alternates actually participated in the deliberations, verbally or through ‘body language’; or because the alternates’ presence exerted a ‘chilling’ effect on the regular jurors.” *Olano*, 507 U.S. at 739. In this case, defendant was actually prejudiced by the court’s intrusion because the court clearly exerted a chilling effect on the deliberations by directing the jurors to remain silent while reviewing the video only one time. *Olano*, 507 U.S. at 739; *Hollahan*, 2019 IL App (3d) 150556, ¶¶ 29-30. See also *Hofer*, 995 F.2d at 749 n.4 (a court’s restriction on a deliberating jury’s access to audio tapes may constitute undue outside influence on the deliberations). As such, the appellate court’s conclusion that the circuit court’s intrusion was structural error was correct because the intrusion rendered the trial an unreliable means of determining guilt or innocence since it clearly impeded or inhibited the jurors’ freedom of expression and action during deliberations.

O. The intrusion into the jury’s deliberations was prejudicial second prong error because it affected the fairness of the defendant’s trial and the integrity of the judicial process.

Even if the error is not deemed to be structural, the “chilling” intrusion into the jury’s deliberations was so serious that it must be deemed prejudicial second prong error because it affected the fairness of the defendant’s trial and the integrity of the judicial process. *Sebby*, 2017 IL 119445, ¶ 50. See also *United States v. Ottersburg*, 76 F.3d 137, 139-40 (7th Cir. 1996) (under *Olano*, prejudice is established when record shows jury’s deliberation was impinged); *Manning v. Huffman*, 269 F.3d 720, 725-26 (6th Cir. 2001) (under *Olano*, prejudice may be presumed when jury’s deliberation is impinged);

As aptly explained by the appellate court:

“the mere presence of the trial judge, the parties, and their attorneys during jury deliberations improperly intrudes upon the privacy of

jury deliberations and has an inherently intimidating and inhibiting effect upon such deliberations. Such intrusions on the jurors' ability to freely discuss and debate the evidence should be deemed presumptively prejudicial (See *Olano*, 507 U.S. at 739), regardless of whether they involve any express communications or the transmission of 'extraneous information.' Moreover, the prejudice created by the presence of the trial judge, the parties, and their attorneys during jury deliberations was compounded in this case by the trial judge's comments to the jurors and the procedure subsequently employed by the court, both of which effectively denied the jury the ability to control the video, to comment on any portion of the video, or to deliberate about what they were watching as the video was being shown. This impeded the jury's deliberations on a matter of obvious concern to the jury, thereby prejudicing the defendant. Accordingly, the trial court committed reversible error." *Hollahan*, 2019 IL App (3d) 150556, ¶ 30.

In short, the intrusion into the jury's deliberations in this case constituted reversible error because defendant was actually prejudiced by the active intrusion under the first and second prongs of the plain error rule.

P. The fact that the jury could have deliberated upon returning to the jury room did not nullify the prejudice of the unnecessary intrusion into its review of the key evidence in the case.

The State argues defendant was not prejudiced because the jury could have deliberated upon returning to the jury room after the conclusion of the playback in the courtroom (State's Br. at 12). However, since first and second prong errors occurred in this case, defendant was prejudiced. *Sebby*, 2017 IL 119445, ¶¶ 50-51. See also *Hollahan*, 2019 IL App (3d) 150556, ¶ 24 (overt "intrusions on the jurors' ability to freely discuss and debate the evidence should be deemed presumptively prejudicial") (citing *Olano*, 507 U.S. at 739).

Further, as correctly noted by the appellate court, the fact that the jury could have deliberated back in the jury room after the conclusion of the playback did not eliminate or mitigate "the prejudicial impact upon deliberations that occurred

while the jurors were viewing the video. ***[T]he jurors had no opportunity to discuss the video as they were viewing it or to pause or replay any portions of the video that they found of particular importance. *** [T]he procedure employed by the trial court directly impeded the jury’s deliberations. The mere fact that the jury could have discussed the video later in the jury room is immaterial. *** [T]he jury was prevented from controlling the video, from freely discussing it, and from debating any issues relating to the video while they were watching it.” *Hollahan*, 2019 IL App (3d) 150556, ¶ 23.

As similarly explained by the Seventh Circuit, in the analogous situation where a deliberating jury must evaluate the contents of an audio recording for “tone, inflections, and demeanor[,]” it may be “necessary for the jury to play the tapes repeatedly as its deliberations progress[]” in order to perform its duty conscientiously. *Hofer*, 995 F.2d at 749. Accordingly, the State’s argument that defendant was not prejudiced because the jury could have deliberated upon returning to the jury room after the conclusion of the playback is misplaced.

Q. The State’s suggestion that the jury was free to deliberate in front of non-jurors during its review of the recording is belied by the record, and would be a violation of the Jury Secrecy Act and the constitutional rights to have the jury deliberate in private and free from outside influence.

The State suggests no error occurred because the jury was free to deliberate during the replay of the video in the courtroom but simply chose not to do so (State’s Br. at 12). This argument is belied by the record because the court clearly stated that everyone was to remain silent during the replay of the video. Specifically, the circuit court stated:

“Please come in and have a seat, we will not be talking to you other than to get the video, period. *** The jury has requested to see the

video again. We do not have an arrangement to show it to you in your deliberation room. I have instructed everyone to not say a word and we will play the video for you. If you need to have the sound adjusted or anything that we can do, all right?" *Hollahan*, 2019 IL App (3d) 150556, ¶ 10.

As fittingly explained by the appellate court:

“This statement conveyed several things to the jury. First, it suggested that no one (including any juror) was to speak while the video was being played. Although the trial court did not explicitly bar the jurors from speaking, the court’s statement to the jury created the impression that the video would be played in silence, and the court did not explicitly give the jurors permission to break that silence by discussing the video while it was being played. In addition, the trial court’s statement informed the jurors that they would not have the ability to control the playing of the video. The trial court told the jury that ‘we will play the video for you’ and suggested that ‘we’ (not the jurors themselves) could adjust the sound if necessary. The court did not give the jurors the opportunity to pause the video or replay any parts they might have wanted to view or discuss in greater detail. This further inhibited the jury’s deliberative process. In sum, the procedure employed by the trial court effectively precluded the jurors from engaging in any deliberations while the video was being shown and likely limited their ability to focus sufficiently on the particular portions of the video that gave them concern.” *Hollahan*, 2019 IL App (3d) 150556, ¶ 22.

Accordingly, the State’s suggestion that the jury was free to deliberate during the replay of the video in the courtroom is not convincing because it is belied by the record. Further, a ruling that would have allowed the jury to openly deliberate in front of the court and non-jurors would have been erroneous because it would have clearly violated the Jury Secrecy Act, and the defendant’s due process and sixth amendment rights to have the jury deliberate in private and free from outside influence.

R. Approving of deliberations in the presence of non-jurors will raise a host of problematic issues.

In addition, allowing a jury to deliberate while reviewing a recording in front of the parties would raise a host of problematic issues. Would the parties

be free to object if the jury's discussions strayed into matters a jury should not consider during deliberations? Should the reporter transcribe the deliberations in order to preserve a record in case objections were raised? Would the no-impeachment rule, which holds that once a verdict has been entered, it will not later be called into question based on the comments or conclusions the jurors expressed during deliberations, bar a subsequent attack on clearly improper jury deliberations? *Pena-Rodriguez v. Colorado*, ___ U.S. ___, 137 S. Ct. 855, 861 (2017). These potential problems show that the State's suggestion that a jury can freely deliberate under the circumstances of this case is not well-founded.

In sum, the State has failed to demonstrate the appellate court's decision was incorrect. The unnecessary presence of the court and non-jurors while the deliberating jury reviewed the key evidence in the case, with instructions to the jury to remain silent while doing so, clearly intruded into the jury's deliberations and prejudiced defendant. Accordingly, this cause should be remanded for a new trial because defendant's bedrock constitutional right to have his guilt decided by an impartial jury, after secret deliberations untainted by outside influence, was violated.

CONCLUSION

For the foregoing reasons, Joseph A. Hollahan respectfully requests that this Court affirm the appellate court's opinion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 26 pages.

/s/Santiago A. Durango
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No. 125091

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Appellate
	)	Court of Illinois, No. 3-15-0556.
Plaintiff-Appellant,)	
	)	There on appeal from the
-vs-	)	Circuit Court of the Twenty-
	)	First Judicial Circuit, Kankakee
	)	County, Illinois, No. 09-CF-630.
JOSEPH A. HOLLAHAN)	
	)	Honorable
Defendant-Appellee,)	Susan S. Tungate,
)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On March 19, 2020, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-Appellee in an envelope deposited in a U.S. mailbox in Ottawa, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Esmeralda Martinez

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E-FILED
3/19/2020 9:34 AM
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