No. 127256

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- BRANDON JACKSON, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-18-0672. There on appeal from the Circuit Court of Cook County, Illinois, No. 14 CR 00994 (01). Honorable Paula M. Daleo, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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ISSUE PRESENTED FOR REVIEW

Whether the trial court's failure to poll one of the jurors denied Brandon Jackson his fundamental right to ensure that the pronounced verdicts were unanimous.

STATEMENT OF FACTS

Following a jury trial, Brandon Jackson was convicted of the first degree murder of Cuauhtemoc Estrada and the attempted armed robbery Rigoberto Anaya. Defense counsel argued that the State had not proved that Brandon was the shooter or otherwise involved in the offense. (R. 1712-29) Brandon was 22 years old at the time of the crime. The court first sentenced him to 55 years for the murder, but then changed the sentence to 60 years; he was sentenced to an additional five years for the attempted armed robbery.

Trial

The crime occurred on December 20, 2013, in the parking lot of the Bellwood VFW hall, which the shooting victim, Cuauhtemoc Estrada, had rented for a Christmas party. (St. Exh. 6B[1]) Estrada's daughter Christina pulled in, and the two suspects soon walked into view, approaching Christina's boyfriend, Rigoberto Anaya. (St. Exh. 6B, 2:54-3:52) Estrada then approached Anaya and the two men. A flash came from the direction of one of the suspects, and Estrada abruptly fell. (St. Exh. 6B, 4:03-:08) According to eyewitnesses, the shooter was wearing a mask. (R. 1073-74, 1110-13)

Brandon Jackson was arrested, and someone who was arrested with him testified that Brandon said that he had shot someone because he was afraid of being shot himself.

[1] State's exhibit 6 contains 12 different video clips, with multiple apparently identical videos. It is not clear which specific files were introduced at trial; all citations in this brief are to the times given for file cam2-notelem-2418-3047.mp4 ("St. Exh. 6B").

(R. 1260-63) Calls Brandon made from jail led police to a gun, though no forensic evidence connected the gun to the shooting. (R. 1395-97, 1480; Sup. R. 69-72, 88)

The jurors deliberated for hours, starting at 12:21 p.m. (R. 1782) The parties and the trial court discussed sequestration, and it was decided that if the jurors had not reached a verdict by 9 p.m. they would be allowed to go home and come back the next day. (R. 1794-95) The jury asked for a definition of reasonable doubt, and was told to keep deliberating. (R. 1788) When the jurors asked whether State's exhibit 38, which appeared to be an arrest photo, showed Brandon or his co-defendant, whose case was separated from Brandon's, they were told it was the co-defendant. (R. 1789-90) Later they asked for permission to use an additional jury room to stretch their legs and take a break, and they were given the room as long as they did not talk about the case there. (R. 1790-91) Next, the jury or some members of the jury said that they had a verdict but apparently had not signed the forms. (R. 1797) The judge said to the lawyers present, "I don't know. They said they had a verdict. Do you want me to sign [*sic*] do you have a verdict? If you have a verdict, sign the forms, right? If you have a verdict, have a verdict, sign the forms." (R. 1797) Finally, the jury came out with signed verdict forms, finding Brandon guilty of first degree murder, personally discharging a firearm that caused death, and attempted armed robbery. (R. 1799; Sec. C. 34-36) Defense counsel asked for the jury to be polled, but the court polled only eleven of the jurors and did not ask Juror Number 3 whether she agreed with the verdicts. (R. 1799-1801)

The court denied the motion for a new trial. (R. 1858; C. 542-65)

Sentencing

In sentencing Brandon, the judge said that it was her "job" to "try to balance"

Estrada's life against Brandon's. (R. 1924) After emphasizing Estrada's military service and role in his family, the judge discussed how Brandon had failed his own family. (R. 1924-25) She initially sentenced Brandon to 55 years for the murder and 5 years for the attempted armed robbery. (R. 1925) The State asked the judge to clarify that the sentence was 30 years plus the 25-year firearm add-on and not 55 years *plus* the 25-year add-on. (R. 1925-26) The judge then increased the sentence to 35 years for the murder and 25 for the add-on, resulting in 60 years. (R. 1926) The court denied the motion to reduce sentence. (R. 1936)

Appeal

On appeal, Brandon argued that the trial court erred in failing to poll every juror and that the failure amounted to second-prong plain error. *People v. Jackson*, 2021 IL App (1st) 180672, ¶ 18. He also argued that the trial judge improperly considered the victim's personal characteristics as aggravating factors and capriciously increased Brandon's sentence to 60 years after initially sentencing him to 55 years. *Id*.

The parties agreed that the trial court had failed to poll every juror and that defense counsel had failed to preserve the issue for appeal. *Id.* The appellate court, with one justice dissenting, relied on *People v. Kellogg*, 77 Ill. 2d 524 (1979), to find second-prong plain error because "the failure to poll every juror at Brandon's request challenges the integrity of the judicial process." *Jackson*, 2021 IL App (1st) 180672, ¶ 47. Because the court vacated Brandon's convictions and remanded for a new trial, it did not address his challenge to his sentence.

On September 29, 2021, this Court granted the State's petition for leave to appeal.

ARGUMENT

The trial court's failure to poll one of the jurors denied Brandon Jackson his fundamental right to ensure that the pronounced verdicts were unanimous.

The right to have the jury polled is a "substantial right" in Illinois and, if the jury is not polled in a proper manner, reversible error occurs. *See*, *e.g.*, *People v. Wheat*, 383 Ill. App. 3d 234, 237 (2d Dist. 2008). This is because when a jury poll is requested, jurors must receive the opportunity to express their opinion "free from the coercive influences that may have dominated the deliberations of the jury room." *People v. Kellogg*, 77 Ill. 2d 524, 528-29 (1979). In this case, following the announcement of the jury's verdicts, defense counsel requested a jury poll, but the court polled only eleven of the twelve jurors. (R. 1799-1801); (St. Br. 4) Neither the State nor defense counsel alerted the court to the error. But because the trial court's faulty jury poll did not safeguard Brandon's fundamental right to a unanimous verdict, the appellate court correctly found plain error under the substantial-rights prong and reversed Brandon's conviction, remanding for a new trial. *People v. Jackson*, 2021 IL App (1st) 180672. This Court should affirm that ruling.

The appellate court found that, in order to ensure the unanimity of the jurors, defendants have an "absolute right" to poll each juror. *Jackson*, 2021 IL App (1st) 180672, ¶ 27 (citing *People v. Rehberger*, 73 Ill. App. 3d 964, 968 (5th Dist. 1979)). The court noted that this Court in *Kellogg* "used mandatory language, emphasizing that a verdict cannot stand if the trial court's poll somehow prevents a juror from expressing assent (or dissent) to the written verdict." *Id.* (citing *Kellogg*, 77 Ill. 2d at 529). It found that "jury polling is not only a procedural device designed to ensure the unanimity of the jury's verdict; it is *the* procedural device for accomplishing that goal." *Id.*, ¶ 32. Due to

the importance of the right to poll jurors, the court reasoned, the denial of this "absolute right" is "serious enough to be considered second-prong plain error." *Id.* ¶ 19.

At the outset, there is no dispute that the trial court erred by failing to properly poll all of the jurors. Yet the State insists that there is no remedy for this error because it was not preserved. (St. Br. 7) Ignoring the significant body of case law enshrining the right to poll the jury as a substantial right, the State maintains that this Court may not review the issue under the substantial-rights prong of plain error. (St. Br. 7) The State, though, downplays the importance of *Kellogg* and related cases and instead bases its argument on more recent case law, namely *People v. McGhee*, 2012 IL App (1st) 093404, which both misapplied second-prong plain error and falsely analogized incomplete jury polling to faulty *voir dire* questioning.

Relying on *McGhee*, the State insists that no substantial-rights plain error occurred because all twelve jurors signed the verdict forms and there were no "indicia of lack of unanimity" apparent from the record. (St. Br. 11) But because not all of the jurors received the opportunity to reveal any lack of unanimity—the "very purpose" of jury polling—the record is incomplete. *Kellogg*, 77 Ill. 2d 524 at 528. The State also fails to recognize that when a substantial right is involved, the error is presumptively prejudicial, and the record need not reveal additional prejudice in order for the error to be remedied. *People v. Herron*, 215 Ill. 2d 167, 185 (2005). Additionally, the State ignores parts of the record that show that the jurors struggled with the result of the case. The State also makes no attempt to explain how the onus to speak up could be placed on an individual unpolled juror who was afforded no such opportunity by the court. The State's arguments here fail, and this Court should affirm the opinion of the appellate court, and find that second-

prong plain error occurred in this case.

A. The right to poll the jury in open court is a substantial right under Illinois law.

It is undisputed that a polling error occurred at Brandon's trial, that it was not preserved, and that it can be reviewed only as second-prong plain error. The plain error doctrine allows this 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. *Herron*, 215 Ill. 2d at 186-87; Ill. Sup. Ct. R. 615(a). To demonstrate substantial-rights error under the second prong of plain error, "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." *Herron*, 215 Ill. 2d at 187. In such cases, "prejudice to the defendant is presumed because of the importance of the right involved, 'regardless of the strength of the evidence.'" *Id.*, (quoting *People v. Blue*, 189 Ill. 2d 99, 138 (2000)). Whether a forfeited claim is reviewable as plain error is a question of law that is reviewed *de novo*. *People v. Johnson*, 238 Ill. 2d 478, 485 (2010).

Criminal defendants have the "inviolate" right to trial by an impartial jury. U.S. Const., amend. VI; Ill. Const. 1970, art. 1, § § 8, 13; *People v. Towns*, 182 Ill. 2d 491, 503 (1998). From English common law through the present day, convictions for serious crimes must be confirmed by twelve jurors, as a "verdict, taken from eleven, was no verdict at all." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020) (internal quotation marks and citations omitted); *see also People v. Lobb*, 17 Ill. 2d 287, 298 (1959) (the right to an impartial jury includes the right to have the facts in controversy determined "by the unanimous verdict of twelve impartial jurors"); 725 ILCS 5/115-4(o) (West

2012). A court may not accept a nonunanimous verdict regardless of the strength of the evidence against the defendant. *People v. Smith*, 271 Ill. App. 3d 763, 767 (2d Dist. 1995).

A truly unanimous verdict must represent the free deliberations of each juror. *People v. Bennett*, 154 Ill. App. 3d 469, 475 (1st Dist. 1987). This right to a freely given verdict is safeguarded by polling all twelve jurors, which allows each juror "an opportunity for free expression unhampered by the fears, errors, or coercive influences that may have dominated the private deliberations of the jury room." *People v. Banks*, 344 Ill. App. 3d 590, 597-98 (1st Dist. 2003) (citing *Kellogg*, 77 Ill. 2d at 528). Accordingly, the defendant has an "absolute" right to poll the jury after a verdict. *People v. DeStefano*, 64 Ill. App. 2d 389, 408 (1st Dist. 1965); *see also Wheat*, 383 Ill. App. 3d at 237 (the right to have the jury polled properly is a "substantial right"); *Rehberger*, 73 Ill. App. 3d at 968-69 (jury polling is a "basic" and "absolute" right without which judgment cannot be entered); *People v. Herron*, 30 Ill. App. 3d 788, 791 (1st Dist. 1975) (referred to hereinafter as "*Alexander Herron*") ("It is clear that a defendant in Illinois has the right to poll the jurors after they render a guilty verdict, and that this right is a substantial right."); *People v. Townsend*, 5 Ill. App. 3d 924, 925 (5th Dist. 1972) (finding "a defendant's right to poll the jury is a substantial right").

Nearly 200 years ago, this Court held that the right to poll is essential because jurors must be permitted to "vary from their first offering of their verdict" by expressing a different verdict in open court than the one they reached in the jury room. *Nomaque v. People*, 1 Ill. 145, 149 (1825) (quoting *Blackley v. Sheldon*, 7 Johns. 32, 33 (N.Y. Sup. Ct. 1810)). The trial court must conduct the jury poll in a manner that affords the jurors

every opportunity to voice dissent from the verdict. *Banks*, 344 Ill. App. 3d at 598. Due to the importance of the right to poll, it is the "indispensable duty" of this Court to correct polling errors. *Nomaque*, 1 Ill. at 150.

This Court has provided specific requirements for jury polling:

> When a jury is polled, *each juror* should be questioned individually as to whether the announced verdict is his own. The poll should be conducted so as to obtain an unequivocal expression from *each juror*. . . . In conducting the poll, *each juror* should be examined to make sure that he truly assents to the verdict.

Kellogg, 77 Ill. 2d at 527-28 (citations omitted, emphases added). *Kellogg* explained that polling must allow for *each juror* to express disagreement, to inform the trial court that a mistake has been made, or to ask to reconsider his or her verdict, "or else the polling process would be a farce and the jurors would be bound by their signatures on the verdict." *Id.* at 528. That is, the fact that the jurors' decision appeared to be unanimous within the confines of the jury room, as shown by the signed verdict form, does not prove that the decision was actually unanimous; jurors must have the opportunity to express disagreement in open court.

In *Kellogg*, the jury returned a guilty verdict signed by all twelve jurors. 77 Ill. 2d at 527. After the verdict was read, each juror was asked, "Was this then and is this now your verdict?" Eleven jurors replied in the affirmative, but one of the jurors provided a more ambiguous response, answering yes, but then asking the court whether she could change her mind. *Id.* The judge did not answer her question, but rather repeated the prior question twice until she gave an affirmative answer. *Id.* This Court concluded that "the judge did not ascertain if it was her desire to change her vote as she had asked, or whether she desired to abide by the verdict she had signed. The record does not therefore reflect

that the verdict of guilty was a unanimous verdict." *Id.* at 530. *Kellogg* explained that polling must allow for each juror to express disagreement, to inform the court that a mistake has been made, or to ask to reconsider the verdict, as jurors are not bound to their signatures on the verdict form. *Id.* at 528. Notably, the error was not preserved, though in that case the State did not object to its review. *Id.* at 527-28.

The situation in *Kellogg* is not uncommon. Indeed, in both *People v. Beasley*, 384 Ill. App. 3d 1039, 1045-46 (4th Dist. 2008), and *Bennett*, 154 Ill. App. 3d at 476-77, eleven jurors assented to the verdict, while one juror voiced ambivalence. As in *Kellogg*, the trial judges in those cases did not allow the ambivalent jurors to express any possible dissent in an unambiguous manner, and the appellate courts reversed and remanded for new trials. *Beasley*, 384 Ill. App. 3d at 1049; *Bennett*, 154 Ill. App. 3d at 476.

Here, where only eleven of the twelve jurors were polled, it is impossible to say whether the unpolled juror would have assented or, as in *Kellogg*, *Beasley*, and *Bennett*, expressed ambivalence. If the trial judges in those cases had made the same error as the judge in this case and left out one of the jurors, there would have been no showing of ambivalence on the record. The *Kellogg* Court recognized that resolving this conundrum is the "very purpose" of polling the jury: without polling no such ambivalence or contradiction will be revealed. *Kellogg*, 77 Ill. 2d at 528. Indeed, here the appellate court found that the "factual differences between the error in *Kellogg* and the error here are a smokescreen. *Kellogg*'s true import involves its discussion about the nature of a defendant's right to a complete jury poll," which did not occur here. *Jackson*, 2021 IL App (1st) 180672, ¶ 35.

The State repeatedly insists that no reversible error occurred in this case because

there were "no indicia of lack of unanimity." (St. Br. 11) As discussed further below, this is untrue. But the State's point underscores the problem created by the polling error here—in *Kellogg*, *Beasley*, and *Bennett*, there were no such indicia *until each juror was polled*. The case law stresses over and over again that the purpose of polling is to elicit such dissent. *See, e.g.*, *Kellogg*, 77 Ill. 2d at 528; *Nomaque*, 1 Ill. at 149. The State can point to no case law that places the onus on a particular juror to speak up in court despite not being afforded the opportunity to speak; as the *Jackson* court found, there is no meaningful difference between situations in which the judge refuses to allow an ambivalent juror to voice any ambivalence and situations in which a juror is given no opportunity to express ambivalence at all.

Because any differences between those two situations are a "smokescreen" (*Jackson*, 2021 IL App (1st) 180672, ¶ 35), Illinois cases have found not just that each polled juror must be permitted to express dissent, but also that the failure to poll jurors upon request is reversible error. *See, e.g.*, *DeStefano*, 64 Ill. App. 2d 389. *DeStefano* involved an unusual fact pattern, in which the jurors reconvened with a guilty verdict after the judge had first declared a mistrial and discharged them due to a misunderstanding. 64 Ill. App. 2d at 393-94. After the guilty verdict was announced, defense counsel asked for the jury to be polled; the court did not refuse, but apparently forgot to do so. *Id.* at 407. Defense counsel failed to preserve the issue. *Id.* at 409. As here, the State in *DeStefano* insisted that "no substantial right of the defendant is violated" by the failure to poll and that no remedy was needed because the right to poll is simply a "common law rule." *Id.* at 407; (St. Br. 5).

The *DeStefano* court rejected the State's attempt to diminish the right to poll the

jury, stating unequivocally that the failure to poll the jury upon request is reversible error, even where the issue is forfeited. 64 Ill. App. 2d at 408-09. In fact, the court specifically held that the failure to poll the jury when asked fell into the category of "[p]lain errors or defects affecting substantial rights." *Id.* at 408 (citing Ill. Sup. Ct. R. 615(a)). The court stressed that its finding of plain error had nothing to do with the unusual circumstances of that case, stating that "the circumstances attending the receipt of the instant guilty verdict demonstrate the importance of the polling of *a jury*" generally—not merely of polling *the jury* in that case. *Id.* at 408 (emphasis added). In fact, *DeStefano* referred to none of the unusual circumstances when it reversed the defendant's conviction. Rather, it could not have been more clear in finding that the failure to poll the jury *alone* constituted plain error: "*Even if the verdict had been properly returned*, we consider the failure to poll the jury, after an affirmative request so to do, to be reversible error." *Id*. at 408-09 (emphasis added). As discussed further below, under the prong of plain error involving a substantial right, the violation of the right itself is the prejudice; it is not necessary to scour the specific circumstances of the case to glean further prejudice. *See Herron*, 215 Ill. 2d at 186-87 (when a substantial right is violated, "prejudice to the defendant is presumed because of the importance of the right involved, 'regardless of the strength of the evidence.'" (quoting *Blue*, 189 Ill. 2d at 138).

The approach to jury polling errors—including unpreserved errors—in federal law is well established and instructive. In federal courts, as in Illinois, "upon a timely request a defendant has an absolute right to poll the jury to ensure the unanimity of the verdict against him." *United States v. Marinari*, 32 F.3d 1209, 1212 (7th Cir. 1994); *see also* Fed. R. Crim. P. 31(d). This Court has made clear that "plain error involves the same

considerations in federal and state court." *Herron*, 215 Ill. 2d at 186. Federal courts review unpreserved polling issues for plain error. *United States v. August*, 984 F.2d 705, 711 (6th Cir. 1992). This is because in federal court, as in Illinois, the "the right to poll a jury is a substantial right." *Marinari*, 32 F.3d at 1212; *see also United States v. F.J. Vollmer & Co.*, 1 F.3d 1511, 1522 (7th Cir. 1993); *Wheat*, 383 Ill. App. 3d 234, 237 (2d Dist. 2008); *Alexander Herron*, 30 Ill. App. 3d at 791. Accordingly, failure to poll the jury upon a timely request results in reversal without an additional showing of prejudice. *Marinari*, 32 F.3d at 1212 (quoting *Vollmer*, 1 F.3d at 1522); *Gov't. of Virgin Islands v. Hercules*, 875 F.2d 414, 418 (3rd Cir. 1989). In the cases cited above, the courts did not look for any "indicia of lack of unanimity" to justify reversal. (*See* St. Br. 11) Rather, the fact that a substantial right was violated demonstrated that a new trial was required, as the error affected the integrity of the trial.

Under federal law there can be "no doubt" that "each juror's signature on a verdict form—standing alone—cannot substitute for an oral poll of the jury in open court." *Marinari*, 32 F.3d at 1212. This is because the only way to ensure "uncoerced unanimity" is by "asking *each juror individually* in open court to answer the question of whether or not the verdict announced was that juror's verdict." *Id.* (emphasis added). When a poll is requested, "the verdict becomes final and 'recorded[' only] when the twelfth juror's assent to that verdict is made on the record." *Marinari*, 32 F.3d at 1213.

United States v. F.J. Vollmer & Co., is directly relevant to this case. 1 F.3d 1511. There, after the verdicts were read, counsel for the corporate defendant requested that the jury be polled. *Id.* at 1522. Immediately after the request, there was a sidebar at which counsel made an oral motion for acquittal. The court reserved ruling on the acquittal

motion and then dismissed the jurors without conducting a poll. *Id.* The failure to conduct the poll appeared to have been entirely accidental, and the district court ruling shows that the defendant did not preserve the issue by raising it in the post-trial motion. *See United States v. McCabe*, 792 F. Supp. 616, 618-22 (C.D. Ill. 1992). In spite of the facts that (1) the error appeared to have been accidental, (2) there was no suggestion of lack of unanimity, and (3) the error was not preserved, the Seventh Circuit Court of Appeals reversed and remanded for a new trial because the failure to poll the jury was a violation of a substantial right. *Vollmer*, 1 F.3d at 1523.

The American Bar Association's Standards for Criminal Justice likewise stress the need for jury polling to preserve the defendant's right to a unanimous verdict:

> When a verdict has been returned and before the jury has dispersed, the jury should be polled at the request of any party or upon the court's own motion. The poll should be conducted by the court or clerk of court asking *each juror individually* whether the verdict announced is his or her verdict. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

ABA Standards for Criminal Justice 15-5.6 (3d ed. 1996) (emphasis added); *see also People v. Ramey*, 152 Ill. 2d 41, 54 (1992) (citing the Standards). The commentary to the Standards explains why polling is essential, noting that a "shy or non-aggressive juror might well be silent as to his verdict until specifically asked about it." ABA Standards for Criminal Justice 15-5.6 (3d ed. 1996), *Commentary* (quoting *People v. Light*, 285 App. Div. 496, 498 (N.Y. App. Div. 1955); *Light*, 285 App. Div. at 498 (further noting that "[j]urors ordinarily are loath to interrupt the court's proceedings and to speak unless spoken to.")). Because the deliberations occur in the privacy of the jury room, without polling it is not clear "whether the jury's verdict reflects the conscience of each of the jurors or whether it was brought about through the coercion or domination of one of them

by some of his fellow jurors or resulted from sheer mental or physical exhaustion of a juror." ABA Standards for Criminal Justice 15-5.6 (3d ed. 1996), *Commentary* (quoting *Commonwealth v. Martin*, 379 Pa. 587, 593 (Pa. 1954)).

Further, contrary to the State's implication, it is in fact "remarkable how often a juror either changes their verdict upon being polled or at least expresses doubt about the earlier pronouncement." Karl Moltzen, *The Jury Poll and A Dissenting Juror: When A Juror in A Criminal Trial Disavows Their Verdict in Open Court*, 35 J. Marshall L. Rev. 45, 65 (2001). This has long been the case; over 200 years ago, one of the cases relied on by *Nomaque*, 145 Ill. at 149, noted that "there are many cases in the books of a jury changing their verdict, immediately after they have pronounced it in open court, and before it was received and entered." *Blackley*, 7 Johns. at 33; *see also, e.g.*, *Kellogg*, 77 Ill. 2d at 528 (polled juror expressed ambivalence in spite of proper jury instructions and unanimous verdict form); *Beasley*, 384 Ill. App. 3d at 1045-46 (same); *People v. Bennett*, 154 Ill. App. 3d 476-77 (same).

Indeed, holdout and dissenting jurors occur so often in our jury system that a robust body of law has developed to account for them. *See, e.g.,* Nancy S. Marder, *Introduction to the 50th Anniversary of 12 Angry Men*, 82 Chi. Kent L. Rev. 557, 564 (2007). Case law reports examples of jurors saying "no" or the equivalent when polled by the court. *See Kellogg*, 77 Ill. 2d at 527; *Banks*, 344 Ill. App. 3d at 598 ("No," but juror later clarified under questioning by court that he was confused by court's compound question.); *People v. Gunn*, 237 Ill. App. 3d 508, 509 (3rd Dist. 1992) ("No. I don't know what—"); *People ex rel. Paul v. Harvey*, 9 Ill. App. 3d 209, 210 (1st Dist. 1972) ("Well, it wasn't exactly, no.").

Kellogg, *DeStefano*, the federal cases, and the ABA Standards place the focus where it belongs: on the jurors' right to assent to the verdict within the jury room but to express a different opinion in the less coercive atmosphere of open court. Nowhere in the State's brief does it acknowledge the purpose of polling: that jurors must be permitted to reach a decision in the jury room yet "vary from their first offering of their verdict" by expressing a different verdict in open court than that they reached in the jury room. *Nomaque*, 1 Ill. at 149. It is noteworthy that the State declines to engage with the purpose of polling or the fact that jurors are not bound to their signatures on the verdict form.

Rather than addressing these facts, the State argues that the right to polling is not a substantial right because it "must be presumed" that the jurors followed their instructions to reach a verdict unanimously in the jury room. (St. Br. 14) But in every single case involving the question of jury polling, the jurors *did* reach an apparently unanimous verdict within the jury room; if they had not, there would have been no verdict to poll. No one is claiming that the verdict reached within the jury room was not apparently unanimous, based on the signed verdict forms. However, when polling is requested, the court must ask *each* juror whether he or she agrees with that verdict in open court, where the trial judge "not only hears the juror's responses but also can observe the juror's demeanor and tone of voice" to determine whether the juror has freely assented to the verdict. *Alexander Herron*, 30 Ill. App. 3d at 792. Again, as this Court held in *Kellogg*, "Jurors must be able to express disagreement during the poll or else the polling process would be a farce and the jurors would be bound by their signatures on the verdict." 77 Ill. 2d at 528.

This Court has often expressed its preference for statements made in open

court—where the judge can both hear the responses and observe the demeanor and tone of voice of the speaker—over those made in private, on paper. The State relies on *People v. Tooles*, 177 Ill. 2d 462, 464-65 (1997), to argue that plain error did not occur here, yet *Tooles*, like the cases and standards referred to above, focuses on the importance of declarations made to the trial judge *in open court*. (St. Br. 9-10) In *Tooles*, this Court found that the failure to provide signed jury waiver forms was not second-prong plain error because the defendants' waivers in open court showed that they were made knowingly and voluntarily. *Id.* at 465, 469, 473. By contrast, this Court has "never found a valid jury waiver where the defendant was not present in open court when a jury waiver, written or otherwise, was at least discussed." *People v. Scott*, 186 Ill. 2d 283, 285 (1999). *Tooles* thus shows the importance of statements made in open court over those made in private. Just as it is for the trial court to decide whether a jury waiver is knowingly and voluntarily given, so too "the question of whether a juror, in responding to a poll of the jury, has freely assented to a verdict is a question of fact for the court to decide." *Alexander Herron*, 30 Ill. App. 3d at 792; *see also Kellogg*, 77 Ill. 2d at 528-29 (jurors must be free to express their opinion in open court, away from the "coercive influences that may have dominated the deliberations of the jury room"). Here, the trial court did not hear Juror Number 3's responses or observe her demeanor or tone of voice. Indeed, she had no opportunity to dissent in open court at all. Accordingly, based on *Kellogg*, *DeStefano*, *Wheat*, and the other Illinois cases discussed above, in addition to the analogous federal cases, Brandon's substantial right to poll the jury was violated, and this Court should find error under the substantial-rights theory of plain error.

B. *People v. McGhee* was wrongly decided where it blatantly ignored *Kellogg* and instead analogized to unrelated case law and where it misunderstood and misapplied second-prong plain error.

For its argument that a substantial right, under the second prong of plain error, was not violated, the State largely ignores *Kellogg* and the other cases discussed above and relies primarily on *People v. McGhee*, 2012 IL App (1st) 093404, and cases relying on *McGhee*, namely *People v. Sharp*, 2015 IL App (1st) 130438, and *People v. Flores*, 2021 IL App (1st) 192219. (St. Br. 11-13, 15) In those cases the appellate court found that the trial court's failure to poll the jurors when requested was not a second-prong plain error. However, *McGhee* was wrongly decided for two reasons, and *Sharp* and *Flores* wrongly relied on *McGhee*.

First, it is striking that *McGhee* did not even acknowledge the existence of *Kellogg*, which was then and remains now this Court's clearest statement on jury polling. *McGhee* instead culled its analysis from the law surrounding faulty Rule 431(b) admonishments, which are simply not analogous to jury polling. Second, *McGhee* betrayed a fundamental misunderstanding of substantial-rights plain error and wrongly claimed that only the tightly limited collection of errors deemed structural errors could be considered plain error under the substantial-rights prong. However, this Court has made clear, both explicitly in *People v. Clark*, 2016 IL 118845, ¶ 46, and implicitly in the multitude of cases finding second-prong plain error where there was no structural error, that *McGhee*'s approach to the substantial-rights prong of plain error was mistaken. *See, e.g.*, *People v. Lewis*, 234 Ill. 2d 32 (2009) (finding no *de minimis* exception to review under the second prong); *People v. Walker*, 232 Ill.2d 113, 131 (2009) (finding second-prong plain error where trial court improperly failed to grant a continuance).

1. *McGhee* wrongly analogized to cases involving Rule 431(b), which are not relevant to jury polling, and ignored well-established precedent.

Despite a plethora of cases on point, most notably *Kellogg*, *McGhee* relied primarily on *People v. Thompson*, 238 Ill. 2d 598 (2010), to find that a polling violation did not constitute substantial-rights plain error. In *Thompson*, this Court determined that a violation of Supreme Court Rule 431(b), which requires the trial court to pose specific questions during *voir dire* to ensure jurors' understanding and willingness to follow fundamental criminal law principles, did not require reversal under second-prong plain error, and that, therefore, only plain error under the closely balanced prong applied. *Id.* at 615. This Court rejected the defendant's argument in *Thompson* because the Rule 431(b) error in question "did not involve a fundamental right or a constitutional protection." *Id*. at 614-15 (citing *People v. Glasper*, 234 Ill. 2d 173 (2009) (subjecting same error to harmless-error analysis)). *McGhee*, relying on *Thompson*, concluded that, "[l]ike questioning the venire under Rule 431(b), polling the jury is merely a procedural device that helps to ensure that the jury's verdict is unanimous, but it is not an indispensable prerequisite to a fair trial." *McGhee*, 2012 IL App (1st) 093404, ¶ 25.

However, the right to poll the jury is not, as the *McGhee* court declared, simply a "common-law rule" by which other, more fundamental rights (such as the right to an impartial jury) are protected. *See McGhee*, 2012 IL App (1st) 093404, ¶ 25. Rather, it is a "substantial right," of the sort that may be reviewed under the second prong of plain error. Ill. Sup. Ct. R. 615(a). Indeed, as discussed above, the failure to poll the jury when asked falls into the category of "[p]lain errors or defects affecting substantial rights." *DeStefano*, 64 Ill. App. 3d at 408; *see also Alexander Herron*, 30 Ill. App. 3d at 791 ("It is clear that

a defendant in Illinois has the right to poll the jurors after they render a guilty verdict, and that this right is a substantial right."); *Wheat*, 383 Ill. App. 3d at 237 (polling is a "substantial right"); *United States v. Randle*, 966 F.2d 1209, 1214 (7th Cir. 1992) (violation of "substantial right" to poll the jury requires new trial without showing of prejudice).

Another crucial distinction between Rule 431(b) errors and polling errors is that Rule 431(b) overlaps with other protections in place to prevent a biased jury, while jury polling is the last and only way to ensure that the apparently unanimous verdict reached in the jury room is in fact unanimous. For instance, the State notes that defendants are also protected from biased jurors through peremptory challenges. (St. Br. 8) But because peremptory challenges, like Rule 431(b) questions, are just one of the many methods for safeguarding an unbiased jury, peremptory challenge violations are not subject to second-prong plain error analysis. (St. Br. 8, citing *People v. Rivera*, 227 Ill. 2d 1, 26 (2009)) Likewise, the State refers to a third method of assuring an unbiased jury, the statutory *voir dire* oath taken by prospective jurors. (St. Br. 9) As this Court has noted, where the statutory *voir dire* oath is not given, the parties may still ensure the impartiality of the jury through *voir dire* questioning and peremptory challenges. *People v. Towns*, 157 Ill. 2d 90, 100 (1993). All of these procedures and protections work together to safeguard the defendant's right to an impartial jury, and the failure of one of those mechanisms can be ameliorated by the proper functioning of another.

Not so with jury polling. As the appellate court here stressed, "jury polling is not only a procedural device designed to ensure the unanimity of the jury's verdict; it is *the* procedural device for accomplishing that goal." *Jackson*, 2021 IL App (1st) 180672, ¶ 32

(emphasis in original). Unlike the multiple layers of protection to ensure an impartial jury, the jury poll is the only safeguard to ensure that the verdict reached in the potentially coercive atmosphere of the jury room is truly unanimous. The *McGhee* court insisted otherwise, but, in fact could cite precisely *one* other protection to guarantee unanimity: "Other procedural requirements exist; for example, the requirement that the jurors individually sign the verdict form." *McGhee*, 2012 IL App (1st) 093404, ¶ 25; (St. Br. 11-12) However, before a verdict is recorded, "a juror has the right to inform the court that a mistake has been made, or to ask that the jury be permitted to reconsider its verdict, or to express disagreement with the verdict returned"; when a party asks for polling, the signatures on the verdict form are not sufficient. *Kellogg*, 77 Ill. 2d at 528. As discussed above, there can be "no doubt" that "each juror's signature on a verdict form—standing alone—cannot substitute for an oral poll of the jury in open court." *Marinari*, 32 F.3d at 1212.

Moreover, of course, in every case involving the question of jury polling, the jurors *did* appear to reach a unanimous verdict within the jury room; if they had not, there would have been no verdict to poll. The *McGhee* court fails to account for the fact that the entire body of jury polling case law is predicated on the assumption that the single safeguard of the unanimous form is insufficient: "[a]lthough their jury room votes form the basis of the announced verdict, the jurors remain free to dissent from the announced verdict when polled" *Hercules*, 875 F.2d at 418 (quoting *United States v. Nelson*, 692 F.2d 83, 84 (9th Cir.1982)). As the appellate court here found, the "signatures on the verdict forms do not serve as a stand-in for jury polling *because* polling gives jurors the chance to expressly disavow the signature they affixed to the form." *Jackson*, 2021 IL

App (1st) 180672, ¶ 32 (emphasis added).

Further, the appellate court in this case noted that, even where the jury was not questioned properly under Rule 431(b), "a juror with incorrect notions about Rule 431(b) principles will not have to rely on those notions in reaching a verdict" where the evidence is truly overwhelming. *Jackson*, 2021 IL App (1st) 180672, ¶ 30. By contrast, a court may not accept a nonunanimous verdict, regardless of the strength of the evidence against the defendant. *Smith*, 271 Ill. App. 3d at 767; *see also Ramos*, 140 S. Ct. at 1395 (a "verdict, taken from eleven, [is] no verdict at all.") (internal quotation marks and citations omitted). That is, even if a reviewing court believed the evidence against a defendant was not just sufficient but overwhelming, it could not affirm a conviction that was based on a nonunanimous verdict. Because jury polling is the only way to ensure that an apparently unanimous verdict truly was unanimous, a reviewing court should not assume, based on the evidence presented, that jurors would necessarily assent to the verdict when polled in open court.

The *Flores* court cited an additional mechanism to purportedly ensure unanimity, noting that the jurors were instructed that their verdict *must* be unanimous. *Flores*, 2021 IL App (1st) 192219, ¶ 19; (*see also* St. Br. 14) But that instruction is toothless without polling to ensure that unanimity. As with the State's argument about signed verdict forms, this argument distracts from the issue at hand: in every case involving polling errors, the jury appeared to have been properly instructed that the verdict must be unanimous. Indeed, given "the fact that jurors are instructed to vote only for a verdict with which they conscientiously agree, [the right to jury polling] implicitly recognizes the influences which may be exerted on individual jurors to acquiesce in the majority vote." *Hercules*,

875 F.2d at 418 (referring specifically to Fed. R. Crim. P. 31(d)). Again, Brandon agrees that all twelve jurors signed the verdict forms; the issue is that they did not all receive the opportunity to dissent in open court.

Jury polling is simply not the same as Rule 431(b) questioning; instead, it is literally the only stopgap between coercion in the jury room and a verdict that only appears to be unanimous, but in fact is not. Rule 431(b) questions are just the first of several procedural safeguards ensuring that a jury understands and accepts fundamental principles of law. In contrast, jury polling is the *last* opportunity to ensure a unanimous verdict. Since the analogy between the two is simply inapt, the *McGhee* court had no reason to ignore this Court's holdings in *Kellogg* or any of the relevant appellate court polling cases and instead try to fit the square peg of jury polling into the round hole of Rule 431(b) questions. This Court should disregard the State's reliance on *McGhee* and instead look to *Kellogg*, *DeStefano*, and the related polling cases to find second-prong plain error.

2. Second-prong plain error is not the rarity the *McGhee* court believed or the State implies.

McGhee also erred by relying on an undeniably mistaken version of plain error. It confused substantial-rights plain error with structural error, incorrectly finding that only errors that fit within the "'very limited class of cases' in which an error has been deemed structural" qualified as second-prong plain error. *McGhee*, 2012 IL App (1st) 093404, ¶ 22 (quoting *Glasper*, 234 Ill. 2d at 198). As *McGhee* noted, structural errors are the six errors involving "a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction." *McGhee*, 2012 IL App

(1st) 093404, ¶ 22 (quoting *Thompson*, 238 Ill. 2d at 609); *see also Neder v. United States*, 527 U.S. 1, 8 (1999) (listing the six structural errors). Plainly, the failure to poll a jury is not on that list of six structural errors, but that does not mean that second-prong plain error did not occur.

In *Clark*, this Court later clarified that, although previous opinions had "equated second-prong plain error with structural error, [this Court] did not restrict plain error to the types of structural error that have been recognized by the [United States] Supreme Court." *Clark*, 2016 IL 118845, ¶ 46. But before *Clark*, many appellate court decisions, like *McGhee*, limited their understanding of second-prong plain error to those six structural errors. For instance, in *People v. Spencer*, the appellate court found that an "error is reversible under the second prong of the plain error doctrine *only* when the error is structural. . . ." 2014 IL App (1st) 130020, ¶ 46 (citation and internal quotation mark omitted; emphasis added). The *Spencer* court looked at the list of structural errors, and did not find on that list a defendant's conviction for an uncharged offense that was not a lesser included offense of a charged offense. *Id.* Notably, that is precisely the same error this Court in *Clark* later clarified *was* in fact second-prong plain error, even though it was not structural error. *Clark*, 2016 IL 118845, ¶¶ 46-47. *McGhee* labored under the same kind of misconception.

During the time between *Thompson* and *Clark*, which is when *McGhee* was decided, the State routinely "claim[ed] that the Illinois Supreme Court has limited second-prong plain errors to 'structural errors' requiring automatic reversal, and likewise has limited the class of potential structural errors to the six examples identified by the United States Supreme Court." *People v. Getter*, 2015 IL App (1st) 121307, ¶ 58. Many

appellate court decisions, such as those in *McGhee* and *Spencer*, accepted that proposition and issued opinions predicated on that assumption, which *Clark* later clarified was erroneous. There is no need to continue to build upon a body of law based on a misunderstanding. *See also People v. Sharp*, 2015 IL App (1st) 130438, ¶ 112 (finding, based solely on *McGhee*, that improper polling was not second-prong plain error); (St. Br. 12) *McGhee*'s analysis of second-prong plain error is fundamentally flawed and should be disregarded.

Indeed, plain error review under the substantial-rights prong is not the rarity that the State implies. In fact, as mentioned above, this Court has repeatedly made clear that there is no *de minimis* exception to review under the second prong. *Lewis*, 234 Ill. 2d at 47-49 (the imposition of a $100 street value fine without a proper evidentiary hearing constituted second-prong plain error). This Court has also found second-prong plain error where, for instance, a prosecutor made inflammatory comments (*People v. Johnson*, 208 Ill. 2d 53, 87 (2003)); where there was a judicial absence during a felony jury trial (*People v. Vargas*, 174 Ill. 2d 355, 363 (1996)); where polygraph evidence was admitted (*People v. Gard,* 158 Ill. 2d 191, 205 (1994)); and where the trial court failed to exercise discretion in arbitrarily denying a request for a continuance (*Walker*, 232 Ill. 2d at 131). This Court has additionally stated in dictum that the failure to prove chain of custody is plain error under the second prong. *See People v. Alsup*, 241 Ill. 2d 266, 276-77 (2011). Further, the appellate court has found second-prong plain error where there were effectively only eleven jurors, due to one juror sleeping (*People v. Jones*, 369 Ill. App. 3d 452, 456 (1st Dist. 2006)), and where an alternate juror participated in deliberations, either instead of or in addition to the twelfth actual juror (*People v. Babbington*, 286 Ill.

App. 3d 724, 733-34 (1st Dist. 1997)).

As discussed above, polling errors have been found to be in the category of "[p]lain errors or defects affecting substantial rights." *DeStefano*, 64 Ill. App. 2d at 408. The right to poll the jury has been called an "absolute" right, and a "substantial" right, and a "basic" right. *Id.*; *Rehberger*, 73 Ill. App. 3d at 968-69; *Wheat*, 383 Ill. App. 3d at 237; *Alexander Herron*, 30 Ill. App. 3d at 791. This Court in *Kellogg* remanded for a new trial following improper polling, even though the error was not preserved. 77 Ill. 2d at 530-31 (note that the State in *Kellogg* did not argue forfeiture). Finally, under federal law, polling errors require reversal without regard to prejudice, in spite of the fact that they are not on the list of structural errors. *See Marinari*, 32 F.3d at 1212; *Vollmer*, 1 F.3d at 1522; *Hercules*, 875 F.2d at 418. For all of these reasons, this Court should not hesitate to review this issue under the second prong of plain error.

3. Contrary to the claims of the State and of *McGhee* and its progeny, second-prong plain error does not require a showing of prejudice in addition to the error itself, nor does it apply only to errors that would not have been easily remedied at trial.

The court in *McGhee* and *Flores* also suggested, and the State now argues, that there can be no second-prong plain error where there is no lack of unanimity apparent from the record. (St. Br. 11, 15); *McGhee*, 2012 IL App (1st) 093404, ¶ 30; *Flores*, 2021 IL App (1st) 192219, ¶ 19. That is, the State argues that Brandon cannot show that he was prejudiced by the error. The State compares this case to *Kellogg*, in which one of the twelve jurors expressed ambivalence, while here one of the twelve jurors was not polled. (St. Br. 15) But, of course, in *Kellogg* the only evidence of lack of unanimity came from polling all of the jurors. Had the *Kellogg* trial judge made the same error as the judge in

this case, the record would have contained none of the evidence required by *McGhee* if the unpolled juror happened to be the juror who expressed ambivalence when polled. The *Kellogg* Court recognized that resolving this conundrum was the "very purpose" of polling the jury. *Kellogg*, 77 Ill. 2d 524 at 528. The same is true in *Beasley* and *Bennett*, where one out of the twelve polled jurors expressed ambivalence. *Beasley*, 384 Ill. App. 3d at 1049; *Bennett*, 154 Ill. App. 3d at 476.

Indeed, if the purpose of polling is to allow "an opportunity for free expression unhampered by the fears, errors, or coercive influences that may have dominated the private deliberations of the jury room," it is difficult to imagine what kind of proof of prejudice—beyond the error itself—a defendant could be expected to provide. *See Banks*, 344 Ill. App. 3d at 597-98. Jury deliberations are, by their nature, sealed off from the court and from the world. *See, e.g.*, *People v. Hollahan*, 2020 IL 125091, ¶ 25 (jury deliberations occur only the in privacy of the jury room). The State's proposed showing of proof wrongly places the onus on an ambivalent or dissenting juror to create some kind of disruption in the deliberative process that would be clear in the appellate record. But it is counterintuitive to expect a juror who has been coerced into signing a verdict form he or she disagreed with to interrupt the judge in order to voice a contrary opinion, as "[j]urors ordinarily are loath to interrupt the court's proceedings and to speak unless spoken to." *Light*, 285 App. Div. at 498. The State's argument runs contrary to the "very purpose" of polling, which is to elicit the kind of proof the State claims is lacking. *Kellogg*, 77 Ill. 2d 524 at 528.

The State claims that Brandon speculates that the unpolled juror would have dissented, but that is not his argument. (St. Br. 15) Rather, it is the State that speculates

that the juror, who was erroneously not polled, would have assented in the verdict. We simply do not know what the unpolled juror would have said, and there is "no doubt" that "each juror's signature on a verdict form—standing alone—cannot substitute for an oral poll of the jury in open court." *Marinari*, 32 F.3d at 1212.

Further, the State's argument more broadly misapprehends substantial-rights plain error. Under this theory of plain error, prejudice to the defendant is presumed because of the importance of the right involved; it is not necessary to show additional prejudice. *Herron*, 215 Ill. 2d at 187. For instance, in *Vargas*, this Court found second-prong plain error when the judge was briefly absent from the courtroom during defense counsel's cross-examination in a jury trial. 174 Ill. 2d at 366. The State argued that the error was harmless, as the defendant could not prove that he was prejudiced by the judge's brief absence. *Id.* at 362. This Court found that "prejudice is inherent when felony trials continue in the absence of the presiding judge" and that therefore this Court "regarded any showing of demonstrable prejudice, or lack thereof, to defendant either resulting from, or during, the judge's absence as immaterial to the disposition of this issue." *Id.* at 371.

Similarly, in *Gard*, 158 Ill. 2d at 205, this Court found second-prong plain error after specifically noting that, due to the strength of the other evidence against him, the defendant could not prove that he was prejudiced by the State's erroneous references to polygraph testing. This Court found second-prong plain error, however, because the erroneous admission "compromised the integrity of the judicial system," even if it did not harm the defendant's case. *Id.* Just as in federal law, the violation of the right to poll the jury is a violation of "substantial right," and its violation necessitates a new trial without

an additional showing of prejudice. *See Randle*, 966 F.2d at 1214. The State's demand that Brandon prove prejudice by showing proof of lack of unanimity misunderstands the nature of second-prong plain error.

Next, the State, relying on *Flores*, argues that this was not second-prong plain error because this was "the type of error that could have been quickly and easily addressed and resolved by the trial court if defendant objected or otherwise brought the issue to the court's attention." (St. Br. 13, quoting *Flores*, 2021 IL App (1st) 192219 ¶ 20) However, any plain error analysis at all presupposes the lack of objection. Further, second-prong plain error is based on the seriousness of the error, not the ease with which it could have been remedied, and the State cites no case other than *Flores* suggesting otherwise. Indeed, in *Vargas*, defense counsel could have quickly and easily addressed the problem of the judge's absence during cross-examination by simply pausing and waiting for the judge to return. 174 Ill. 2d at 366. Counsel not only did not do so, but affirmatively plunged ahead. Nevertheless, this Court found second-prong plain error, because the judicial absence was a substantial error. Notably, this Court in *Kellogg* expressed frustration that no objection had been made before the jury was discharged, stating that counsel's "failure to make a timely objection has necessitated a review by the appellate court, a review by this court, and a new trial in the trial court, all of which might have been avoided." 77 Ill. 2d at 530-31. In spite of this, a new trial was warranted. Additionally, the error could have been quickly resolved in the federal cases cited above, yet those courts likewise did not consider that fact a reason to deny the defendant relief. The ease with which an error could have been corrected is simply not part of the plain error analysis.

C. The State's suggestion that defense counsel would engage in improper sandbagging by strategically failing to object is unwarranted.

This Court's frustration in *Kellogg* with defense counsel's failure to object may suggest a concern, echoed by the State, that defense counsel would engage in some kind of unethical sandbagging by purposely failing to object to the discharge of the jury without proper polling. (St. Br. 13-14) The State compares that possibility to the situation in *People v. Radford*, 2020 IL 123975, ¶ 37, in which defense counsel cooperated with the partial closure during jury selection of a courtroom crowded with emotional spectators. This Court found that the partial closure was reasonable and also that the defendant's cooperation in the closure prevented the trial judge from remedying any problem with it. *Id.* This Court suggested that, if such a partial closure *were* second-prong plain error, there could be a problem with defense counsel "potentially remaining silent about a possible error and waiting to raise the issue, seeking automatic reversal only if the case does not conclude in his favor." *Id.*

The situation with polling is different, as both the defendant and the State have an interest in ensuring the verdict is truly unanimous. *See People v. Black*, 367 Ill. 209, 214 (1937) ("The position of state's attorney imposes on that official the obligation to see that every defendant has a just trial."). Here, where one of the jurors was not polled, the State and the defense equally could have and should have perceived the error and remedied it. In *Radford*, by contrast, because defense counsel cooperated with the courtroom closure, the State would have no reason to see that closure as erroneous—and therefore, no reason to object to it or attempt to remedy it; unlike incomplete polling, the closure was not a clearcut error.

Rather, the polling situation is less like *Radford* and more like *Vargas*, 174 Ill. 2d

at 363, the case in which the judge was briefly absent. Judicial absence, like incomplete polling, does not require a judgment call: it is unquestionably erroneous. In both *Vargas* and in this case *either* the State or defense counsel could have brought the error to the trial court's attention, yet neither did. In *Vargas*, this Court did not assume that its finding of substantial-rights plain error would lead to defense counsel attempting to game the system by plunging ahead at trial on the occasional circumstance when a judge left the courtroom; possibly this is because the onus was on both the defense and the State to ensure that a trial did not continue in the judge's absence. Likewise, this Court should not assume that a finding of substantial-rights plain error here would lead to defense counsel intentionally failing to object on the occasional circumstance when there is incomplete polling; as in *Vargas*, the onus would be on both the defense and the State to ensure the polling was complete. Moreover the State's suggestion of sandbagging is "denigratory to the defense bar." *See People v. Sebby*, 2017 IL 119445, ¶ 71. Nothing in the record, or in the State's brief, points to any evidence that trial counsel avoided objecting in order to attempt to obtain relief on appeal.

It should also be stressed that the federal courts do not appear to believe that licensed defense attorneys, as officers of the court, would willingly stand by when an improperly polled jury is discharged in order gain advantage on appeal. Indeed, appellate counsel can find no federal decision raising this specter, in spite of the fact that the law is clear that a polling error results in reversal in the federal courts.

Additionally, the State does not acknowledge the inverse of its sandbagging concern: if there is no second-prong plain error review for polling errors, the trial prosecutor has no incentive to correct such errors in cases that are not closely balanced.

The State suggests that defense counsel would intentionally fail to correct a clear polling error in order to gain advantage on appeal if the error is second-prong plain error; but by the same logic, the State, too, might fail to correct a clear polling error where the defendant would be left without the remedy of second-prong plain error.

D. Other cases relied on by the State are not persuasive or simply not relevant.

While the State relies primarily on *McGhee*, none of the other polling cases it cites warrant reversing the appellate court's decision. The State points to *Sharp*, 2015 IL App (1st) 130438, but that case does not support a different result for two reasons. First, it engaged in no analysis but simply relied on *McGhee*, which, as argued above, was wrongly decided. *Sharp*, 2015 IL App (1st) 130438, ¶ 112. Second, as the appellate court here noted, the *Sharp* appellant argued only that the error showed ineffective assistance of counsel and not second-prong plain error; because the *Sharp* court addressed second-prong plain error *sua sponte*, without the benefit of briefing on the topic, appellate counsel could not even point out the flaws in *McGhee*. *Jackson*, 2021 IL App (1st) 180672, ¶ 33; *Sharp*, 2015 IL App (1st) 130438, ¶¶ 111-13.

The State also claims that the appellate court in *People v. Galloway*, 74 Ill. App. 3d 624 (1st Dist. 1979), "declined to presume error stemming from incomplete jury polling." (St. Br. 11) However, as the State later acknowledges, the court in fact found that the error had been forfeited. *Id.* at 627; (St. Br. 11) As the State does not acknowledge, nothing in the case suggests that *Galloway* considered, let alone rejected, second-prong plain error. *Id.* Rather, the court's remark about the "clear evidence" of the crime suggested that it, at most, considered the error under the closely balanced prong of plain error. *Id.*

Additionally, the State looks to one case from Maryland and one case from California, neither of which is on point. (St. Br. 16, citing *Colvin v. State*, 150 A.3d 850, 856 (Md. 2016); *People v. Anzalone*, 298 P.3d 849, 856 (Cal. 2013)) In *Colvin*, the court found that an alleged polling error was not cognizable under a Maryland law that permitted the State to correct an illegal sentence. *Colvin*, 150 A.3d at 721. The court did not address plain error or any analogous issue. Moreover, the one unpolled juror was the foreperson, who, unlike the unpolled juror here, *did* publicly address the court, by orally announcing the verdict. *Id.* at 722. The trial court thus was able to observe the unpolled juror's tone and demeanor when stating the verdict. Further, after the incomplete polling, all twelve jurors were "hearkened to the verdict," which is one of the accepted methods of demonstrating assent to a verdict under Maryland law. *Id.* at 727. *Colvin* has nothing to do with this case.

Anzalone is likewise not relevant, foremost because there was no request for a jury poll. *Anzalone*, 56 Cal. 4th at 551. Additionally, the *Anzalone* court, like *McGhee* and *Sharp*, looked to the list of six federally recognized structural errors and rejected the appellant's argument because polling errors are not on that list. *Id.* at 554-55. Although *Anzalone* claimed to be interested in how polling errors were considered in federal court, it did not actually cite any federal polling case or acknowledge that polling errors in federal court result in reversal without regard to prejudice. *Id. Anzalone*, then, is both factually dissimilar to this case and analytically flawed.

Indeed, the only cases that are truly relevant to this case are *Kellogg* and the other pre-*McGhee* cases cited above, as well as the analogous federal cases, cases that look to the law surrounding jury polling and not to the unrelated and distinct issue of Rule 431(b)

questions. The State provides no reason for this Court to ignore those cases and to instead base its ruling on unrelated and irrelevant cases.

E. The jury's verdict did not come easily, with long deliberations, multiple questions to the court, and some confusion regarding the signing of the verdict forms.

The State insists that no plain error occurred because the record does not show lack of unanimity. (St. Br. 11-14) As discussed above, the State is incorrect in suggesting that second-prong plain error requires the defendant to prove prejudice beyond the prejudice caused by the error itself. *See Herron*, 215 Ill. 2d at 187; *Vargas*, 174 Ill. 2d at 371. However, the State's claim also glosses over the facts of the jury's deliberations. While the verdict forms contain twelve signatures, the record demonstrates that the jury encountered some difficulty reaching those verdicts. The jurors deliberated for hours, starting at 12:21 p.m. (R. 1782) The parties and the trial court discussed sequestration, and it was decided that if the jurors had not reached a verdict by 9 p.m. they would be allowed to go home and come back the next day. (R. 1794-95) The jury asked for a definition of reasonable doubt, and was told to keep deliberating. (R. 1788) When the jurors asked whether State's exhibit 38, which appeared to be an arrest photo, showed Brandon or his co-defendant, whose case was separated from Brandon's, they were told it was the co-defendant. (R. 1789-90) Later they asked for permission to use an additional jury room to stretch their legs and take a break, and they were given the room as long as they did not talk about the case there. (R. 1790-91) Next, there was some sort of irregular occurrence in which the jury, or some members of the jury, claimed that a verdict had been reached; however the jurors apparently had not signed the forms. (R. 1797) The judge said to the lawyers present, "I don't know. They said they had a verdict. Do you

want me to sign [*sic*] do you have a verdict? If you have a verdict, sign the forms, right? If you have a verdict, have a verdict, sign the forms." (R. 1797) Finally, the jury came out with signed verdict forms, finding Brandon guilty of first degree murder, personally discharging a firearm that caused death, and attempted armed robbery. (R. 1799; Sec. C. 34-36)

Given the prejudice inherent in second-prong plain error, Brandon's argument does not depend on proof of lack of unanimity. But it is certainly notable that the State ignores all of these events during deliberations and instead blithely maintains that there were no indications that the jury may not have been unanimous. (St. Br. 11) In this case, as in any other jury trial, the only way to ensure true unanimity is not by scouring the record to search for clues that may have escaped the confines of the jury room, but rather by "asking each juror individually in open court to answer the question of whether or not the verdict announced was that juror's verdict." *Marinari*, 32 F.3d at 1212.

F. Conclusion.

As the appellate court here noted, the United States Supreme Court recently emphatically confirmed the need for jury verdicts to be truly unanimous. *See Jackson*, 2021 IL App (1st) 180672, ¶¶ 44-46 (citing *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020)). *Jackson* found that *Ramos* revealed "the importance of *each* juror's verdict." 2021 IL App (1st) 180672, ¶ 44 (emphasis added). *Ramos*, in rejecting the ten-to-two verdicts that had previously been permitted in Louisiana, rejected the idea that "breezy cost-benefit analysis" could excuse the need for unanimous juries. *Ramos*, 140 S. Ct. at 1401. Here, the appellate court, relying on *Ramos*, similarly concluded that "the only way to ensure that all 12 jurors adhere to the signatures they affixed to the jury forms is to ask

each one whether he or she remains resolute in the verdict." *Jackson*, 2021 IL App (1st) 180672, ¶ 46. The failure to poll every juror at Brandon's request, then, challenged the integrity of the judicial process and thus amounted to plain error.

The State's argument, relying on *McGhee* and Rule 431(b) cases, fails to consider the nature of the right to poll or the right of jurors to change their minds or express ambivalence in open court. Yet without a complete poll, it is not possible to know whether the verdict forms truly reflected the will of every juror. The relevant Illinois case law and federal case law on jury polling and Illinois plain error precedent all demonstrate that a substantial error occurred in this case, requiring a new trial. Accordingly, this Court should affirm the holding of the appellate court.

CONCLUSION

For the foregoing reasons, Brandon Jackson, defendant-appellee, respectfully requests that this Court affirm the judgment of the appellate court.

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) table of contents and 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 36 pages.

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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- BRANDON JACKSON, Defendant-Appellee.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-18-0672. There on appeal from the Circuit Court of Cook County, Illinois , No. 14 CR 00994 (01). Honorable Paula M. Daleo, 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 February 18, 2022, 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. mail box in Chicago, 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.

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