Appeal No. 23-CF-432

DISTRICT OF COLUMBIA COURT OF APPEALS

STEVEN ROBIN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division

REDACTED BRIEF FOR APPELLANT

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DISCLOSURE STATEMENT

Appellant Steven Robin was represented at trial by Sylvia Smith and Ashley Whidby of the Public Defender Service (PDS). The United States was represented at trial by Assistant United States Attorneys Jacqueline Yarbro and Kathleen Houck. Mr. Robin is represented on appeal by Samia Fam, Shilpa S. Satoskar, and Sarah McDonald of PDS.

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ISSUE PRESENTED

Whether reversal is required where it is undisputed that behind the closed doors of the jury deliberation room, a U.S. Marshal responded to the jury's questions about the key physical evidence in this case—the firearm Steven Robin was charged with possessing—without the knowledge, presence, or input of the trial judge, Mr. Robin, or counsel, and, in doing so, made unilateral decisions affecting the jury's assessment of the evidence, which led the jury to handle the firearm in a different and more dangerous state than it was presented in the courtroom.

STATEMENT OF THE CASE AND JURISDICTION

Steven Robin was charged by indictment with one count of Unlawful Possession of a Firearm (Prior Conviction), D.C. Code § 22-4503(a)(1), one count of Carrying a Pistol Without a License (Outside Home or Place of Business), D.C. Code § 22-4504(a)(2), one count of Possession of a Large-Capacity Ammunition Feeding Device, D.C. Code § 7-2506.01(b), one count of Possession of an Unregistered Firearm, D.C. Code § 7-2502.01(a), and one count of Unlawful Possession of Ammunition, D.C. Code § 7-2506.01(a)(3). R-II at 216.[1] After a four-day jury trial before the Honorable James Crowell, a jury found Mr. Robin guilty of all counts. *Id.* at 582-83.

Fourteen days after the jury verdict, on November 29, 2022, Mr. Robin filed a motion for a new trial alleging violations of Superior Court Criminal Rule 43 and Mr. Robin's Fifth and Sixth Amendment rights during jury deliberations. Judge Crowell ordered the government to respond but did not hold a hearing, and denied the motion on January 9, 2023. R-II at 608, 622.

On April 18, 2023, Judge Crowell sentenced Mr. Robin to an aggregate term of twenty-two months' incarceration and three years' supervised release. R-II at 645. Mr. Robin filed a timely notice of appeal on May 18, 2023. *Id.* at 646.

This Court has jurisdiction under D.C. Code § 11-721(a)(1).

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[1] Citations to "R-I at *" and "R-II at *" refer to the electronic page number of the first and second volumes, respectively, of the record on appeal amassed by the Appeals Coordinator. Citations to "**/**/** at *" designate a particular month, day, year, and page of the transcripts.

STATEMENT OF FACTS

Introduction

The central question for the jury in Steven Robin's trial was whether Mr. Robin had tossed a firearm under a parked car or whether the firearm had been placed there—perhaps planted—by someone else. During deliberations, the jury asked to see the firearm, which had been admitted in evidence. A U.S. marshal brought the gun into the jury deliberation room. While in the deliberation room and without informing the trial court or the parties, the marshal answered the jury's questions about the gun. In the course of this ex parte communication with the jury, the marshal unilaterally decided that the magazine, without ammunition, could be placed in the firearm—contrary to the way the firearm was presented in the courtroom during trial (according to usual practice) and contrary to the way it was found on the scene. A juror then conducted a "demonstration" with the firearm in which she tossed the firearm with the magazine, but no bullets, inserted. The marshal's unilateral response to the jury's questions, which affected the jury's assessment of the evidence, deprived Mr. Robin of his right to a fair trial, and the trial court erred in denying a defense motion for new trial raising this constitutional error.

Evidence at Trial

On the evening of June 8, 2022, four Metropolitan Police Department (MPD) officers with the Violent Crime Impact Team (VCIT), a citywide gun interdiction unit, were on routine patrol in an unmarked sedan in Southeast D.C. 11/10/22 at 141-

42; 11/14/22 at 92-93.[2] Three of those officers—Bryan Madera, Brandon Joseph, and Emily Painten—testified at trial.[3] The officers each testified that as they approached the 4800 block of Benning Road SE, they saw Mr. Robin talking to another person in the parking lot of the Benning Park apartment complex. 11/9/22 at 132-33; 11/10/22 at 146; 11/14/22 at 93. As the unmarked car approached the entrance to the parking lot, but before it turned in, Mr. Robin walked away from the other person and toward a parked SUV that was backed into a parking space in the lot.[4] App'x B at 00:09-14 (parking lot surveillance video, admitted as Gov't Exh. 2).[5] Although Officers Madera and Joseph testified that they saw Mr. Robin, who was not wearing a belt, grab his waistband as he walked toward the SUV, 11/9/22 at

[2] VCIT, formerly called the Gun Recovery Unit (GRU), 11/10/22 at 183, 208; 11/14/22 at 91, was a citywide unit "designed to go out and recover illegal firearms within the District of Columbia," 11/14/22 at 36.

[3] Officer Joseph was sitting in the passenger seat of the unmarked police car, with Officer Painten behind him on the rear passenger side. 11/10/22 at 146; 11/14/22 at 93. Officer Madera was sitting behind Officer Minzak, who was driving the unmarked vehicle but did not testify at trial. 11/10/22 at 146; 11/9/22 at 133.

[4] The officers never looked into who owned the SUV. 11/10/22 at 222-23. The government's failure to obtain any surveillance footage from earlier in the day, which could have shown who else had access to the SUV or may have placed something under it, was a subject of litigation and part of the defense's argument in closing. 11/9/22 at 36-59; 11/15/22 at 35.

[5] Mr. Robin has filed a contemporaneous motion to supplement the record with the surveillance footage, which was admitted as Government Exhibit 2; Officer Madera's body-worn camera footage, which was admitted as Government Exhibit 3; and Officer Joseph's body-worn camera footage, which was admitted as Government Exhibit 6.

134, 177; 11/10/22 at 146, Officer Painten testified that she did not see such a movement, 11/14/22 at 98.

As Mr. Robin passed by the back of the SUV, he briefly squatted. *See* App'x B at 00:14-16. Officer Madera testified that Mr. Robin then "adjusted the front of his waistband as in like fixing his shirt" as he walked away from the SUV and toward the unmarked police car. 11/9/22 at 137. The defense argued that Mr. Robin had stopped to pick up a twenty-dollar bill, which was found in his pocket when he was searched incident to arrest. 11/14/22 at 102; 11/15/22 at 39. Officer Madera, however, "believe[d] because of [Mr. Robin's] characteristics and his actions that he discarded a firearm, so [the officer] immediately exited [the] vehicle and approached [Mr. Robin]." 11/9/22 at 137. Officer Madera grabbed Mr. Robin and wrapped his arms around him in what the officer described at trial as a "bear hug." *Id.* at 169; App'x C at 19:00:25-40 (Officer Madera's body-worn camera (BWC), admitted as Gov't Exh. 3). Officer Painten and another officer grabbed Mr. Robin's arms as Officer Madera bearhugged him. 11/14/22 at 95; App'x B at 00:35-40. Within a matter of seconds, the officers had Mr. Robin in handcuffs, having heard the code word for a firearm from officers who had gone to look under the SUV. 11/14/22 at 95; App'x C at 19:00:49-55.

While Officer Madera went to restrain Mr. Robin, Officer Joseph, along with Nicholas Damron—another MPD officer who had arrived in a second unmarked police car—went toward the parked SUV. App'x B at 00:25-37; 11/9/22 at 177; 11/10/22 at 150. Officer Damron ducked to look under the car from the driver's side and quickly gave the code word for the presence of a firearm, "1-800." App'x D at

19:00:37 (Officer Joseph's BWC, admitted as Gov't Exh. 6). Officer Joseph, who was looking under the SUV from the back, almost immediately echoed, "1-800." *Id.* at 19:00:38; 11/10/22 at 167. Officer Joseph's BWC did not capture any view under the car from that angle, 11/10/22 at 167; App'x D at 19:00:36-39, and Officer Damron's BWC was not on, 11/9/22 at 179. After giving the code word, Officer Damron walked away from the SUV toward another "scene" just up the hill in the parking lot, where officers had stopped a group of people. 11/10/22 at 47, 168.

Officer Joseph, meanwhile, went around from the back of the SUV to the passenger side, because he could not reach the firearm from the back. 11/10/22 at 169. This time, when he ducked to look under the SUV he "us[ed] [his] Body-Worn Camera to show the firearm under the vehicle." 11/9/22 at 145; App'x D at 19:00:47-51. Although he was not authorized to recover firearms and was still wearing the tactical gloves he wore in the car (not clean gloves for handling evidence), Officer Joseph reached under the SUV and grabbed the gun by the magazine. App'x D at 19:00:15-58.

Officer Joseph testified that he grabbed the firearm right away due to what he called the "exigent circumstance[]" of the presence of "a possibly loaded weapon." 11/10/22 at 175, 183-84.[6] He acknowledged, however, that the MPD general order

[6] At the time that Officer Joseph grabbed the gun, there were no civilians near the SUV and multiple officers around—four police cars had arrived in the parking lot by this time. 11/9/22 at 167; 11/10/22 at 185-86. Even after Officer Joseph picked up the gun, the officers did not let people near the scene. Officer Minzak threatened to "pop" people in the face if they approached and repeatedly pushed someone who tried to retrieve Mr. Robin's property. 11/10/22 at 187, 195-96.

governing "Crime Scene Response and Evidence Collection" instructed officers to "secure the scene and make sure the evidence is moved as little as possible," in part to avoid cross-contaminating evidence with DNA or other biological materials. *Id.* at 174-75 (discussing MPD General Order 304.08). He further acknowledged that his unit, VCIT, was required to use crime scene technicians to recover firearms, *id.* at 183-84, and that he was not a crime scene technician, *id.* at 227; 11/14/22 at 71.

Although one of the MPD officers in the parking lot at the time Officer Joseph grabbed the gun—Allorie Sanders—was a certified crime scene technician, Officer Joseph did not seek her assistance and she did not handle the firearm on the scene (though she would later falsely assert in a crime scene evidence report that she was the person who recovered the firearm). 11/10/22 at 154; 11/14/22 at 41, 72-73.[7] Instead, multiple other officers—none of whom were crime scene technicians trained in evidence recovery—participated in bagging the firearm. Officer Painten handed a paper bag to Officer Madera, who opened the bag by sticking his hand inside and swirling his hand around. App'x C at 19:01:03-16. While doing so, Officer Madera was wearing the same tactical gloves he wore when bearhugging

[7] The crime scene evidence report falsely stated that Officer Sanders recovered the firearm and photographed it at the scene. 11/14/22 at 41-42. On cross-examination, Officer Sanders acknowledged that, a few weeks before her testimony in this case, she had admitted on the stand in another trial that she had made false statements in the crime scene report in that case. In that case, as here, she had reported recovering a firearm and photographing it on the scene, even though she had not. *Id.* at 77-79. Even after this issue came to light in that prior case, Officer Sanders told prosecutors in this case that she had recovered the firearm here. She did not realize that she had not personally recovered the firearm in this case until seeing her BWC video during trial. *Id.* at 81-82.

Mr. Robin with his hands on Mr. Robin's body. *Id.* at 19:00:34-40, 19:01:06-16. Officer Joseph then placed the firearm into the paper bag with the magazine still inserted, *id.* at 19:01:18-20, and took it to an MPD station about fifteen minutes away. 11/10/22 at 153-54.

Only at the station was the firearm handed off to the crime scene technician, Officer Sanders. 11/10/22 at 154. Officer Sanders put on "a new pair of gloves out of the box" and took the firearm out of the paper bag. 11/14/22 at 38. She dusted the firearm and magazine for fingerprints, but "there were no fingerprints on the firearm," *id.* at 48, even though Mr. Robin was barehanded on the scene, App'x C at 19:00:30-35.[8] Officer Sanders also swabbed both the firearm and the magazine for DNA by "r[unning] the swab over quite a bit of the gun" to "pick up any potential DNA left behind." 11/14/22 at 50. In swabbing the gun, Officer Sanders paid particular attention to "the areas most likely to be touched," *id.*, including the parts of the magazine that someone would likely touch when loading the gun and that would likely touch someone's body if the gun were in their waistband, *id.* at 74-75.

A forensic DNA analyst tested the firearm swabs and determined that there were three contributors to the DNA on the gun. 11/10/22 at 107. Sixty-seven percent of the DNA mixture found on the firearm was attributed to "contributor one," an unknown individual. *Id.* at 108-10. A buccal swab taken from Mr. Robin matched "contributor two," whose DNA comprised thirty-one percent of the DNA mixture found on the weapon. *Id.* at 108-09. An unknown third individual contributed two

[8] Officer Joseph wore tactical gloves when he picked up the gun. App'x D at 19:00:50-58.

percent of the DNA mixture. *See id.* As to the magazine, the DNA analyst estimated that the swabs included DNA from only two contributors, *id.* at 115, but the sample contained too little DNA to compare to any reference samples, *id.* at 101-02, 115-16. On cross-examination, the defense elicited testimony about how a person's DNA could be transferred to a surface he did not touch, *id.* at 118-26, and defense counsel argued in closing that the officers transferred Mr. Robin's DNA to the firearm when they mishandled the gun, 11/15/22 at 29, 36; *see* 11/10/22 at 118-19 (government's DNA analyst testifying that bearhugging a person and then touching a bag could leave the person's DNA on the bag).[9]

The firearm, magazine, and bullets were admitted as exhibits at trial. 11/10/22 at 158-60, 162.[10] The magazine was not in the firearm while the gun was in the courtroom. *See id.* at 159-60; 11/14/22 at 46-47. When the gun was admitted into evidence, the trial court told the jury that "the U.S. Marshals ha[d] already cleared this weapon," which had "been rendered inoperable." 11/10/22 at 160. The

[9] The defense tied this mishandling of evidence to the "by-any-means-necessary" mentality and aggressive tactics of the VCIT, formerly known as the GRU. 11/15/22 at 19-20, 26, 29-32, 38-40. The GRU came under scrutiny for its aggressive branding a few years before this trial, *see* 11/10/22 at 209-13 (Officer Joseph, a former GRU member, testifying about appearing in a photograph posing with a banner depicting guns, crossbones, and a skull with a bullet hole between the eyes, reading "Gun Recovery Unit" and "[v]est up one in the chamber"), and was the subject of an investigation regarding its practice of "patting people down for no reason" and "telling people to lift up their shirts to show . . . their waistbands," 11/14/22 at 66.

[10] There were fifteen bullets recovered from the firearm—fourteen in the magazine and one in the chamber. 11/14/22 at 53. The firearm was not registered and Mr. Robin did not have a license. 11/10/22 at 137. The parties stipulated that Mr. Robin had a prior conviction for purposes of D.C. Code § 22-4503(a)(1). 11/14/22 at 104.

government presented the firearm to two witnesses. Officer Joseph testified that the firearm was the one he recovered on June 8, *id.* at 158, and Officer Sanders testified that the firearm was the one she processed that day, 11/14/22 at 46. No witness conducted any demonstration with the firearm.

Jury Deliberations

The jury began deliberations at 10:54 a.m. on November 15. 11/15/22 at 47-48. When it started deliberating, the jury had in the jury room all the exhibits that were "admitted into evidence except for the weapon and the bullets." 11/14/22 at 184. The trial court had given the jury the following instruction regarding the firearm, without objection:

> If you wish to examine the weapon please let madam clerk know and we will have a U.S. Marshal come in and bring that to you. For security purposes, the United States Marshal will remain in the jury room while each of you have an opportunity to review the evidence. You should not discuss the evidence or otherwise discuss the case among yourselves while the Marshal is present in the jury room. You may ask to examine this evidence as often as you find it necessary to do so.

Id. at 184-85.

At 12:12 p.m., the jury sent a note asking to see the gun. R-II at 580.[11] The court did not inform either party of this note; defense counsel learned of the note the day after the jury verdict, when the note was filed on the docket. *Id.* at 585, 610. Defense counsel then spoke to jurors about what transpired while the marshal was in the jury room and learned that the marshal had communicated ex parte with the

[11] The jury sent a second note, stating that it had reached a verdict, at 2:45 p.m. R-II at 581.

jurors about the evidence, responding unilaterally to jurors' questions about their assessment of the gun.

Based on the statements of jurors, counsel filed a motion for a new trial on November 29, 2022. Counsel recounted in the motion that "[a] juror recall[ed] asking the marshal if the marshal could put the magazine in the gun," and that, according to the juror, the marshal "responded in the affirmative and proceeded to place the magazine of the firearm into the gun." R-II at 584, 586. The marshal also communicated with members of the jury about whether the bullets could be put into the firearm; the marshal "t[old] [the jurors] that they were able to put the magazine in the firearm but not the bullets." *Id.* at 586. One juror then conducted a "demonstration" in front of the other jurors and the marshal, tossing the firearm—with the magazine, but no bullets, inserted—"to see if they could toss it as far as Mr. Robin in the short time the government claimed he did." *Id.* Counsel alleged that, according to a juror, "[t]he jury initially believed that Mr. Robin bent down too quickly to be able to toss a firearm, but ultimately concluded that he would have been able to do so based on their experiments with the firearm." *Id.* at 587. Further, at least one member of the jury had been "particularly curious about the magazine because she 'wondered how [Mr. Robin's] DNA could be on the firearm but not on the magazine.'" *Id.* at 586.

The defense argued that these events violated Superior Court Criminal Rule 43 and Mr. Robin's Fifth and Sixth Amendment rights, requiring a new trial. In addition to arguing that Mr. Robin and his counsel had a right to be present when the court responded to the jury note asking to see the gun, R-II at 588-89, the defense

argued that the marshal's response to the jury's questions introduced extrinsic evidence, entitling Mr. Robin to a new trial, *id.* at 589-90. The defense pointed out that "the gun and magazine were always separate" during trial, and that the gun "had bullets in it at the time it was recovered." *Id.* at 590. Therefore, the marshal's response to the jury's questions led the jury to view the "evidence in an environment and setting that was both unlike how it was presented at trial and unlike the state it was in at the time it was recovered." *Id.* The defense argued that counsel should have been permitted to argue about the propriety of the jury observing and tossing the gun in that state. *Id.*

The trial court ordered the government to respond. R-II at 608. In its opposition, the government did not dispute the accuracy of the representations in the new trial motion or argue that the court could not rely upon them. Instead, the government accepted as fact that the marshal had engaged in ex parte communications with the jury, that the gun had been altered by the insertion of the magazine but not the bullets, and that a juror had tossed the gun in that state with the marshal present. *Id.* at 611, 616-21. As to the ex parte communications, the government argued that the "marshal's statements did not address the facts or the applicable law and thus did not constitute extrinsic evidence." *Id.* at 617. It further argued that the marshal's responses to the jury's questions "only implicated the safe handling of the firearm once it was properly being inspected by the jury," but failed to specify any "safety protocols" under which the marshal purported to be acting in deciding the state in which the jury could inspect the firearm. *Id.* at 617-18.

The trial court denied the motion for a new trial on January 9, 2023. R-II at 622-32. The court did not hold an evidentiary hearing, and instead assumed that the events occurred as set forth in the defense motion. *Id.* at 623, 629, 631. With respect to the alleged ex parte communications, the court concluded that the marshal's statement "inform[ing] [the jurors] . . . what he could and could not do with the firearm as they examined it" was "for safety reasons" and "parallel[ed] the Court's ministerial function." *Id.* at 631. The court held that the ex parte communications did not warrant a new trial because they did not "touch[] on facts in controversy or law applicable to the case." *Id.*[12]

[12] The trial court rejected the argument that Mr. Robin had a right to be informed of the jury note asking to see the gun, because transmitting the gun to the jury room was a ministerial action executing the procedure outlined in the jury instructions. R-II at 622-29. As to the jury's tossing of the gun, the court ruled that the demonstration fell within the permissible bounds of a jury's examination of properly admitted evidence and did not introduce new or extrinsic evidence. *Id.* at 630. Though the "firearm was not in the exact same state or environment when the jury conducted its demonstrations," the jury did not "shed its collective common sense" and could recognize that "an unloaded firearm in an indoor carpeted room may behave differently than a loaded firearm in an outdoor parking lot." *Id.*

SUMMARY OF ARGUMENT

While deliberating, Mr. Robin's jury asked for guidance in performing its factfinding role. The jury wanted to know how it could evaluate the key physical evidence against Mr. Robin—specifically, whether the magazine and bullets could be loaded in the firearm that Mr. Robin was alleged to have tossed under an SUV. When the firearm was presented in the courtroom, entered into evidence, and transmitted to the jury room at the jurors' request, it contained neither the magazine nor any bullets. When recovered at the scene, in contrast, it contained both. In response to the jury's questions, a U.S. marshal unilaterally decided to tell the jury—without consulting or even notifying the trial judge or the parties—that the magazine, but not the bullets, could be placed in the firearm. That ex parte response to the jury's questions violated Mr. Robin's constitutional rights and affected the jurors' assessment of the key physical evidence as they endeavored to answer the central question at trial: whether, as the government argued, Mr. Robin had the gun in his waistband and tossed it under the car, or whether, consistent with Mr. Robin's theory, he had never touched the gun. The trial judge erred in denying the defense motion for new trial once this ex parte communication came to light after the verdict.

The answer to the jury's questions should have come from the judge, with the presence and input of Mr. Robin and his counsel. But the questions never "even ma[d]e it to the attention of a judge, the defendant, or his counsel." *Euceda v. United States*, 66 A.3d 994, 1007 (D.C. 2013). The absence of any one of these players in handling the delicate matter of communication with a deliberating jury would be reversible error; the absence of all three here "represent[ed] a breakdown of all the

constitutional protections required during the 'crucial stage'" of jury deliberations. *Id.* (quoting *United States v. Workcuff*, 422 F.2d 700, 702 (D.C. Cir. 1970) (per curiam)).

Because the breakdown in the structures protecting Mr. Robin's right to a fair trial implicated the very mechanism of trial by jury, it was a structural error requiring automatic reversal of his convictions. Even if the error is analyzed for prejudicial effect, however, the government cannot show that the violation of Mr. Robin's constitutional rights was harmless beyond a reasonable doubt where the marshal's improper ex parte communication directly concerned and affected the jury's evaluation of the key physical evidence in this hotly contested case and where the jury's questions might have been answered differently had the judge and counsel been informed and included in shaping the response.

ARGUMENT

REVERSIBLE ERROR OCCURRED WHEN A U.S. MARSHAL ANSWERED THE DELIBERATING JURY'S QUESTIONS WITHOUT INVOLVING THE TRIAL JUDGE, MR. ROBIN, OR COUNSEL, AND UNILATERALLY DECIDED TO INSERT THE EMPTY MAGAZINE IN THE FIREARM, AFFECTING THE JURY'S ASSESSMENT OF THAT KEY PHYSICAL EVIDENCE.

When a deliberating jury asks for guidance, the response must come from the judge. That response must be made with the input—and presence—of the defense. "[T]his court has consistently held that '[a] defendant and his counsel have a right to be informed of all communications from the jury and to offer their reactions before the trial judge undertakes to respond.'" *Hallmon v. United States*, 722 A.2d 26, 27 (D.C. 1998) (quoting *Smith v. United States*, 389 A.2d 1356, 1361 (D.C. 1978)). "In this case, as in any case, 'the jury's message should have been answered in open court, and [the defense] should have been given an opportunity to be heard before the trial judge responded.'" *Id.* at 27-28 (quoting *Rogers v. United States*, 422 U.S. 35, 39 (1975)).

"A defendant's right to be present and to have counsel present at trial—and thus the right not to have the trial court communicate ex parte with the jury"—is codified in Superior Court Criminal Rule 43, which guarantees a defendant's right to be present at every stage of trial. *Euceda*, 66 A.3d at 1005-06. Rule 43 "incorporates the protections afforded by the Sixth Amendment Confrontation Clause, the Fifth Amendment Due Process Clause, and the common law right of presence." *Id.* at 1006 (quoting *Welch v. United States*, 466 A.2d 829, 838 (D.C. 1983)). The right to presence is a condition of due process at any stage of the trial

where the defendant's presence would "contribute to the fairness of the proceeding," *Mooney v. United States*, 938 A.2d 710, 721 (D.C. 2007), which includes any response to a substantive jury note, *Euceda*, 66 A.3d at 1005, 1007-08.

The right to presence applies equally when someone *other* than the trial judge responds to a jury's question or when the jury's question is not committed in writing to a note. In fact, this Court has deemed cases of ex parte communication with the jury especially troubling in such circumstances. *See Euceda*, 66 A.3d at 1006-07, 1008 n.20 (finding a constitutional violation of the right to presence where courtroom clerk, rather than trial judge, responded to jury's note, and noting that response by someone other than the judge raised additional constitutional concerns); *Etheredge v. District of Columbia*, 635 A.2d 908, 923 (D.C. 1993) (noting that oral communications between a judge and a deliberating jury are "particularly" likely to "imperil[] . . . the principles of due process" (quoting *Guzzi v. Jersey Cent. Power & Light Co.*, 115 A.2d 629, 634 (N.J. Super. Ct. App. Div. 1955))).[13] The marshal's ex parte communication to the jury in this case was constitutional error requiring reversal.

[13] Notes become part of the record, but a judge can never know the exact content or context of an unrecorded oral communication with a court official. *See United States v. Burns*, 683 F.2d 1056, 1058 (7th Cir. 1982) (noting that oral communication with a deliberating jury "detract[s] from the appearance of justice" and "precludes the parties from making a record . . . , thereby thwarting appellate review"); *State v. Sessions*, 621 N.W.2d 751, 756 (Minn. 2001) (noting that "the lack of a record compounds the lack of confidence society can have in the integrity of the proceedings" and emphasizing the importance of a contemporaneous record of "a stage [of trial] as delicate as communications with the jury . . . during deliberations").

I. THE MARSHAL'S UNILATERAL RESPONSE TO THE JURY'S QUESTIONS ABOUT WHETHER THEY COULD PUT THE MAGAZINE AND BULLETS IN THE FIREARM, WITHOUT THE KNOWLEDGE, PRESENCE, OR INPUT OF MR. ROBIN AND COUNSEL, VIOLATED MR. ROBIN'S CONSTITUTIONAL RIGHTS.

"The deliberations of a jury represent a critical stage of a trial," when the jurors "endeavor, in a confidential setting, to resolve the questions which have been put before them." *Wilson v. United States*, 419 A.2d 353, 355 (D.C. 1980). Deliberations are "the essence of the factfinding function," which the jury must be allowed to "perform without coercion and [with] a strong measure of independence." *Id.*[14] When a deliberating jury has an "inquiry" that "require[s] a judicial response," certain "firmly established" principles govern the handling of the jury's inquiry. *Wilson*, 419 A.2d at 355-56. Critically, "the court should inform the accused and his counsel and permit them to state their position" before "responding to a communication from a jury." *Id.* at 356 (citing *Rogers*, 422 U.S. 35). Any communication to a deliberating jury must then be conducted by the trial court, with the defendant and counsel present. *Hallmon*, 722 A.2d at 27-28. The handling of the jury's inquiry here, which involved neither the judge nor the defense, ran far afield of these longstanding constitutional mandates.

[14] Because it is a cornerstone of our jury system that impartial jurors will deliberate privately among themselves, inquiry into extraneous influences on the deliberative process is an exception to the rule that jurors may not impeach their own verdict. *Khaalis v. United States*, 408 A.2d 313, 359 (D.C. 1979).

A. The jurors' questions about how they could evaluate the evidence required a judicial response, and it was constitutional error for the marshal to rule on the jury's request to load the firearm with the magazine and bullets.

It was constitutional error for the marshal, rather than the judge, to respond to the jury's questions about the evidence.[15] The marshal usurped a judicial function when he answered the deliberating jury's questions, particularly because he made a unilateral ruling on a jury request that called for the exercise of judicial discretion. This action deprived Mr. Robin of his "right to have all critical stages of [his] trial conducted by a person with jurisdiction to preside." *Gomez v. United States*, 490 U.S. 858, 876 (1989).

This Court has made clear that it is improper for a court official to respond unilaterally to a jury's questions. In *Euceda v. United States*, the fact that a clerk, rather than the judge, answered the jury's questions about an element of an offense

[15] In this appeal Mr. Robin does not challenge the trial court's handling of the jury note asking to see the firearm, but rather what transpired after the marshal transmitted the firearm to the jury room. It is worth noting, however, that some courts have disavowed the practice of having court officials bring evidence into the deliberation room altogether due to the risks that ex parte communications will occur, as they did here. *E.g.*, *United States v. Fredericks*, 599 F.2d 262, 266 (8th Cir. 1979) ("Initially we note that requiring a United States Marshal to enter the jury deliberation room for purposes of displaying evidence cannot be condoned. Its use is quite possibly per se reversible error."); *Little v. United States*, 73 F.2d 861, 864 (10th Cir. 1934) ("To permit various persons, under one pretext or another, to be with the jury in its deliberations is to open the door to grave abuse and to strike directly at the heart of the system."); *State v. Pickens*, 916 N.W.2d 612, 618 (N.D. 2018) ("Allowing another person into the jury room to display evidence may influence the jury's decision in unexpected ways not preserved in the record. This type of interaction raises potentially serious concerns about the privacy and integrity of jury deliberations.").

"reinforce[d] [this Court's] conclusion that Mr. Euceda's constitutional rights were violated." 66 A.3d at 1008 n.20 (citing *Gomez*, 490 U.S. at 876). Similarly, in *(Chris) Johnson v. United States*, this Court held that a courtroom clerk's action in telling the jury to rewrite its note "without informing the judge or either counsel before doing so" was erroneous, 804 A.2d 297, 306 (D.C. 2002), and in *Hallmon v. United States*, this Court held that "it was improper for the clerk to respond directly" to the jury's request for a written copy of the instructions, 722 A.2d at 27. *Accord, e.g.*, *Lindsey v. State*, 625 S.E.2d 431, 434 (Ga. Ct. App. 2005) (stating that it would be a "clearly egregious error" for a bailiff to "answer[] [a] jury's question without first presenting it to the judge"); *Young v. State Farm Mut. Auto. Ins. Co.*, 975 S.W.2d 98, 99-100 (Ky. 1998) (holding that bailiff's statement to jurors that they could not receive requested depositions was "patently improper" and "clearly [in] exce[ss] [of] his authority," and cautioning bailiffs to "bring any question to the attention of the court"); *People v. Pegeise*, 600 N.Y.S.2d 26, 28 (N.Y. App. Div. 1993) ("[T]he delegation of the judge's duty to respond to the jury's notes to a court employee . . . deprived the defendant of his right to a trial by jury, supervised by a judge.").

Indeed, communicating with a deliberating jury is a responsibility the trial judge cannot even delegate. *Compare Hallmon*, 722 A.2d at 27 ("Regardless of the reason, it was improper for the clerk to respond directly to the jury's note, and the *trial judge should not have allowed it*." (emphasis added)), *and Foster v. George Washington Univ. Med. Ctr.*, 738 A.2d 791, 798 (D.C. 1999) ("In matters of substance, including the response to virtually any jury note during deliberations, the clerk should not be expected to act as an oral messenger."), *with Dallago v. United*

States, 427 F.2d 546, 553-54 (D.C. Cir. 1969) ("mechanical" process of transmitting admitted exhibits to jury "is fully delegable"). *See also People v. Moyler*, 634 N.Y.S.2d 593, 594 (N.Y. App. Div. 1995) ("[T]he court may not delegate the responsibility of communicating with the jury to non-judicial personnel, and generally may not communicate with the jury through a non-judicial intermediary." (citing *People v. Torres*, 531 N.E.2d 635, 636 (N.Y. 1988))); *Wittmeier v. Post*, 105 N.W.2d 65, 70 (S.D. 1960) ("The trial judge is the only person having authority to act upon or answer requests of the jury . . . ."); *Wheaton v. United States*, 133 F.2d 522, 526 (8th Cir. 1943) ("A bailiff is a mere custodian of the jury and should not be used or permitted by the court to convey to the jury any instructions or directions as to the merits of the case under consideration or as to how the jury may consider the issues presented."); *State v. Merricks*, 831 So. 2d 156, 160 (Fla. 2002) ("While it may be tempting for a bailiff to answer the jurors' requests directly, the efficient administration of justice demands that the bailiff not act on requests related to the case except to communicate the jurors' requests to the court." (quoting *Thiefault v. State*, 655 So. 2d 1277, 1279 (Fla. Dist. Ct. App. 1995))).

There are multiple reasons for the rule that the response to a question from a deliberating jury must come from the judge. For one, there is a risk of miscommunication in any communication, particularly at the critical moment when a jury is seeking guidance or approval in its deliberative process. *See Roberts v. United States*, 213 A.3d 593, 598 (D.C. 2019) ("[T]he trial court must communicate with the jury with precision and care during deliberations . . . ."); *Foster*, 738 A.2d at 796 ("[T]he judge's decision to have the clerk address the jury created a risk of

miscommunication even of as seemingly uncomplicated a directive as 're-write the note.'"); *see also Lowrey v. State*, 197 P.2d 637, 652 (Okla. Crim. App. 1948) ("[P]rohibition against communication with the jury by . . . court officials . . . does not mean by the spoken or written word only, for we will take judicial knowledge of the fact that communication may be had by facial expression, motions or signs.").

Relatedly, there is a risk that talking to jurors about their assessment of the evidence will affect the weight they assign to that evidence. Although jurors routinely and permissibly make decisions about how to assess the evidence, non-jurors may not make or affect those decisions without the protections present in open court. When jurors ask for outside help or approval regarding their assessment of the evidence, care must be taken to ensure that the response will not create an extraneous influence on the jury or invade its factfinding role. *See, e.g.*, *People v. Flores*, 725 N.Y.S.2d 655, 656 (N.Y. App. Div. 2001) (new trial required where "court officer usurped the court's function by permitting the jury to believe that it could allow one of [its] members to translate [a] letter" that had been admitted in evidence); *State v. Moore*, 228 P.2d 137, 141 (Wash. 1951) (holding that jury's request for a magnifying glass should have been "conveyed to the judge for appropriate instructions" and noting that different considerations apply when a juror, as opposed to a bailiff, brings a magnifying glass into the deliberation room (distinguishing *State v. Everson*, 7 P.2d 603 (Wash. 1932))). Only the judge is in the position to navigate and avoid these risks. Therefore, the response to the jury's questions about the firearm had to come from the judge, not the marshal.

The fact that the marshal not only communicated to deliberating jurors but ruled on their requests regarding the firearm—an action that required the exercise of judicial discretion—only adds to the gravity of the constitutional error. *See Commonwealth v. Bacigalupo*, 731 N.E.2d 559, 564 (Mass. App. Ct. 2000) (noting that a jury note is "of legal significance" when it "require[s] the judge to exercise her discretion"); *see also Foster*, 738 A.2d at 796, 798 (noting "the danger, in all but strictly ministerial matters, of the court speaking to the jury indirectly through the clerk," and implicitly concluding that even the "seemingly uncomplicated" act of telling jurors to "re-write the[ir] note" was not a "strictly ministerial matter"); *United States v. Holton*, 116 F.3d 1536, 1545-46 (D.C. Cir. 1997) (emphasizing, in finding no constitutional violation, that there was no evidence suggesting that law clerk who conducted an audio playback pursuant to procedures previously accepted by parties "made independent decisions about whether or how to replay tapes"). When the marshal ruled on the jury's requests to insert the magazine and bullets, he usurped a judicial function and deprived Mr. Robin of his right to have that "discretionary decision [made] by a judge," *Euceda*, 66 A.3d at 1008.

The trial judge, in exercising his discretion, could have answered the jurors' questions in multiple different ways. *See* Robert M. Jarvis, *A Primer on the Use of Dangerous Trial Exhibits*, 37 Am. J. Trial Advoc. 519, 525 (2014) ("By their very nature, dangerous exhibits [such as firearms] provoke both curiosity and apprehension. Therefore, care must be taken in how, when, and where dangerous exhibits are presented to the jury."). For example, the judge might have determined that putting the magazine in the gun (for the first time since trial began) would be

unacceptably prejudicial because it would increase the emotional potency of having a firearm in the jury room, or because it would change the firearm from its state in the courtroom and on the scene. *Cf., e.g.*, *United States v. Mueller*, 405 F. App'x 648, 651 (3d Cir. 2010) (noting that "other appropriate factors" in addition to safety might have motivated judge's decision not to allow jurors to hold an evidentiary firearm); *People v. Dean*, No. 4-22-0468, 2023 WL 6580729, at *16 (Ill. App. Ct. Oct. 6, 2023) (concluding that it was appropriate for trial judge to consider, in making decision as to whether and how jurors could evaluate a firearm in the jury room, what the jurors wanted to do with the gun and whether it could be accomplished safely).[16] Or, the judge might have determined that any such evaluation of the weapon should happen in open court. *Cf., e.g.*, *Commonwealth v. Reed*, 990 A.2d 1158, 1171 (Pa. 2010) ("[T]he better practice is to confine any necessary examination of firearms by jurors to the courtroom."). Perhaps the judge would have told the jurors that the magazine could be inserted, but that they should be mindful of the differences between the firearm in that state and its condition on the scene. As these possibilities illustrate, "the various elements of the problem" raised by the jury's questions about inserting the magazine and the bullets "d[id] not preordain a single permissible conclusion," but rather called for the exercise of discretion. *(James) Johnson v. United States*, 398 A.2d 354, 361 (D.C. 1979).

[16] The judge could also have considered arguments about whether seeing the process of loading the magazine into the gun—an action no witness performed or described during trial—could have given the jurors extrinsic information, which Mr. Robin was unable to test or refute, about the likelihood that DNA or fingerprints would get on the magazine while loading it.

The trial court therefore erred in characterizing the marshal's action as the exercise of a "ministerial function," R-II at 631. *See Ministerial*, Black's Law Dictionary (12th ed. 2024) ("Of, relating to, or involving an act that involves obedience to instructions or laws instead of discretion, judgment, or skill; of, relating to, or involving a duty that is so plain in point of law and so clear in matter of fact that no element of discretion is left to the precise mode of its performance <the court clerk's ministerial duties include recording judgments on the docket>."). *Compare Dallago*, 427 F.2d at 553-54 ("mechanical operation of transmitt[ing]" exhibits to jury room after decision to provide the exhibits has been made by judge with notice to counsel is "ministerial"), *with id.* at 553 ("examination [of documents] in the jury room during deliberations is a matter within the sound discretion of the trial court," and defense counsel must be apprised of court's decision "so that timely objections and requests for appropriate instructions may be made"), *and Foster*, 738 A.2d at 798 (telling jury to rewrite note was not a "strictly ministerial" action).

If the trial court thought the decision about the firearm was ministerial or could be delegated to the marshal because it involved safety—setting aside that the marshal's decision regarding the magazine undermined, rather than facilitated, safe handling of the weapon—this was error. Judges may not delegate safety questions to marshals when those questions implicate a defendant's rights. *Cf. De Beárn v. United States*, 237 A.3d 105, 109-10, 109 n.7 (D.C. 2020) (collecting cases holding that trial judges may not unquestioningly defer to marshals regarding shackling in the courtroom); *Cooley v. State*, 867 A.2d 1065, 1067 (Md. 2005) ("Final determinations of what measures constitute appropriate courtroom security are

decisions that rest entirely in the discretion of the trial judge and such ultimate decisions normally may not be delegated or abrogated to law enforcement officers.").[17] Although the trial judge could have considered the marshal's expertise in the safe handling of firearms in deciding whether the magazine could be inserted, a judge is not *required* to let a jury insert a magazine in a firearm when a marshal says it is sufficiently safe. *Cf. Lemons v. Skidmore*, 985 F.2d 354, 358 (7th Cir. 1993) ("The judge may not delegate his discretion to another party. While he could have consulted . . . court security officers, and listened to their opinions and the reasons in support of them, he had to consider all the evidence and ultimately make the decision [regarding shackling] himself."). There were other factors to consider, and other reasons a judge might have denied the jury's request to insert the magazine even if it could be done safely. *See Mueller*, 405 F. App'x at 650-51 (rejecting appellant's argument that the trial court "had no legitimate reason for refusing to provide the jury with full access to the firearm as it requested" when the gun "had been secured and posed no safety threat" because "other appropriate factors" aside from safety might have motivated the judge's denial of the request). Therefore, even if the trial judge would have simply deferred to the marshal in resolving the jury's questions in the first instance, this would have been a "[f]ailure to exercise choice in a situation calling for choice," which "is an abuse of discretion whether the cause is ignorance of the right to exercise choice or mere intransigence." *(James) Johnson*,

[17] Nor was this a "safety" question necessitating an immediate response. The marshal could have told the jury to put its questions in a note, then conveyed that note to the trial judge, taking the firearm out of the jury room with him when he left.

398 A.2d at 363. The "absence of any discretionary decision by a judge," *Euceda*, 66 A.3d at 1008, violated Mr. Robin's constitutional rights.

B. The complete exclusion of Mr. Robin and his counsel from the process of responding to the jurors' questions about the evidence violated Mr. Robin's constitutional rights.

Mr. Robin's constitutional rights were further violated because he and his counsel were cut out entirely from the process of responding to the deliberating jury's questions about its assessment of the evidence. The wholesale exclusion of the defense violated Mr. Robin's constitutional right to counsel and his constitutional right to presence, which includes the right to be informed of any communications from the jury, *Euceda*, 66 A.3d at 1013; *Hallmon*, 722 A.2d at 28, the right to be present when a response is given to the jury, *Harris v. United States*, 489 A.2d 464, 467 (D.C. 1985), and the right to be involved in the formulation of that response, *Euceda*, 66 A.3d at 1013; *Hallmon*, 722 A.2d at 28.

This Court has repeatedly held that communication from a court official in response to a question or request from a deliberating jury, without the input or presence of the defendant or counsel, violates the defendant's constitutional right to presence. In *Winestock v. United States*, the trial judge responded ex parte to jury notes requesting (1) a "[t]ranscript of the first officer's report or description of the first robbery" and (2) "Mr. Winestock's statement on the night of arrest." 429 A.2d 519, 528 (D.C. 1981). The trial court responded in writing, telling the jury that no such documents were admitted in evidence. *Id.* This Court held that the trial judge's communication to the jury was constitutional error because "[Mr. Winestock] and

his counsel were not in the courtroom when the trial judge received or responded to the jurors' notes" and the defense was not "accorded the opportunity to suggest what the judge's responses to the notes should be." *Id.* at 528-29.

Then, in *Euceda*, this Court held that "Mr. Euceda was deprived of his constitutional right to 'the presence of defense counsel and the accused at all critical stages of the prosecution'" where "a clerk received and responded to [a jury note asking questions about an element of one of the charged offenses] without alerting Mr. Euceda or his counsel." 66 A.3d at 997 (quoting *United States v. McCoy*, 429 F.2d 739, 742 (D.C. Cir. 1970)). Because excluding the defense from the response to a substantive jury note "implicates important rights," the errors in handling the jury's inquiry constituted "a clear violation of Mr. Euceda's constitutional rights" and an "obvious" error. *Id.* at 997, 1008. As in *Winestock*, the Court in *Euceda* emphasized the importance of affording the defense the "opportunity to shape the court's response." *Id.* at 997, 1013.

This Court followed *Euceda* in *Roberts v. United States*, which did not involve a jury question about the applicable law but instead addressed a jury note that indicated the numerical breakdown of the jurors' votes. 213 A.3d at 594-95. Upon "realizing that [the note] contained a numerical breakdown of how the jury was voting," the trial judge stopped reading the note and refused to let the defense review it. *Id.* at 594-96. Applying *Euceda*, *Roberts* held that it was constitutional error to withhold the note from the defense, even though the judge was "acting from the best of motives" and even though the defense was aware of the existence of the note and able to argue about how the judge should handle the situation. *Id.* at 595-97. As the

Court observed, "counsel has a critical role to play in advocating for a response to a jury note that is most favorable to his client," and Mr. Roberts's counsel was "clearly hamstrung in his ability to fulfill that role" where he did not know what the note actually said. *Id.* at 598.[18]

Mr. Robin's presence was constitutionally required here, just as the defendants' presence was required in *Winestock*, *Euceda*, and *Roberts*, because "a fair and just hearing [was] thwarted by his absence." *Euceda*, 66 A.3d at 1005-06 (quoting *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (per curiam)). "[W]henever [the defendant's] presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge," his involuntary absence violates due process. *Gagnon*, 470 U.S. at 526 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934)). Where counsel is also absent, the defendant has been deprived of his Sixth Amendment right to the assistance of counsel as well. The

[18] In other cases, this Court has determined that an ex parte response to a jury inquiry was error without expressly deciding whether the error was constitutional. *See, e.g.*, *(Chris) Johnson*, 804 A.2d at 302-03, 306-07 (holding that courtroom clerk's suggestion to jury to rewrite note so as not to reflect verdict was error, but harmless where the jury sent a second, "substantially similar" note that the defense was able to review); *Hallmon*, 722 A.2d at 27-28 (holding that clerk's response to jury note asking for copy of jury instructions was error, but harmless under either test because clerk's response to jury read, "No. However, any part of the instruction can be re-read to you in open court at your request."—and "no such request was forthcoming"); *Hazel v. United States*, 599 A.2d 38, 46-47 (D.C. 1991) (assuming that trial court constitutionally erred in going forward with reinstruction in defendant's absence, because features including fact that defendant "heard the trial judge's intention to reinstruct [the jury] . . . and had ample opportunity to assist his counsel in any strategic response to the [jury's] request for reinstruction" rendered error harmless beyond a reasonable doubt).

complete lack of involvement of both Mr. Robin and his counsel in the process of communicating with the jury was constitutionally fatal here. *Euceda*, 66 A.3d at 1007-08.

Mr. Robin's right to help "shape the court's response" to the jury's questions, *Euceda*, 66 A.3d at 997, was particularly important given the range of possible responses. *See supra* pp. 23-24; *Bacigalupo*, 731 N.E.2d at 564 (noting that "[t]he constitutional right to the assistance of counsel is of particular importance when a judge receives a communication . . . from a deliberating jury" that "require[s] the judge to exercise her discretion"); *cf. Mooney*, 938 A.2d at 717-21 (defendant "can contribute to the fairness of the proceeding," and thus "has a due process right to be present," when trial court has any measure of discretion in a resentencing proceeding). The parties' input could have focused the judge's mind on a variety of considerations—juror safety, prejudice to Mr. Robin, similarity to conditions in the courtroom and on the scene, to name a few—that might have affected the court's response to the jury's questions. *See* Jarvis, *supra*, at 522-23 (noting the complexity involved in ensuring that a "dangerous exhibit" is safe without affecting its integrity, and stating that "an agreement should be reached with opposing counsel and approved by the court" before changes are made to a dangerous exhibit); *cf., e.g.*, *Dean*, 2023 WL 6580729, at *16 (trial court "listen[ed] to suggestions" about how jury's requests to view firearm could be accomplished safely). But the defense had no opportunity to present its position on the proper response to the jurors' questions about their evaluation of the firearm, an opportunity that was critical to Mr. Robin's "opportunity to defend against the charge." *Snyder*, 291 U.S. at 105-06; *Roberts*, 213

A.3d at 598 (recognizing counsel's "critical role . . . in advocating for a response to a jury note that is most favorable to his client").

Mr. Robin's presence was also necessary to maintain the fairness of the proceedings because both a defendant and the public may justifiably lose confidence in the fairness and outcome of a trial when the jury discusses the evidence with a non-juror in secret. The right to presence exists in large part to "protect[] the integrity and reliability of the trial mechanism" and "prevent the loss of confidence in courts as instruments of justice which secret trials would engender." *Heiligh v. United States*, 379 A.2d 689, 693 n.7 (D.C. 1977) (quoting *United States v. Gregorio*, 497 F.2d 1253, 1258-59 (4th Cir. 1974)).[19] The complete exclusion of the defense from the critical stage of trial when the jury asked, and received an answer to, its questions about how it could assess the evidence violated Mr. Robin's constitutional rights.

[19] This sense of unfairness may be especially acute when the jury's ex parte, case-related communication is with a United States marshal in a case prosecuted by the United States. *Cf. People v. Henderson*, 92 N.E.3d 501, 512 (Ill. App. Ct. 2017) ("[W]e can say with absolute certainty that allowing the jury to review evidence in the courtroom during deliberations and only in the company of an employee of the State's Attorney's office and a court bailiff rendered defendant's trial 'fundamentally unfair' and 'an unreliable means of determining guilt.'" (quoting *People v. Thompson*, 939 N.E.2d 403, 410 (Ill. 2010))).

II. THESE ERRORS REQUIRE REVERSAL.

A. The breakdown in the proper handling of the jurors' questions about how they could handle the key physical evidence affected the structure in which the trial proceeds.

The marshal's response to the jury's questions about the key physical evidence during the "critical stage" of jury deliberations, *Wilson*, 419 A.2d at 355, without the knowledge or input of the judge, Mr. Robin, or his counsel, was a structural error requiring reversal. Courts have pronounced structural error where the trial judge was excluded from the process of responding to deliberating jurors' questions but the defense was involved, *e.g.*, *Riley v. Deeds*, 56 F.3d 1117, 1120 (9th Cir. 1995) (structural error where "no judge presided and no judicial discretion was exercised" in responding to jury's request for a readback of testimony, but defendant and counsel were present for readback), and where the judge handled the response but did not include the defense, *see Euceda*, 66 A.3d at 1006 n.17 (collecting cases, including *French v. Jones*, 332 F.3d 430 (6th Cir. 2003)). Here, *neither* the judge nor counsel was involved. In the "structural vacuum" that occurred in this case, there was a "breakdown in the construct of the trial, a structural collapse so severe that its effect on the trial cannot be 'quantitatively assessed in the context of the other evidence presented.'" *Riley*, 56 F.3d at 1120-21 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991)). Outright reversal is therefore required.

The principle that jurors will deliberate only among themselves, with any questions about the case being directed to the trial judge, is fundamental to the system of trial by jury, supervised by a judge. Cutting out the judge from the delicate,

critical stage of responding to a deliberating jury's questions is a "structural defect affecting the framework within which the trial proceeds." *Fulminante*, 499 U.S. at 310; *accord Riley*, 56 F.3d at 1119-22 (holding, where jury requested a readback of a witness's testimony and judge's law clerk had the court reporter read the testimony, that "the trial judge's absence during the readback . . . , coupled with the judge's failure to rule upon the jury's request for the readback, his failure to exercise any discretion over what testimony would be read, and his unavailability during the proceeding was structural constitutional error which requires automatic reversal of Riley's conviction"); *People v. Ahmed*, 487 N.E.2d 894, 895 (N.Y. 1985) ("The failure of a judge to retain control of deliberations, because of its impact on the constitutional guarantee of trial by jury, also implicates the organization of the court or the mode of proceedings prescribed by law . . . ."); *id.* at 897 ("[A]t least two of the jury's notes appear not to have been answered by or even called to the attention of the trial judge, which itself would constitute grounds for reversal."). This deprivation of Mr. Robin's "right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside" was structural error. *Gomez*, 490 U.S. at 876 (structural error where a magistrate, rather than a judge, presided over voir dire) (cited in *Euceda*, 66 A.3d at 1008 n.20).

Moreover, the absence of counsel during a "critical stage" of trial—that is, one holding "significant consequences for the accused," *Bell v. Cone*, 535 U.S. 685, 695-96 (2002)—is structural error requiring automatic reversal. *United States v. Cronic*, 466 U.S. 648, 659 (1984). Communicating with a deliberating jury in response to its questions is a "critical stage" of trial. *Musladin v. Lamarque*, 555

F.3d 830, 840-43 (9th Cir. 2009) ("[D]efense counsel plays a crucial role in formulating *any* mid-deliberation communication to the jury by the trial judge . . . ."); *see Euceda*, 66 A.3d at 1007 n.19, 1010 (describing deliberations as a "crucial" and "critical" stage); *Wilson*, 419 A.2d at 355 ("The deliberations of a jury represent a critical stage of a trial."). "The uncertainty of the prejudice [Mr. Robin] suffered because he was not represented by counsel during this critical stage of his trial makes the outcome of his trial unreliable." *French*, 332 F.3d at 438 (structural error where defendant's attorneys "did not have an opportunity to respond to the jury's note" and were not "present when the trial judge gave [a] supplemental instruction" in response to the note).

Because a mid-deliberations communication to the jury occurred without any involvement from the judge or Mr. Robin or his counsel, Mr. Robin's convictions must be reversed outright.

B. The government cannot show that the errors in handling the response to the jury's questions were harmless.

Even if the Court determines that the mishandling of the jury's questions is amenable to harmlessness analysis, the government cannot show that the error was harmless. Because the marshal's unilateral response to the jury's questions was an error of constitutional proportions, this Court's assessment of harm is governed by the constitutional harmless error analysis articulated in *Chapman v. California*, 386 U.S. 18 (1967). *Euceda*, 66 A.3d at 1007-08 (holding, where appellant did not argue structural error, that "the *Chapman* standard governs" when "a substantive jury note . . . fail[s] to even make it to the attention of a judge, the defendant, or his

counsel"). Under this standard, Mr. Robin's convictions can be upheld only if "the guilty verdict actually rendered in this trial was surely unattributable to the error." *Ellis v. United States*, 941 A.2d 1042, 1049 (D.C. 2008) (emphasis omitted) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)). But even under the *Kotteakos* standard, the government cannot show "that the judgment was not substantially swayed by the error." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

Whether Mr. Robin tossed the gun was the central, dispositive issue at trial, and the government's case had serious weaknesses. No witness saw Mr. Robin with a gun or saw him toss something under the car. The government showed the jury surveillance footage of the moment that it contended Mr. Robin had tossed a gun, but the video did not show Mr. Robin tossing anything. And although Mr. Robin was barehanded at all relevant times, including when the government claimed he had handled the gun, his fingerprints were not on it. The fact that Mr. Robin's DNA was on the gun was consistent with both the prosecution and defense theories. Mr. Robin was not the primary contributor of DNA; someone else's DNA was on the gun in much greater quantity. And the defense offered a compelling explanation, supported by video showing how the officers handled the gun and expert testimony on DNA transfer, for the presence of Mr. Robin's DNA: the officers' mishandling of the gun on the scene, after touching Mr. Robin, transferred Mr. Robin's DNA to the gun.

The jury's desire to see the gun illustrates that the jury did not think the surveillance footage showing Mr. Robin squatting near the car—for which the defense had offered a plausible explanation unrelated to a firearm—resolved the question of Mr. Robin's guilt. *See Barron v. United States*, 818 A.2d 987, 993 (D.C.

2003) (where defense theory was that backseat passenger was the shooter and jury requested to view defendant's car, it was "logical to infer that the jury was still questioning whether someone else could have actually fired the shots from the backseat"). The jury's questions about inserting the ammunition and magazine, on which no fingerprints or identifiable DNA could be found, make clear that examination of the firearm with the magazine inside was important to the jury's deliberations and could have affected its verdict. *United States v. Santana*, 175 F.3d 57, 67 (1st Cir. 1999) ("[B]ecause the jurors specifically asked to observe Santana without his headphones, they obviously deemed such evidence important to their deliberations."); *United States v. Luffred*, 911 F.2d 1011, 1015 (5th Cir. 1990) ("That the jury specifically called for the chart satisfies the requisite proof of prejudice. The jury deemed it of value in its deliberations."). Even without considering the jurors' statements to this effect, *see, e.g.*, R-II at 586 ("[The jurors] wanted to see if they could toss [the firearm] as far as Mr. Robin in the short time the government claimed he did."); *id.* ("A juror was particularly curious about the magazine because she 'wondered how [Mr. Robin's] DNA could be on the firearm but not on the magazine.'"), it is apparent that the jury wanted to examine the gun in that state to test the government's theory that Mr. Robin tossed it, or to see how it was possible that Mr. Robin's fingerprints and DNA would not have ended up on the magazine.

The government cannot show that the ex parte communication was harmless because the marshal's unilateral decision to insert the empty magazine directly

affected the jury's assessment of the key evidence in the case.[20] The marshal's decision could have given the jury information about how a magazine is inserted—which was relevant to questions about the lack of identifiable DNA on the magazine—that the jury did not get during trial. *See Hill v. United States*, 622 A.2d 680, 685 (D.C. 1993) ("[C]ourts have been unwilling to ignore the real possibility of prejudice where [an] improper contact furnished [a] juror with 'crucial extra-

[20] In denying the new trial motion, the trial court incorrectly characterized the marshal's communication to the jury as one that "d[id] not rise to the standard of touching on facts in controversy or law applicable to the case," citing *Rushen v. Spain*, 464 U.S. 114, 121 (1983) (per curiam). R-II at 631. To the contrary, the ex parte communication here was directly material to the central fact in controversy—whether Mr. Robin tossed the gun that was found under the SUV. *Rushen*, in contrast, involved a (pre-deliberations) communication on a subject attenuated on multiple levels from any fact at issue in the trial. During the state-court trial in *Rushen*, one of the defense witnesses identified a Mr. Pratt as having been involved in an alleged police plot leading to the arrest of the defendant, Mr. Spain; the prosecution sought to impeach that defense witness by introducing evidence that Mr. Pratt was in custody for a 1968 murder at the time. 464 U.S. at 115-16. A juror, realizing that the 1968 murder was the murder of her childhood friend, went to the judge's chambers to tell the judge of her acquaintance with Mr. Pratt's murder victim, while assuring the judge that this would not affect her disposition of the case. *Id.* at 116. The government conceded that the ex parte communication was federal constitutional error, but the trial court concluded that Mr. Spain was not prejudiced, and the state appellate court agreed. *Id.* at 116-17, 117 n.2. The U.S. Supreme Court reviewed the grant of a writ of habeas corpus based on these events and, in that posture, applied a "presumption of correctness" to the state courts' findings about the effect of the ex parte communication. *Id.* at 120. The per curiam *Rushen* majority found the state courts' conclusion that Mr. Spain was not prejudiced adequately supported, noting that "[t]he 1968 murder was not related to the crimes at issue in [Mr. Spain's] trial" and that Mr. Pratt, who was "not connected to any of the offenses for which [Mr. Spain] was convicted[,] . . . did not testify at the trial." *Id.* There was no such attenuation here, where the jury's questions and the marshal's response concerned the key physical evidence and the very question at issue at trial.

judicial information' or information 'concern[ing] the primary factual issue before the jury.'" (citation omitted) (first quoting *United States v. Butler*, 822 F.2d 1191, 1196 (D.C. Cir. 1987); and then quoting *United States v. Delaney*, 732 F.2d 639, 642 (8th Cir. 1984))). The marshal's decision also led the jury to conduct an attempted reenactment of the government's version of events under conditions that did not match either the conditions in the courtroom (where the magazine was never in the firearm) or the conditions as they would have been on the scene (where the firearm was loaded with fifteen bullet cartridges).

Because the marshal's answer to the jury's questions shaped the conditions under which the jury conducted its demonstration, the government cannot show that the error did not affect the verdict. First, take the fact that the marshal's decision altered the firearm from its condition on the scene. The serious risk that this change could have affected the conclusions the jury drew from the evidence is apparent from cases addressing the use of demonstrative evidence in the courtroom, in which courts recognize that even relatively minor differences may render a demonstration unacceptably prejudicial. *See* 2 McCormick on Evidence § 217, Westlaw (database updated July 2022) (noting that demonstrations in the courtroom are "subject to careful scrutiny by the court to insure [their] substantial similarity to the out-of-court events"); *Jackson v. Fletcher*, 647 F.2d 1020, 1027 (10th Cir. 1981) ("In many instances, a slight change in the conditions under which [an] experiment is made will so distort the result as to wholly destroy its value as evidence, and make it harmful, rather than helpful." (quoting *Navajo Freight Lines v. Mahaffy*, 174 F.2d 305, 310

(10th Cir. 1949))).[21] Second, the marshal's decision changed the firearm from its condition in the courtroom. This change could also have affected the jury's decision.

[21] In commenting on the jury's demonstration, the trial judge stated that "[a] jury does not shed its collective common sense and ability to interpret that an unloaded firearm in an indoor carpeted room may behave differently than a loaded firearm in an outdoor parking lot," citing *United States v. Abeyta*, 27 F.3d 470, 477 (10th Cir. 1994). R-II at 630. But this language addresses circumstances in which courts learn after the verdict that jurors decided among themselves to attempt a demonstration "in the privacy of the jury room," as in *Abeyta*, 27 F.3d at 477. In such circumstances, courts will—largely out of respect for the independence of the jury in its factfinding role—give a measure of leeway to the jury's manner of scrutinizing the evidence. But that is not what happened here. Unlike the jury in *Abeyta*, which acted independently in evaluating the evidence, the jury here did not decide on its own how to evaluate the firearm; it asked the marshal for help or permission. When a court official facilitates the jury's evaluation of evidence in a new state, the result is different. *See, e.g.*, *People v. Andrew*, 549 N.Y.S.2d 268, 269-70 (N.Y. App. Div. 1989) (reversible error where deputy sheriff who brought evidentiary firearm into jury room authorized removal of trigger guard that had been on firearm in courtroom and held firearm while juror test-fired it); *Flores*, 725 N.Y.S.2d at 656 (holding that new trial was required where court officer "permitt[ed] the jury to believe that it could allow one of [its] members to translate [a] letter" admitted in evidence); *Taylor v. Commonwealth*, 17 S.E. 812, 816 (Va. 1893) (holding that post-verdict discovery that jury had taken apart an evidentiary firearm in the deliberation room did not require reversal, but suggesting that the result would be different if the trial court had told the jury how it could "look at, examine, or consider the gun"); *cf. Pease v. State*, 214 P.3d 305, 310 (Alaska 2009) (Eastaugh, J., dissenting from dismissal of petition for hearing as improvidently granted) (noting that jurors' "assum[ption] that [their out-of-court experiment] had been permitted by the bailiff or the trial judge" likely "heightened [jurors'] willingness to give [the experiment] weight"). Here, if the jury's questions had gone to the judge in the first instance, the judge might have decided that the firearm evidence could not be altered in any way, or, if he had allowed the empty magazine to be loaded into the gun, he might have decided that an instruction about the altered state of the firearm would be appropriate. The presumption that jurors will exercise common sense does not negate the utility of cautionary instructions. *Cf., e.g.*, *Lloyd v. United States*, 64 A.3d 405, 410 (D.C. 2013) ("When discussing the use of photographs as demonstrative evidence, we have

With the magazine inserted and the firearm thus *closer* to its condition on the scene (though still materially different from that condition), the jury might have been less mindful of the differences in the firearm's condition, or taken any conclusions drawn from its demonstration more seriously, than if it had been considering the firearm as it was presented in the courtroom. Had the jury's questions about inserting the magazine and the bullets been conveyed to the trial court and the parties, the defense would have weighed in not only on whether this should be allowed but also on whether, if the judge determined it should be allowed, the jurors needed an instruction or reminder about the differences between the state of the firearm on the scene and with the magazine (but no bullets) inserted. In this close case where the central question was whether Mr. Robin had tossed the firearm that police found under the SUV, the jury's questions about changing the condition of the firearm mattered, and so did the response.

Here, because the jury's questions never went to the trial judge, there is no way to know with certainty how the trial judge would have responded in the first instance. As this Court recognized in *Euceda*, the "absence of any discretionary decision by a judge" makes a determination of harmlessness too speculative. 66 A.3d at 1008; *accord Blender v. Malecki*, 606 So. 2d 498, 499 (Fla. Dist. Ct. App. 1992) (where bailiff told jurors they could not have requested depositions without communicating jurors' requests to judge or parties, it was not possible to conclude

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made clear that, in order to avoid prejudice, the jury must be made aware of any differences between what the photograph depicts and what actually occurred . . . , [so] the trial court should have given the jury a cautionary instruction about the exhibit . . . .").

"that this occurrence did not affect the outcome of the case," because "[w]here an occurrence outside the record prevents a trial court from exercising its discretion, [a reviewing court] cannot speculate how the trial court would have ruled on the matter").

Should the Court consider how the judge would have responded to the jury's request in the first instance, however, there are strong reasons to doubt that the jury's question about inserting the magazine would have been resolved the same way if it had gone through the proper channels.[22] *Cf. Winestock*, 429 A.2d at 529-30 (concluding that trial court's ex parte response to jurors was harmless where there appeared to be "no reasonable possibility" that trial court would have answered jury's notes differently with input from the defense). Putting the magazine in the gun departed from the way the gun was presented—apparently according to standard practice—in the courtroom, and was inconsistent with safety protocols routinely employed in other jurisdictions, which require that magazines be removed from

[22] The transcript from the proceedings in *United States v. Lalchan*, 2013-CF1-4987, which the defense appended to the motion for new trial, shows how things might have played out differently. R-II at 599-607. Like in this case, the jurors in *Lalchan* asked the marshal to do something with the gun (the record does not make clear precisely what). *Id.* at 601. Rather than answering the jurors' questions himself, as the marshal did in this case, the marshal in *Lalchan* told the jurors to "put any issues in a note." *Id.* The jury then sent a note containing questions about the operation of the gun, such as whether "the top part of the gun ha[d] to be manually cocked" and whether there had been "any change to the safety." *Id.* at 616. The judge asked for the parties' positions on the note, *id.* at 602-04, and, based on the parties' input, told the jury in open court: "I am not answering your questions because you must decide this case based on the evidence presented during the trial. And just a reminder that the U.S. Marshal is unable to do anything other than transport weapons and ammunition to you upon written request." *Id.* at 605.

evidentiary firearms.[23] It seems unlikely that the trial court would have made the apparently unusual decision to let jurors handle a gun loaded with an empty magazine, without so much as a cautionary instruction, if it had been able to consider the issue in the first instance with the benefit of the parties' input.

Communication with a deliberating jury is a delicate matter, "pregnant with possibilities for error." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 460 (1978). Where, as here, a court official communicates with the jury without the knowledge

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[23] *See, e.g.*, U.S. Marshals Service, *Weapons Policy for the New US Courthouse—Salt Lake City, UT* (May 15, 2014), https://www.utd.uscourts.gov/sites/utd/files/FirearmsPolicy.pdf ("Weapons brought to court to be used as evidence are authorized if: 1. The weapon is presented to the U.S. Marshals Service for a safety check at the time the weapon is first brought into the courthouse, and 2. The weapon is presented in the courtroom in a safe condition, i.e., . . . [a]ll semi-automatic handguns will have the slide locked to the rear *and the magazines removed*." (emphasis added)); South Carolina Courts, *Guidelines for Safe Handling of Firearms as Evidence in the Courtroom*, https://www.sccourts.org/clerkOfCourtManual/firearmsguide.pdf ("All evidentiary firearms, when they are in the court building and courtroom, will be *open.* This means: 1. *The clip or magazine removed*, bullets removed from cylinder; bullet removed from chamber[.]" (second emphasis added)); Minnesota Eighth Judicial District, Administrative Policy 46, *Procedures for the Safe Handling of Firearms in the Courtroom* (Oct. 3, 2000), https://www.mncourts.gov/mncourtsgov/media/eighth_district/documents/Admin_Pol_46.pdf ("All firearms, when they are in the court building and courtroom, will be open. This means: 1. *The clip or magazine shall be removed* and rounds removed from cylinder or chamber." (emphasis added)).

The D.C. Department of Forensic Services even directs its professionals involved in firearm testing to "not transport firearms with magazines inserted." D.C. Dep't of Forensic Servs., FEU 12, *Evidence Handling and Case Distribution* (Sept. 22, 2021), https://dfs.dc.gov/sites/default/files/dc/sites/dfs/publication/attachments/FEU12-Evidence_Handling_and_Case_Distribution.pdf. Letting a room of lay jurors handle the magazine-loaded gun without giving the question substantial thought thus seems a particularly surprising decision.

of the trial judge, defense counsel, or the defendant, and makes decisions about the jury's assessment of the evidence, the government cannot show that the error was harmless beyond a reasonable doubt, or even that it is "highly probable that [the] error did not contribute to the verdict," *Ellis*, 941 A.2d at 1048 (*Kotteakos* standard) (quoting *United States v. Tussa*, 816 F.2d 58, 67 (2d Cir. 1987)). The content of the ex parte communication here is undisputed, so reversal is required.

CONCLUSION

For the reasons stated above, this Court should reverse the denial of Mr. Robin's new trial motion and reverse his convictions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been served electronically via the Appellate E-Filing System upon Chrisellen Kolb, Chief, Appellate Division, Office of the United States Attorney, on this 8th day of July, 2024.

/s/ Sarah McDonald
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