Appeal No. 23-CF-432

Regular Calendar: February 19, 2025

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

REPLY BRIEF FOR APPELLANT

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When a deliberating jury asks a question, the response must come from the judge. *See Euceda v. United States*, 66 A.3d 994, 1008 n.20 (D.C. 2013) (fact that clerk, not judge, answered jury's questions "reinforce[d] [the] conclusion that Mr. Euceda's constitutional rights were violated"); *Hallmon v. United States*, 722 A.2d 26, 27 (D.C. 1998) ("[I]t was improper for the clerk to respond directly to the jury's note, and the trial judge should not have allowed it."); *(Chris) Johnson v. United States*, 804 A.2d 297, 306 (D.C. 2002) (erroneous for clerk to "respond[] directly to [a] note from the jury without informing the judge or either counsel before doing so"). Additionally, the defense must have "a chance to shape the court's response." *Euceda*, 66 A.3d at 1013; *Hallmon*, 722 A.2d at 27-28.

The government attempts to deflect attention from the fact that the marshal unilaterally answered the deliberating jury's questions about altering the gun without notifying or consulting the court or counsel and recasts the marshal's actions as "supervising" or "facilitating" an agreed-upon process for the jury's review of the dangerous evidence. But the notion that the marshal was doing no more than what the judge and parties agreed to is false and leads to two fundamental misconceptions that underlie every aspect of the government's argument.

First, the government's suggestion that Mr. Robin acquiesced to the marshal's actions is belied by the record *See, e.g.*, Appellee's Br. at 22, 33. It is true that Mr. Robin agreed that the marshal could bring the firearm to the jurors upon their request and "remain in the jury room while" the jurors "review[ed] the evidence." 11/14/22 at 184. But Mr. Robin never agreed to have the marshal make unilateral decisions

about how the jury could review the firearm or answer the jury's questions about altering it. Nor did the defense have reason to anticipate that such events would transpire; to the contrary, the court had instructed the jurors not to "discuss the evidence or otherwise discuss the case among yourselves while the Marshal is present in the jury room." 11/14/22 at 184-85.

Second, the government's overarching claim that the marshal's communications with the jury in response to its questions were merely the "discharge[] [of a] ministerial duty," Appellee's Br. at 13, 22, 26, 28-29, 31-32, 35, 37 n.16, 42, is without merit. Implicitly acknowledging that a non-ministerial interaction with the jury would have violated the Constitution, the government stakes nearly its entirely argument on the premise that the marshal's action was ministerial. But that characterization of the communications does not accurately describe what happened in this case. Here, the marshal not only answered the deliberating jury's questions; he also made an independent decision about *how* the questions should be resolved, even though the answer had not been discussed or predetermined by the judge with the input of the parties. Nor could the marshal's decision to load the magazine into the gun be understood as necessary for juror safety. Under this Court's case law and the commonly understood meaning of "ministerial," which refers to actions performed in a prescribed manner without reliance on one's own judgment or discretion, the marshal's unilateral resolution of the issue and his response to the jury's question about altering the evidence was not a ministerial act.

Because the marshal's communication to the jury was not ministerial, Mr. Robin and his counsel had a statutory and constitutional right to help formulate a

judicial response to the jury's questions. The government has not shown that the failure to adhere to these mandates was harmless beyond a reasonable doubt.

I. THE MARSHAL'S RESPONSE TO THE DELIBERATING JURY'S QUESTIONS ABOUT ITS ASSESSMENT OF THE EVIDENCE WAS NOT MINISTERIAL, WHICH THE GOVERNMENT IMPLICITLY ACKNOWLEDGES MEANS THAT MR. ROBIN'S PRESENCE WAS CONSTITUTIONALLY REQUIRED.

Multiple features of the marshal's response to the jury's questions made the communication a stage of trial at which Mr. Robin's presence "ha[d] a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (per curiam) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934)). During the crucial stage of jury deliberations, the marshal answered a question from the jury about its assessment of the key evidence in the case.[1] The defense had no "opportunity to

[1] The government's suggestion (at 23 n.14) that courts have called into doubt the rule that the defense must be apprised of all communications to the jury rests on decisions that do not involve case-related questions that arise in the course of a jury's deliberations. The cases the government cites in footnote 14 of its brief—in contrast to *Smith v. United States*, 389 A.2d 1356, 1361 (D.C. 1978) (per curiam) ("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."), *Rogers v. United States*, 422 U.S. 35, 39 (1975), and this case—uniformly involve pre-deliberations communications with single jurors about personal issues, rather than questions posed by a deliberating jury related to the jury's assessment of the case. *See Gagnon*, 470 U.S. at 523-29 (defendants' absence from judge's pre-deliberations communication with juror who expressed concern about Mr. Gagnon sketching jurors during trial did not violate defendants' constitutional rights where Mr. Gagnon's counsel was present during the *in camera* conversation (and had been the one to suggest it), the judge had informed all defendants of his intention to speak with the juror (and no objection was raised), and a transcript of the *in camera*

suggest what the judge's response[] to the [question] should be." *Winestock v. United States*, 429 A.2d 519, 528 (D.C. 1981). Nor had the answer to the question been resolved by the judge and the parties in advance, such that all that remained for the marshal to do was to convey the answer to the jury. Instead, the marshal made an independent decision about how to resolve the jury's question. And the answer that the marshal settled on (without any input from counsel or the court), and then communicated to the jury, altered the key physical evidence against Mr. Robin and directly affected the jury's evaluation of the evidence.

There is no support for the government's core argument that the marshal's ex parte and off-the-record communication to the jury was a permissible "ministerial" action. A ministerial action is one "performed without the independent exercise of discretion or judgment," *Ministerial Act*, Black's Law Dictionary (12th ed. 2024), involving "obedience to instructions or laws instead of discretion, judgment, or skill," *Ministerial*, Black's Law Dictionary (12th ed. 2024). Here, the decision whether the jury could handle the firearm in a condition matching neither the condition in the courtroom nor the condition on the scene was not a ministerial one. Because there were myriad ways a judge could have exercised his discretion in

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proceeding was made available to the parties); *Walker v. United States*, 982 A.2d 723, 741-42 (D.C. 2009) (assuming without deciding that judge's ex parte conversation with jurors about scheduling was error); *United States v. Carson*, 455 F.3d 336, 348-50, 354 (D.C. Cir. 2006) (ex parte communications with jurors about one juror's personal and medical issues, the substance of which was reported in open court, not constitutional error); *United States v. Bravata*, 636 F. App'x 277, 292-93 (6th Cir. 2016) (rejecting claim that defendant had constitutional right to be present when judge, court nurse, and EMTs spoke to juror about health issues).

resolving that question, *see* Appellant's Br. at 23-24, the marshal's independent decision about how to handle the jury's request, and his unilateral communication of that decision to the jury, was decidedly non-ministerial.

This Court's cases illustrate that the marshal's response to the jury's question about loading the magazine falls firmly on the non-ministerial side of the ledger. This Court has recognized that the "response to virtually any jury note during deliberations" is a "matter[] of substance." *Foster v. George Washington Univ. Med. Ctr.*, 738 A.2d 791, 798 (D.C. 1999); *see also Hallmon*, 722 A.2d at 27 & n.1 (trial judge may not delegate task of communicating with jury during deliberations). Accordingly, it has deemed an action as simple as telling a jury to rewrite a note (at the judge's direction) not ministerial. *Foster*, 738 A.2d at 796, 798. Similarly, it has considered conducting a readback of testimony not ministerial, even in the absence of any decisionmaking about whether the readback could happen or which testimony would be read back. *Harris v. United States*, 489 A.2d 464, 468 (D.C. 1985).

The marshal's interaction with the jury here was even further from "ministerial" than the actions in *Foster* and *Harris*. Here, the marshal did not simply act as a mouthpiece for the judge or carry out the judge's decision; instead, the marshal made an independent decision about how to handle the jury's question. If even the communications at the judges' behest in *Foster* and *Harris* were not ministerial, the marshal's communication to the jury here, which required the marshal to decide how to resolve the jury's question, cannot be deemed ministerial. "[D]ecision-making activity is not ministerial . . . ." *(James) Johnson v. United States*, 398 A.2d 354, 361 (D.C. 1979); *Ministerial*, Black's Law Dictionary (12th

ed. 2024) (defining "ministerial" to mean "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"). To the contrary, it is during "the *formulation* of the response to a jury's request" that the rights to presence and counsel are most critical. *United States v. Martinez*, 850 F.3d 1097, 1104 (9th Cir. 2017).[2]

The government's repeated invocation of "courthouse safety protocols" as the justification for the marshal's action, *see* Appellee's Br. at 14, 29, 37, 42, also fails. The government's discussion of safety protocols is generally misleading. For example, the government asserts (at 14) that the jury's inspection of the evidence was "consistent with the agreed-upon safety protocols outlined by the court," and (at 29) that the judge followed the "courthouse safety protocols" enforced by the marshal, but these are both simply references to the jury instruction providing that the marshal would remain in the jury room while the firearm was in the room. 11/14/22 at 184. The government fails to point to any "safety protocols" condoning—much less mandating—the marshal's decision to insert the magazine. Further, the government asserts (at 13) that while in the jury room, the marshal

[2] Thus, this case is unlike evidence-transmittal cases such as *Dallago v. United States*, 427 F.2d 546, 552-53 (D.C. Cir. 1969), *Quarles v. United States*, 349 A.2d 690, 691-92 (D.C. 1975), and *McConnaughey v. United States*, 804 A.2d 334, 341 (D.C. 2002). In those cases, as here, when the jurors requested to see the firearm, they knew exactly what would happen, as did the parties, because the request had been anticipated in the jury instructions: the marshal would bring the firearm to the jury room. "[T]he mechanical operation of transmittal" was a ministerial act carrying out a decision that was already made in the parties' presence. *Dallago*, 427 F.2d at 553-54. Here, however, the marshal then went beyond that prearranged course and responded to further jury questions of which the parties had not been apprised.

"g[ave] safety instructions" and then "answer[ed] a single question about those safety instructions," but there is no indication in the record that the marshal gave safety instructions, much less that the judge or parties expected him to do so.[3] The firearm had already been admitted into evidence in a safe manner: with the magazine removed. The government ignores the obvious fact that the marshal's decision that the magazine could be loaded in the gun did not keep the jurors any safer.

This fact, as well as the absence of any policy mandating the marshal's decision to insert the magazine into the gun, sets this case apart from *People v. Kelly*, 781 N.Y.S.2d 75 (N.Y. App. Div. 2004), *aff'd*, 832 N.E.2d 1179 (N.Y. 2005), the intermediate New York state court opinion that is the government's primary support for its characterization of the marshal's action here as ministerial. In *Kelly*, a court officer brought a sheathed bayonet admitted in evidence into the jury room during deliberations upon the jury's request. *Id.* at 81. When jurors asked to handle the bayonet, the court officer refused. *Id.* Unlike here, in *Kelly* the record showed that the officer's response was consistent with established policy. *Id.* at 83. Affidavits from a supervising court officer with no involvement in the case stated that "a court officer is *obliged* to deny a deliberating juror's request to hold a knife or gun and, without any other conversation with the juror, . . . either inform the juror to put the request in writing or promptly report the request to the court." *Id.* (emphasis added). In the face of this evidence that the court officer's refusal to let the jury handle a

[3] Indeed, it would be unusual and concerning to expect that jury instructions about safe handling of firearms—which necessarily highlight the dangerous nature of firearms—be relayed ex parte in the jury room in a case where the defendant is on trial for possessing a firearm.

dangerous instrument was dictated by a sensible preexisting policy designed to keep jurors safe, the action could be deemed ministerial. Not so here.[4]

Here, in contrast, the government has pointed to nothing *obliging* the marshal to grant the jury's request to insert the magazine into the firearm. This is unsurprising, because unlike in *Kelly*, the marshal's action here was not in furtherance of safety. To the contrary, it could only make the firearm less safe—so much so that many courts, as a matter of policy, prohibit an evidentiary firearm from ever being presented in court in that state. *See* Appellant's Br. at 42 n.23 (citing courthouse policies mandating that evidentiary firearms must have the magazine removed whenever they are in the court building).

Moreover, in contrast to *Kelly*, the marshal here improperly had the "final say" on the handling of the firearm. 781 N.Y.S.2d at 85-86. In *Kelly*, the court officer left the jury room and promptly informed the judge of what had transpired. *Id.* at 85.[5]

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[4] To the extent there is broad language in *Kelly* deeming "safeguarding the jury" a ministerial duty, that language—which is not binding on this Court in any event—must be understood in light of the particular facts of *Kelly*. 781 N.Y.S.2d at 85. As Mr. Robin argued in his opening brief (at 25-26), and the government has not disputed, plenty of decisions—for example, shackling a defendant in the courtroom, or sequestering a jury—are made in the name of safeguarding juries; that does not make them ministerial. *See, e.g.*, *People v. Guzman-Rincon*, 369 P.3d 752, 759-60 (Colo. App. 2015) (rejecting government's argument that conversation with deliberating jurors regarding threat and sequestration did not involve substantive matters because it was safety-related). And, as discussed, while the refusal to let jurors handle the bayonet in *Kelly* can plainly be understood as necessary to keep jurors safe, the same cannot be said of the decision to insert the magazine.

[5] After the officer refused the jury's request to handle the bayonet, he went on to conduct a "demonstration" for the jurors, at their request, in which he removed the bayonet from its sheath. *Kelly*, 781 N.Y.S.2d at 81-82. Pursuant to the parties'

The judge then informed the parties, and defense counsel consulted with Mr. Kelly. *Id.* at 83, 85. The appellate court concluded that this "had the same effect as if the court officer had asked the jurors to put their request in writing." *Id.* at 85. The fact that the jury-room events promptly came to the judge's and parties' attention during deliberations allowed them to discuss how to handle the situation and agree on a resolution. *Id.* at 86. Thus, the appellate court rejected the defendant's argument "that the court officer had the 'final say' on the jurors' request," and instead concluded that "it was the court and the parties who had the final say on the matter." *Id.*[6]

The *Kelly* court recognized that the result is different where, as here, the final decision about how to handle a jury's request rests with a court officer. *See* 781 N.Y.S.2d at 86. The cases *Kelly* distinguished on this ground are instructive. In *People v. Flores*, a deliberating jury "summoned a court officer and inquired of him if they could have [a letter written in Spanish and admitted into evidence without an

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agreement, the judge gave a curative instruction directing the jury to disregard the jury-room demonstration. *Id.*

[6] The government does not address the Court of Appeals decision affirming the intermediate court in *Kelly*. 832 N.E.2d 1179 (N.Y. 2005). Little wonder, because that opinion's clearer focus on preservation only highlights the differences between *Kelly* and this case. There, the defense learned of the marshal's actions before the jury's verdict but did not seek a mistrial or otherwise raise any objection. *Id.* at 1182. Because "the impropriety was protestable but unprotested," Mr. Kelly could obtain reversal *only* if he demonstrated what New York law deems a "mode of proceedings" error—a "tightly circumscribed class . . . immune from the requirement of preservation." *Id.* at 1181-82. The Court of Appeals held that no mode-of-proceedings error occurred because "the court officer did not have the last word; the court did, after it continued to exercise full and proper control of the trial." *Id.*

accompanying English translation] translated into English." 725 N.Y.S.2d 655, 656 (N.Y. App. Div. 2001). The court officer replied that "the evidence was 'the way it was,' and asked . . . if [the jurors] wanted to have someone from the court translate the letter for them." *Id.* The jury "responded that there was someone on the jury who spoke Spanish and that juror would translate for the entire jury." *Id.* Even in the absence of any response by the court officer, the appellate court held that he "usurped the [judge's] function by permitting the jury to believe that it could allow one of [its] members to translate the letter." *Id.* The court officer should have "informed the [judge] of this exchange or instructed the jury to put their request to have the letter translated" in a written request to the judge, *id.*, and by failing to do so he deprived the trial judge of the "final say" on the jury's request, *Kelly*, 781 N.Y.S.2d at 86 (discussing *Flores*). Reversal was also required in *People v. Nichols*, where a court clerk refused the jury's request for a readback of testimony without conveying the request to the judge or the parties. 558 N.Y.S.2d 772, 773 (N.Y. App. Div. 1990). And in *People v. Khalek*, New York's highest court rejected the argument that court officers' communication with a deliberating jury was "ministerial" where the officers entered the jury room to convey the judge's directive that the jury cease deliberations for the evening but then, when the jury asked an officer to inform the court that a verdict had been reached, went beyond carrying out the judge's directives and told the jurors they could deliver their verdict the next morning. 689 N.E.2d 914, 915 (N.Y. 1997).

The case law is clear that where, as here, an officer makes an independent decision about how to handle a jury's question (as opposed to carrying out a judge's

decision), that cannot be a ministerial act. *See Ministerial*, Black's Law Dictionary (12th ed. 2024). Although the government puts most of its stock in *Kelly*, it is telling that the only other cases the government cites (at 26-27) as examples of ministerial actions involve court officers carrying out a judge's action, rather than making independent decisions. The government relies on *United States v. Holton*, which addressed whether the right to presence applies to the replaying of tapes that were played during trial. 116 F.3d 1536, 1545-46 (D.C. Cir. 1997). In *Holton*, the D.C. Circuit rejected the contention that defense presence was required. *Id.* at 1546. *But see United States v. Kupau*, 781 F.2d 740, 743 (9th Cir. 1986) (holding that a tape replay is "a stage of the trial at which the presence of the defendant is required[; it] differs from the kind of technical assistance rendered by the marshals in dealing with the physical needs of the jury[] *because it involves the crucial jury function of reviewing the evidence*" (emphasis added)).[7] In so holding, however, *Holton* emphasized that the parties were informed of the procedures for the replay beforehand and that there was "no evidence suggesting that the law clerk [who conducted the replay] either made independent decisions about whether or how to replay tapes or remained in the courtroom while the jury was deliberating." 116 F.3d

[7] *Holton*—which is not binding on this Court—recognized a split among federal circuit courts with respect to whether tape replays implicate the right to presence. *See* 116 F.3d at 1546. The Ninth Circuit's approach, which requires a defendant's presence "when tape-recorded conversations are replayed to a jury," *United States v. Felix-Rodriguez*, 22 F.3d 964, 967 (9th Cir. 1994), is more consistent with the decisions of this Court, which have acknowledged that readbacks of testimony are unlike "the 'ministerial' action of transmitting exhibits," *Harris*, 489 A.2d at 468 (holding that defendant's absence from readback was not error only because his lawyers were present and fully able to protect defendant's interests).

at 1545-46. Similarly, in *United States v. Martinez-Camargo*, 765 F. App'x 205, 209-10 (9th Cir. 2019) (non-precedential) (cited in Appellee's Br. at 27), when the courtroom deputy communicated with the jury, she was acting on the judge's directive and merely conveyed information that came from the judge himself. *See id.* (after jury requested to review video interrogation that was played during trial, judge sent courtroom deputy to "confirm which portions of the interview [the jurors] wished to review"). Here, in contrast, the marshal made an independent decision about how the jury could handle the evidence.

Because the jury's question called for a decision about how the jury could handle and assess the evidence, the defense should have been notified and given the "chance to shape the court's response." *Euceda*, 66 A.3d at 1013.[8]

II. BECAUSE ANSWERING THE JURY'S QUESTIONS ABOUT ITS ASSESSMENT OF THE EVIDENCE WAS NOT A MINISTERIAL ACT, IT HAD TO BE DONE BY THE JUDGE, NOT THE MARSHAL.

A. This Argument Is Properly Before this Court.

Mr. Robin's argument that it was improper for the marshal, as opposed to the judge, to resolve and respond to the jury's question is fully preserved. In the trial court, Mr. Robin claimed that a new trial was necessary because of the marshal's

[8] Courts agree, moreover, that when there is any question whether a communication to the jury is "ministerial," any doubts should be resolved in favor of requiring the defense's involvement. *See, e.g.*, *Harris v. State*, 984 A.2d 314, 325 (Md. Ct. Spec. App. 2009) ("[C]ourts should err on the side of caution when dealing with jury communications."); *Ford v. State*, 690 N.W.2d 706, 713 (Minn. 2005) ("[A]ny doubt regarding whether a communication relates to a housekeeping or substantive matter should be resolved in favor of defendant's presence.").

improper communication with the deliberating jury. This claim was sufficient to preserve the more specific argument that the marshal's action was improper on the ground that the response to the jury's question should have come from the judge. "Once a claim is properly presented to the trial court, a party can make any argument in the appellate court in support of that claim, *parties are not limited to the precise arguments made below*." *Anthony v. United States*, 935 A.2d 275, 282 n.10 (D.C. 2007) (quoting *Randolph v. United States*, 882 A.2d 210, 217-18 (D.C. 2005)); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

Moreover, the trial court was "fairly apprised" of the argument that the marshal usurped the court's authority. *In re M.C.*, 8 A.3d 1215, 1223 (D.C. 2010) (holding that the "determinative factor for purposes of preservation for appellate review" is whether the trial judge was "fairly apprised" as to the issue). The trial court was focused on the question whether the challenged action by the marshal was ministerial. R-II at 631 (Order at 10); *see Abdus-Price v. United States*, 873 A.2d 326, 332 n.7 (D.C. 2005) ("[E]ven if a claim was not pressed below, it properly may be addressed on appeal so long as it was passed upon." (quoting *District of Columbia v. Helen Dwight Reid Educ. Found.*, 766 A.2d 28, 33 n.3 (D.C. 2001))). This question fairly alerted the trial court to an issue regarding the improper exercise of judicial authority, because it is inherent in the idea that a court officer's action was not ministerial that it had to be performed by a judge.

Indeed, the absence of the judge and the absence of the defense are two sides of the same coin. When responding to a deliberating jury's question is *not* ministerial, it is true both that the defense must be involved *and* that the judge must

formulate the response. The absence of either suffices for reversal, but the errors compound each other. This Court has recognized that the absence of judicial involvement is a significant factor adding to the gravity (and harm) of a right-to-presence violation. *See Hallmon*, 722 A.2d at 27; *Euceda*, 66 A.3d at 1007-08. And it has done so in cases where neither trial counsel *nor* appellate counsel raised any argument about the fact that someone other than the judge responded to the jury's question. *See, e.g.*, *Euceda*, 66 A.3d at 1007-08, 1008 n.20. Therefore, whether or not the argument that the answer to the jury's question should have come from the judge is treated as a separate "claim," this Court can and should consider that issue as part and parcel of the right-to-presence analysis.[9]

B. Even if It Is Treated as a Separate Claim, the Marshal's Exercise of a Judicial Function Warrants Reversal Under any Standard of Review.

Because the argument that the marshal improperly exercised a judicial function is fully preserved, this Court should not apply the plain-error standard. Even if it does, however, the argument warrants reversal.

[9] The government itself recognizes that these issues are intertwined. In attempting to distinguish *Hallmon*, 722 A.2d at 27-28, the government notes that the jury's request for a written copy of the jury instructions in that case was directed to the judge, making it improper for the law clerk to "intercept" that communication, whereas here, the jury "posed its questions to the U.S. Marshal." Appellee's Br. at 28 n.15. Although the government is mistaken in asserting that a jury can decide whether its question requires a judicial response, its focus on whether the marshal was authorized to answer the jury's question reveals that it correctly recognizes that questions about whether a court officer may answer a jury's question independent of the judge are relevant to the right-to-presence analysis.

The government accepts, as it must, that if the marshal's action was not a "ministerial" or "mechanical" act, Mr. Robin had the right to have a judge preside and resolve the jury's question. Appellee's Br. at 30-32. The government relies on *United States v. Desir*, which holds that although magistrate judges may perform ministerial acts, a magistrate improperly performs a judicial function "by responding to [a] jury's question that [goes] beyond the simple performance of a ministerial task." 257 F.3d 1233, 1237-38 (11th Cir. 2001). Thus, in *Desir*, the magistrate's decision to decline the jury's request for a readback of testimony, without the judge being aware that the jury had made such a request, mandated reversal. *Id.* at 1238.

For the reasons stated above, the marshal's action here, as in *Desir*, clearly and obviously "went beyond the simple performance of a ministerial task." 257 F.3d at 1238. In light of this Court's cases holding that court officials may not take it upon themselves to respond to deliberating juries' questions, *see, e.g.*, *Hallmon*, 722 A.2d at 27 (holding that it was "improper for the clerk to respond directly" to the jury's request for a written copy of the instructions); *(Chris) Johnson*, 804 A.2d at 306 (holding that it was improper for the courtroom clerk to tell the jury to rewrite its note "without informing the judge or either counsel before doing so"), the error here was plain, satisfying the first two prongs of plain-error review.

Further, prong three of plain-error review is satisfied because the deprivation of Mr. Robin's "right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside" was a structural error. *Gomez v. United States*, 490 U.S. 858, 876 (1989); *PB Legacy, Inc. v. Am. Mariculture, Inc.*, 104 F.4th 1258, 1264 (11th Cir. 2024) ("[R]esponding to jury questions [is a] critical stage[] of a

trial.").[10] Structural errors are "intrinsically harmful" and necessarily affect a defendant's substantial rights. *Fortune v. United States*, 59 A.3d 949, 956 (D.C. 2013). In any event, the fact that the marshal's decision shaped the jury's deliberations and its review of the key physical evidence establishes a "reasonable probability that the . . . violation had a prejudicial effect on the outcome of [Mr. Robin's] trial." *Thomas v. United States*, 914 A.2d 1, 21 (D.C. 2006).

Finally, the error in declining to grant a new trial where a marshal exercised a judicial function "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Keerikkattil v. United States*, 313 A.3d 591, 601 (D.C. 2024) (quoting *Grogan v. United States*, 271 A.3d 196, 213 (D.C. 2022)). Where a deliberating jury's question is resolved without the defendant's knowledge, and without even the assurance that the question was resolved by an impartial adjudicator with authority to do so, "the integrity and reliability of the trial mechanism" has been jeopardized. *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)); *see also United States v. Recio*, 371 F.3d 1093, 1103 n.7 (9th Cir. 2004) ("[I]t is difficult to imagine

[10] Even the government largely accepts that if the marshal exercised a judicial function without Mr. Robin's consent, that error would be structural. Appellee's Br. at 30-34. The government contends (at 33) that Mr. Robin consented to this course of action, but the defense's lack of objection to the marshal transmitting the firearm and remaining in the jury room while the jury examined the firearm (without communicating with jurors or being privy to their deliberations) cannot establish consent to the marshal answering the jury's questions about the firearm while in the jury deliberation room. *Cf. PB Legacy, Inc.*, 104 F.4th at 1265 ("Consent to a magistrate judge's performance of a ministerial task . . . does not imply consent to a magistrate judge's performance of Article III functions.").

a case where structural error will not satisfy *Olano*'s fourth requirement," because structural errors "necessarily render a trial fundamentally unfair" (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999))). Thus, even if the Court treats the contention that the response to the jury's question needed to come from the judge as a separate, forfeited claim of error, it still requires reversal.

III. EVEN ASSUMING THAT HARMLESS-ERROR REVIEW APPLIES, THE GOVERNMENT HAS NOT MET ITS BURDEN TO DEMONSTRATE HARMLESSNESS BEYOND A REASONABLE DOUBT.

Any analysis of harmlessness in this case must take into account that the marshal's improper ex parte communication to the jury occurred during the "critical stage" when the jurors were attempting "to resolve the questions . . . before them." *Wilson v. United States*, 419 A.2d 353, 355 (D.C. 1980). When a jury asks a question at such a moment, it is because the answer matters to their deliberations. A defendant's right to be apprised of such communications is therefore important enough that "a judgment of conviction ordinarily cannot be upheld if the record discloses a violation of the right." *Winder v. State*, 765 A.2d 97, 123 (Md. 2001) (quoting *Stewart v. State*, 638 A.2d 754, 759 (Md. 1994)). This is particularly true where, as here, the answer relates to the case and requires the exercise of judgment. *See Etheredge v. District of Columbia*, 635 A.2d 908, 922 (D.C. 1993) (positing that there could "perhaps" be "some non-substantive matters which are so removed from the merits of a case" that the ex parte communication may be harmless, citing as an example a "hungry jury['s]" request for food (quoting *Guzzi v. Jersey Cent. Power & Light Co.*, 115 A.2d 629, 634 (N.J. Super. Ct. App. Div. 1955))); *see also*

Hallmon, 722 A.2d at 28 (finding support for the notion that "a '*non-substantive*' violation of Rule 43 *may* be deemed harmless" (emphases added)). It is truer still here because Mr. Robin, his counsel, *and* the judge were all cut out from determining the response. *See Harris*, 489 A.2d at 469 n.5 (noting that the presence of counsel is a factor to be considered in determining whether a personal right-to-presence violation is prejudicial).

Beyond the mere fact of the ex parte communication, the marshal's decision to load the magazine into the firearm gave the jury information that was not in evidence. Contrary to the government's argument (at 19 n.11), seeing how a magazine is loaded into a firearm had direct bearing on the questions before the jury. Although the jury heard during trial that a receiver is the "portion [of a firearm] that holds the trigger and allows the magazine to[ ] fit in," 11/10/22 at 157, the jury never heard someone explain how to load a magazine in a firearm, and it certainly never saw someone load a magazine in a firearm during trial. The government contends that it "requires nothing more than common sense" to understand "why the exposed parts of a firearm might contain DNA suitable for comparison but not the largely unexposed magazine loaded into the firearm." Appellee's Br. at 19 n.11. But if the firearm were Mr. Robin's, it would seem that he would have handled the "unexposed" parts of the magazine in order to load it—this is why crime scene analysts swab for DNA and dust for fingerprints on the parts of a magazine that are "unexposed" when the gun is loaded, *see* 11/14/22 at 50, 74-75. By seeing someone load the firearm, the jury obtained extrinsic information about how much of the magazine a person would actually touch when loading the magazine into the firearm.

This Court cannot "ignore the real possibility of prejudice where [an] improper contact furnished the juror[s] with 'crucial extra-judicial information.'" *Hill v. United States*, 622 A.2d 680, 685 (D.C. 1993) (quoting *United States v. Butler*, 822 F.2d 1191, 1196 (D.C. Cir. 1987)).

The government relies heavily on the fact that the trial court stated, in ruling on the motion for new trial, that it would have permitted the jury to conduct demonstrations with the firearm. R-II at 630 (Order at 9). This argument misconstrues the question before this Court. Mr. Robin does not challenge the propriety of the jury engaging in demonstrations.[11] Nor has he argued that the trial court would likely have prohibited demonstrations by the jury had it been presented with the question in the first instance. Instead, Mr. Robin points out—and the government does not dispute—that the jury's demonstration was not insignificant to its deliberations. And the government cannot show that decisions that the marshal made—decisions that should have been made by the judge, with the parties' input—did not affect those demonstrations, and in turn, the deliberations.

The government cannot avoid the fact that the marshal's decision affected the jury's deliberations by resort to the axiom that jurors are "permitted" to use "common sense" in assessing the evidence. Appellee's Br. at 39-40 (citing *Covington v. United States*, 278 A.3d 90, 99 (D.C. 2022)). As Mr. Robin pointed out in his opening brief (at 38-39, 39 n.21), the principle that jurors need not leave their common sense at the door does not render differences between demonstrative

[11] The government nevertheless devotes an entire section of its brief (at 16-21) to rebutting this notion.

evidence and the events actually alleged in the case harmless beyond a reasonable doubt. To the contrary, this Court has reiterated just how important it is that juries be reminded of any differences between demonstrative evidence and what actually occurred. *E.g.*, *Lloyd v. United States*, 64 A.3d 405, 410 (D.C. 2013).

Contrary to the government's suggestion (at 42), nothing in the trial court's order indicates that the judge would have made the same decision about loading the empty magazine in the firearm (without even a cautionary instruction) if the request had gone through the proper channels. *See* R-II at 630-31 (Order at 9-10) (stating that the judge would have allowed the demonstration, but silent as to whether he would have allowed the magazine to be loaded). To the extent the judge's order suggests that he would have unquestioningly deferred to the marshals because "safety" was involved, that would have been legally erroneous. *Cf. De Béarn v. United States*, 237 A.3d 105, 109-10 (D.C. 2020) (trial judge may not simply defer to marshals regarding shackling in the courtroom). "Failure to exercise choice in a situation calling for choice is an abuse of discretion whether the cause is ignorance of the right to exercise choice or mere intransigence . . . ." *(James) Johnson*, 398 A.2d at 363. The government cannot meet its heavy burden to establish harmlessness on the premise that the trial court would have made a legally impermissible ruling on the subject had it been asked. None of the government's arguments establish harmlessness beyond a reasonable doubt, and so this Court must reverse.

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 5th day of February, 2025.

/s/ Sarah McDonald
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