

No.
IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH A. HOLLAHAN, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

From time to time, deliberating juries must examine evidence in the courtroom that could have been examined in private in the jury room but for obstacles with using the jury room. For example, a jury may need to deliberate in the courtroom (or other suitable room) because (i) the evidence the jury wishes to examine is in the courtroom and is too large to remove to the jury room, or (ii) playback equipment for a recording in evidence is available only in the courtroom, or (iii) the air-conditioning is not working in the jury room, or (iv) the jury room is under repair.

A number of federal and state courts have endorsed closing the courtroom for privacy when a jury must deliberate in the courtroom for these reasons. The court below joined other courts that have taken the opposite view in the belief that the right to private jury deliberations applies only in the jury room. These courts permit the presence of non-jurors in the courtroom, and the supervision and restriction of the jury during its examination of the evidence in the courtroom, even if the evidence could have been examined in private in the jury room but for obstacles with using the jury room.

The question presented is:

Does the right to private and secret jury deliberations apply only in the jury room?

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Petitioner Joseph A. Hollahan respectfully petitions this Court for a writ of certiorari to review the judgment below.

OPINIONS BELOW

The published opinion of the Supreme Court of Illinois reversing the Appellate Court of Illinois, and affirming the Circuit Court of Illinois, is reported at 2020 IL 125091, and is attached as Appendix A. The published opinion of the Appellate Court of Illinois reversing Joseph Hollahan's conviction, including a dissenting opinion, is reported at 2019 IL App (3d) 150556, and is attached as Appendix B.

JURISDICTION

On September 24, 2020, the Supreme Court of Illinois issued its opinion reversing the Appellate Court of Illinois, and affirming the Circuit Court of Illinois. No petition for rehearing was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

1. At about midnight on August 29, 2015, Petitioner Joseph Hollahan was driving an acquaintance home when he was stopped by Illinois State Trooper Timothy Davis in Kankakee, Illinois. App. 15a. Davis testified at Petitioner's jury trial that he stopped Petitioner because: (i) he saw Petitioner's vehicle start to enter a left turn lane and then jerk back into its lane; (ii) Petitioner's rear license plate light was not operational and had a plastic cover on it; (iii) Petitioner drove onto a double yellow line, then straddled a lane divider line; (iv) and Petitioner failed to yield to a fire truck that was flashing its emergency lights. App. 15a. Trooper Davis added that Petitioner did not stop immediately after Davis turned on his flashing lights.

During the stop, Davis administered three field sobriety tests. App. 16a. Petitioner failed the tests, and was arrested. App. 14a, 16a. All of these events were audiovisually recorded by a dash cam in Davis's patrol car (video). A redacted version of the video containing only admissible evidence was copied to a digital versatile disc (DVD), and the 12 minute video was played to the jury during the State's case-in-chief. App. 16a.

Petitioner testified in his own behalf and related that: (i) he jerked his car because he was giving his passenger a ride to an unfamiliar address, and he was about to make a wrong turn; (ii) he did not yield to the fire truck because the fire truck had just "whipped" around the corner, giving Petitioner no time to react; and (iii) that he pulled over right away when he saw the police lights. App. 16a.

Shortly after the jury retired to deliberate, it asked to rewatch the video. No objection was voiced to the jury's request by either party, and the trial court granted the request. The video had to be viewed in the courtroom because the court did not

have the “arrangement” necessary to allow the jury to view the video in the jury room. On its own, the court allowed Petitioner, the attorneys, and two alternate jurors to remain in the courtroom while the jury watched the recording. Petitioner’s counsel did not object to this procedure.

Before the jury was brought back into the courtroom, the court admonished Petitioner and the attorneys that while the jury watched the video, “[n]o one will have any conversation.” App. 2a. When the jury was brought back into the courtroom, the trial court addressed the jurors, stating:

“Please come in and have a seat, we will not be talking to you other than to get the video, period The jury has requested to see the video again. We do not have an arrangement to show it to you in your deliberation room. I have instructed everyone to not say a word and we will play the video for you. If you need to have the sound adjusted or anything that we can do, all right?” App. 2a-3a, 17a.

After watching the video in silence, the jury returned to the jury room. Less than an hour later, the jury found Petitioner guilty of aggravated driving under the influence of alcohol. App. 2a, 18a. Petitioner was sentenced to a one-year term of imprisonment. App. 18a.

2. Petitioner challenged his conviction on direct appeal. He argued, in relevant part, that the trial court committed plain error when, in response to the jury’s request during deliberations to view the video for a second time, the trial court, had the jury watch the video in the courtroom in silence, and while the court, the Petitioner, the attorneys, and two alternate jurors were present. Petitioner argued the trial court should have allowed the jury to watch the video by itself in a closed courtroom so it could pause and rewind the video as necessary, and deliberate in private while doing so. App. 14a.

Petitioner also argued that by forcing the jury to watch the video in public in a manner in which it could not deliberate, the trial court incorrectly imposed the principles that guarantee a public trial on a situation where these principles do not apply. Lastly, Petitioner argued the jury's request to rewatch the video showed the case was closely balanced, and that he was therefore prejudiced by the intrusion into the jury's deliberations. App. 28a-29a. In response, the State argued the trial judge had discretion to supervise and restrict the deliberating jury's review of evidence in the courtroom, and, with no citation to authority, that the trial judge did not possess authority to close the courtroom (State's Appellate Court Brief at 2-3, 8-11).

A divided three member panel of the Appellate Court of Illinois reversed Petitioner's conviction, and remanded the cause for a new trial. The majority found that the "presence of the trial court, the defendant, the prosecutor, and defense counsel during jury deliberations in this case clearly inhibited the jurors' deliberations and restrained their freedom of expression and action." App. 21a. The majority added that "[a]ny reasonable doubt on this question was removed by the trial court's statement to the jury" that it was to remain silent while watching the video. App. 21a-22a. The majority reasoned that this statement by the trial judge had improperly interfered with the jury's deliberations because:

"This statement conveyed several things to the jury. First, it suggested that no one (including any juror) was to speak while the video was being played. Although the trial court did not explicitly bar the jurors from speaking, the court's statement to the jury created the impression that the video would be played in silence, and the court did not explicitly give the jurors permission to break that silence by discussing the video while it was being played. In addition, the trial court's statement informed the jurors that they would not have the ability to control the playing of the video. The trial court told the jury that 'we will play the video for you' and suggested that 'we' (not the jurors themselves) could adjust the sound if necessary. The court did not give the jurors the opportunity to pause the video or replay any parts they might have wanted to view or discuss in

greater detail. This further inhibited the jury's deliberative process. In sum, the procedure employed by the trial court effectively precluded the jurors from engaging in any deliberations while the video was being shown and likely limited their ability to focus sufficiently on the particular portions of the video that gave them concern." App. 22a.

The majority also rejected the contention advanced by other Illinois appellate courts that replaying a video for a silent jury during deliberations in the presence of non-jurors was not error because it was no different than playing the video under identical circumstances during the trial. App. 24a-25a. The majority reasoned that "a jury's viewing of a video recording during trial is critically different from its viewing of that same recording *during deliberations* [because, unlike] . . . public trials, jury deliberations must occur in privacy and secrecy." App. 25a (emphasis in original). The majority added that "[i]f a trial court fails to protect the jurors from such influences (as in this case), it commits reversible error." App. 25a.

The majority also disagreed with the contention put forward by other Illinois appellate courts that when the judge chooses to have a recording replayed in the courtroom during deliberation, the court, parties, and counsel must be present to view or hear the evidence, and the trial judge must instruct the jury not to discuss the evidence while in the courtroom. App. 26a. The majority stated that "if, for some reason, a video . . . recording must be played for a deliberating jury in the courtroom, the jury should view the video in private, not in the presence of the parties, their attorneys, or the trial judge." App. 27a

The majority added that:

"[W]e find it difficult to believe that, with all of the digital and other 'user-friendly' technology currently available (such as laptop computers and tablets, to name only a few), a trial court cannot arrange for the jury to view video or audio evidence in the jury room without risking the destruction of evidence or other technical difficulties. The fact that this problem recurs so often in this State is inexplicable. In our view, if a trial

court decides to grant a jury's request to review audio or video evidence during deliberations, the only acceptable practice is to arrange for the jury to view the evidence at issue in private, preferably by bringing a laptop, tablet, or some similar device into the jury room. . . . But even if, for some reason, a video or audio recording must be played for a deliberating jury in the courtroom, the jury should view the video in private, not in the presence of the parties, their attorneys, or the trial judge." App. 26a-27a.

The majority further disagreed with the contention advanced by other Illinois appellate courts that assumes that "anything that occurs in the courtroom, even jury deliberations, is a 'court proceeding' requiring the presence of the judge and the parties." App. 27a. The majority explained that:

"[J]ury deliberations must be conducted privately and in secret so as to insulate the jury from improper influence. (Citation omitted). The parties have no right to be present for such deliberations, regardless of where they occur. The mere fact that a portion of jury deliberations occurs in the courtroom does not transform those deliberations into a public trial proceeding." App. 27a.

The majority emphasized that "once a trial court decides to grant the jury's request [to review evidence in the courtroom], the jury should be allowed to view any such evidence in private because the viewing constitutes a part of the jury's deliberations." App. 28a.

This issue was not preserved for review in the trial court. Therefore, Petitioner argued in the Illinois appellate court that review was warranted under the Illinois plain error rule which is "not significantly different" than the federal plain error rule. App. 6a-7a. The majority reasoned that, "having the jury watch the video in the courtroom in the presence of the trial court, the prosecutor, the defendant, and defense counsel" was plain and obvious error because this intrusion violated the "basic principle of our justice system that jury deliberations shall remain private and secret." App. 20a.

The appellate court majority found that the error was prejudicial because the intrusion affected the jury's deliberations and thereby its verdict. App. 20a-21a. The majority explained that:

“[I]t is hard to imagine a more intrusive, more chilling presence in the deliberations than the opposing parties—the defendant with his attorney and the State in the person of the State's Attorney—and the trial judge.” (Citation omitted). The State's attorney, the defendant, and the defendant's counsel each has a direct interest in the outcome of the litigation. Moreover, the trial court serves as an authoritative figure who presides over the litigation. The presence of these parties during jury deliberations is inherently intimidating to jurors and would almost certainly have inhibited their deliberations while the video was being played. It is extremely unlikely that any juror would have felt free to discuss the details of the video and its possible impact on his or her decision in the presence of these parties.” App. 21a.

The majority added that “[a]ny reasonable doubt on this question was removed by the trial court's statement to the jury” that it was to remain silent while watching the video, which “effectively precluded the jurors from engaging in any deliberations while the video was being shown and likely limited their ability to focus sufficiently on the particular portions of the video that gave them concern.” App. 21a-22a.

The appellate court majority also found that the intrusive procedure employed by the trial court amounted to structural error because “[a]nything that intrudes upon the privacy of jury deliberations and impedes or inhibits impedes the jurors' freedom of expression and action during deliberations in this manner renders the trial an unreliable means of determining guilt or innocence.” App. 28a.

The dissent would have found that no error occurred because “the mode and manner in which a trial court allows a jury to review a piece of evidence during jury deliberations falls within the scope of the court's . . . discretion” and is reversible only if prejudicial to the defendant. App. 5a, 30a-31a. The dissent would have found that no

prejudicial communication or information reached the jury, and would have therefore affirmed. App. 32a-33a.

3. The Supreme Court of Illinois allowed discretionary review and reversed the appellate court in a unanimous decision authored by the Honorable Lloyd A. Karmeier. There, Petitioner expressly acknowledged numerous times in his brief that limited situations exist where court supervision is necessary when a deliberating jury must examine video evidence in the courtroom (Petitioner's Ill. S. Ct. Brief at 9, 15, 18). For example, so the content of the video is not viewed out of context, so the video does not overemphasize evidence, so the jury does not inadvertently view matters it should not consider, so the defendant is not otherwise prejudiced, or so the jury does not inadvertently damage or destroy the evidence. *Id.* Petitioner argued that when the foregoing circumstances are not present, as in this case, defendants possess a right to have the jury deliberate in private in the courtroom with no outside interference.

The Supreme Court of Illinois disagreed with Petitioner, stating that there is an "understanding" that private deliberations can only be conducted in the jury room "and no other." App. 12a. The court further found that no error arose from the procedure employed by the trial court because the trial court possessed inherent discretion to supervise the review of the video in the courtroom, and because no interference with the jury's deliberation occurred since the jury's deliberation had been temporarily suspended while the jurors watched the video in silence. App. 6a, 10a-12a. The court further found that, even if error occurred, Petitioner was not prejudiced by the procedure because the non-jurors who were present did not participate in the deliberations. App. 10a-11a, 12a-13a.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURTS ARE DIVIDED ON THE QUESTION OF WHETHER THE RIGHT TO PRIVATE AND SECRET JURY DELIBERATIONS APPLIES ONLY TO DELIBERATIONS THAT ARE HELD IN THE JURY ROOM.

In *United States v. Olano*, 507 U.S. 725 (1993), this Court considered the question of whether the presence of alternate jurors in the jury room during deliberations constituted presumptively prejudicial error. *Id.* at 737. This Court began its analysis of the question with an affirmation of “the cardinal principle that the deliberations of the jury shall remain private and secret.” *Id.* at 737. This Court decided that the presence of non-jurors during deliberations will constitute presumptively prejudicial plain error only when the non-deliberating outside persons “either participated in the jury’s deliberations or ‘chilled’ deliberation by the regular jurors.” *Id.* at 739. Since the alternate jurors in *Olano* remained “orally silent” and did not otherwise indicate their views or attitude,” this Court found that their presence in the jury room “did not operate as a restraint upon the regular jurors’ freedom of expression and action,” and was therefore no different than “the presence in the juryroom of an unexamined book which had not been admitted into evidence.” *Id.* at 739. This Court concluded that no presumptively prejudicial error occurred under these circumstances *Id.* at 738, 741. This Court explained that no prejudice occurred because no harm resulted from the benign presence of the alternate jurors in the jury room. *Id.* at 738, 741. Therefore, reversal would have been pointless. *Id.* This Court suggested, however, that if the error had been prejudicial – because a non-deliberating outside person influenced the jury’s deliberations, and thereby its verdict – then a substantial right would have been affected justifying plain error correction under *United States v. Atkinson*, 297 U.S. 157, 160 (1936). *Id.* at 737, 741.

There is now a split in the lower courts as to whether the principle that jury deliberations shall remain private and secret applies only to jury deliberations that are held in the jury room. The Supreme Court of Illinois has stepped into the fray with its ruling that a trial court has inherent power to supervise and restrict the jury when it deliberates outside the jury room. Other courts have taken the opposite view, however, and endorsed the use of closed courtrooms for private jury deliberations when the evidence could have been reviewed in the privacy of the jury room, but had to be reviewed in the courtroom due to obstacles with using the jury room to examine the evidence. These courts have done so to ensure a reliable means of determining guilt or innocence.

For example, the Supreme Court of Indiana endorsed the use of a closed courtroom for private jury deliberations in *Richey v. State*, 426 N.E.2d 389 (Ind. 1981). There, the jury had to relocate to the closed courtroom “because the air conditioning system in the courthouse was broken.” *Id.* at 397. The court observed that what mattered was not the specific location where the jury deliberated. *Id.* Instead, what mattered was that the jury deliberations be conducted in a private place. *Id.*

The Supreme Court of Arizona also endorsed the use of a closed courtroom for private jury deliberations in *State v. Boag*, 104 Ariz. 362, 368-69 (Ariz. 1969). No explanation was provided as to why deliberation was conducted in the courtroom, but the defendant argued it was error to allow jury deliberation in the courtroom because the courtroom contained law books and a telephone. *Id.* Similarly, the Ninth Circuit endorsed the use of a closed courtroom for private jury deliberations when some of the deliberations had to be held in the courtroom because some exhibits, a large propeller

and engine parts, were too large to remove to the jury room. *Benna v. Reeder Flying Serv., Inc.*, 578 F.2d 269, 271 (9th Cir. 1978).

In *State v. Magnano*, 181 Wash. App. 689 (2014), on facts analogous to the facts of this case, the Court of Appeals of Washington held that jury deliberations in a courtroom that was closed, so the jury could review a 9-1-1 recording, did not violate the defendant's right to a public trial. *Magnano*, 181 Wash. App. at 692-700. There, the trial judge characterized the closed door proceeding as a "continuation of the deliberations." *Magnano*, 181 Wash. App. at 692.

Furthermore, the nature of the evidence at issue in this case, *i.e.*, a video recording, does not automatically require that a deliberating jury examine the evidence under the court's supervision or with restrictions. A rationale for allowing a deliberating jury to review recordings without restrictions is that, in general, recordings should not be treated any differently than other evidentiary exhibits. *State v. Reyes*, 308 P.2d 182, 196, 209 Or. 595, 635-36 (Or. 1957); *People v. Manuel*, 294 Ill. App. 3d 113, 126 (1st Dist. 1997). Under this rationale, lower courts have allowed deliberating juries to privately review admitted video recordings without restrictions or supervision. See, *e.g.*, *Flanagan v. State*, 368 Ark. 143, 162-68 (Ark. 2006); *State v. Cheloha*, 25 Neb. App. 403, 407-08 (Neb. App. 2018); *Thorne v. State*, 174 So. 3d 477, 478-79 (Fla. Dist. Ct. App. 2015); *People v. Gingles*, 2014 COA 163, ¶¶ 9-18, 350 P.3d 968 (Colo. App. 2014). Likewise, federal courts have allowed deliberating juries to privately review admitted video recordings without restrictions or supervision. See, *e.g.*, *United States v. Chadwell*, 798 F.3d 910, 914 (9th Cir. 2015).

In the analogous situation of admitted audio recordings, a number of decisions have found that, under the right circumstances, such recordings may be reviewed in

private by a deliberating jury without supervision or restrictions. For example, in *United States v. Hofer*, 995 F.2d 746 (7th Cir. 1993), the Seventh Circuit concluded that it had not been unfair to allow the jury during deliberations to review audio tapes without court supervision. *Id.* at 749. See also *State v. Castellanos*, 132 Wash. 2d 94, 100-01(Wash. 1997); *Reyes*, 308 P.2d at 196, 209 Or. at 635-37.

Indeed, the right to private jury deliberations has been deemed to be so inherently important that as long ago as 1957 playback devices were being brought to jury rooms to allow deliberating juries to review audio recordings in private and without restrictions. See *People v. Walker*, 150 Cal. App. 2d 594, 602-03, 310 P.2d 110 (1957); *Reyes*, 209 Or. at 636. This practice is still being followed. See *People v. Montes*, 2013 IL App (2d) 111132, ¶ 47 (computer and the audio recording sent to deliberating jury, bailiff directed to instruct jury on how to use computer for playback); *Thorne*, 174 So. 3d at 478 (deliberating jury furnished with laptop computer containing defendant's videotaped statements).

The Seventh Circuit has explained that a deliberating jury's private review of recordings without supervision or restrictions is important because it may be "necessary for the jury to play the tapes repeatedly as its deliberations progress[]" in order to perform its duty conscientiously. *Hofer*, 995 F.2d at 749. In harmony with this reasoning, the appellate court in this case explained that having to view the video in court under supervision and with restrictions deprived the jury of the "opportunity to discuss the video as they were viewing it or to pause or replay any portions of the video that they found of particular importance." App. 23a.

As shown by these federal and state decisions, since a closed courtroom is in essence a relocated jury room, or annex to the jury room, allowing juries to deliberate

in closed courtrooms does not offend the constitution or procedural norms. Instead, the use of closed courtrooms for private jury deliberations, when it is necessary due to obstacles with use of the jury room for private review of the same evidence, ensures a reliable means of determining guilt or innocence. Ultimately what matters is that jury deliberations be conducted in a private place, and not the location of the room where the deliberations are conducted. *Richey*, 426 N.E.2d at 397.

The opposite view, articulated in numerous lower court decisions, finds that under a court's inherent powers to oversee evidentiary matters, it is, in effect, never error to supervise jury deliberations which must be conducted in the courtroom, regardless of the circumstances. App. 10a. For example, in *State v. Davidson*, 509 S.W.3d 156 (Tenn. 2016), the Supreme Court of Tennessee surveyed the law and stated that a deliberating "jury's viewing of [video] evidence in the open courtroom does not necessarily violate the privacy of jury deliberations." *Id.* at 202. In that case, the deliberating jury reviewed a video of defendant's statement, in open court, with spectators present. *Id.* at 201-02. Everyone was admonished to remain silent. *Id.* at 201.

Notably, in its opinion, the Supreme Court of Tennessee cited to a case from the Criminal Court of Appeals of Tennessee that observed that "if the jury must review evidence in the courtroom, the better practice is for the court officer to bring the jury into the courtroom without the presence of the trial court and counsel." *Id.* at 202-03. Another Tennessee Court of Appeals decision noted in the opinion criticized a decision of a trial court which had allowed the deliberating jury to view a video in open court, with the defendant and counsel present, rather than instructing the jury on the

operation of the equipment and then leaving the jury alone in the courtroom to view the video. *Id.* at 203.

On facts somewhat analogous to the facts of this case, in *State v. Jones*, 102 A.3d 694 (Conn. 2014), the Supreme Court of Connecticut, ruled, relying on Connecticut law, that the trial court properly exercised its discretion by requiring the jury to review a video in open court because of equipment issues. *Id.* at 701. The concurring Justice stated that the video should have been given to the jury to review in the privacy of the jury room but agreed with the majority's result because the error had been harmless due to the strength of the State's other evidence, and the numerous times the video was shown during the trial. *Id.* at 705, 707-08 (McDonald, J., concurring).

An apparent and recurring flaw with these decisions is their failure to offer any justification, other than the court's inherent power to oversee evidence, for stripping a defendant of the right to private jury deliberations when evidence that could have been examined in private in the jury room, has to be examined in another room that can be closed for privacy. No such justification exists. Certainly, this Court's statement in *Olano* , that "deliberations of the jury shall remain private and secret," does not limit application of the right to deliberations that are held in the jury room. *Olano*, 507 U.S. at 737.

The flaw with these decisions is further exposed by that fact that, had the jury been able to examine the evidence in the jury room, the trial judge's inherent authority would not have permitted intrusion into the jury's deliberation. The fact that a jury has to relocate to another private room should not change this understanding. As aptly noted by the Appellate Court of Illinois in this case, the parties have no right to be present at private jury deliberations, "regardless of where they occur." App. 27a.

Indeed, if the right to private jury deliberations is deemed to apply only in the jury room, the importance of the location of where the jury deliberates will be elevated over the importance of the right itself. Such a principle would reveal an insufficient appreciation of the right at stake which has existed since at least “the mid-1300s” and is, thus, a deeply rooted right. Diane E. Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C.L. REV. 203, 215-18 (2005). Because the right is fundamental, and therefore observed in every state and federal court in the nation, but unevenly applied, the issue presented is of national significance.

The lower courts, in short, are split on whether defendants enjoy the right to private jury deliberations over evidence that could have been examined in the privacy of the jury room, but that must be examined in the courtroom. Indeed, the split exists even within some of the decisions addressing the issue. However, the fundamental right to private jury deliberations in the courtroom should not be applied differently across state and federal jurisdictions.

II. THIS CASE IS A SUITABLE VEHICLE FOR THE COURT TO RESOLVE THE QUESTION PRESENTED.

This case provides a suitable vehicle for this Court to resolve the question presented. First, the facts of the case are well suited for a full analysis of the issue. Second, there is no procedural barrier to reaching the issue. Third, the courts below squarely addressed and resolved the issue. Indeed, as the facts are not in dispute, this Court can decide the issue as a matter of law. Fourth, the case does not involve overwhelming evidence such that the analysis of the error can be avoided on the ground that it is harmless.

Initially, the facts of the case present a suitable vehicle for a full analysis of the issue. This case concerns a traffic stop. Traffic stops are frequently recorded by the

police. Here, the state trooper who conducted the stop audiovisually recorded the preliminary traffic violations that triggered the stop. The events that occurred after the stop, including a field sobriety test, were also audiovisually recorded. A redacted copy of the video, which removed inadmissible evidence, was put on a DVD that could be played on a computer or DVD player. The 12 minute video was played once at the trial. The other relevant evidence at the trial consisted of the Trooper's testimony, and the Petitioner's testimony which disputed the Trooper's version of the events.

The deliberating jury asked to review the video again. This reveals that the evidence of guilt was not overwhelming because, logically, there would have been no need to review the video had the evidence been overwhelming and not closely balanced. Furthermore, the impartial video was the key evidence at the trial because the trooper and Petitioner provided conflicting testimony, and because the video captured the core events that led to the charge. The impartial video allowed the jury be an eyewitness to these events.

No objection to allowing the jury to view the video without court supervision or restrictions was voiced by either party. More specifically, there was no objection that the viewing should be supervised in order to prevent overemphasis of the evidence, so the jury would not inadvertently view matters it should not consider, or so the jury would not inadvertently damage or destroy the evidence. Therefore, had playback equipment, such as a laptop computer or DVD player, been available in the jury room, the jury could have watched the recording in the privacy of the jury room, and engaged in secret deliberations while doing so. However, the equipment needed for the playback was available for use only in the courtroom. The jury was therefore brought into the courtroom for its review of the video.

In the courtroom, the trial judge ordered everyone to remain silent during the viewing of the video. Without explaining why it was necessary, the trial judge allowed Petitioner, the attorneys, and the alternate jurors to remain in the courtroom during the viewing. The option of allowing the jury to review the recording in a closed courtroom in private was given no consideration by the judge, nor was input requested from the parties on how the review should be conducted. After viewing the 12 minute video one time under these restrictions, the jury retired for further deliberation in the jury room, and later found defendant guilty of aggravated driving under the influence of alcohol.

The unpreserved question of whether the jury should have been allowed to deliberate in private in the courtroom while rewatching the video was reviewed for plain error by the Appellate Court of Illinois. As previously noted, the Illinois and federal plain error rules are “not significantly different.” App. 6a. The appellate court found that the failure to allow the jury to watch the video privately in the courtroom had amounted to structural error, and ordered a new trial. The appellate court reasoned that the trial court’s restrictions and supervision, along with the presence of the non-jurors while the deliberating jurors rewatched the video, unnecessarily chilled the jury’s deliberation, and thereby tainted its verdict (Appendix B).

The Supreme Court of Illinois reviewed for plain error. That court found that no error occurred because the trial court had discretion to control how the video would be rewatched in the courtroom. The Supreme Court of Illinois also concluded that due to the trial court’s order that the jury remain silent, no intrusion into the deliberations occurred because the jury had not actually been deliberating while rewatching the video. The court also stated that there is an “understanding” that deliberations can

only be conducted in the jury room “and no other.” App. 12a. The court reversed the decision of the appellate court and affirmed Petitioner’s conviction (Appendix A).

Under these circumstances, this case provides a suitable vehicle for this Court to resolve the question presented. First, there is no procedural barrier to reaching the issue. The issue was reviewed for plain error in the courts of Illinois. As noted by the Supreme Court of Illinois in its opinion, the Illinois and federal plain error rules are “not significantly different.” App. 6a. The plain error aspect of the issue can therefore be addressed by this Court because it has already been fully addressed by the courts below.

Second, the courts below squarely addressed, factually and legally, the substantive issue of whether the right to private jury deliberations applies only when the jury is deliberating in the jury room. Third, the case does not involve overwhelming evidence such that the analysis of the error can be avoided on the ground that it is harmless. Moreover, as the facts are not in dispute, this Court can decide the issue as a matter of law. Accordingly, through this case, this Court can clarify whether the cardinal principle that jury deliberations shall remain private and secret applies only to jury deliberations held in the jury room, or whether the right extends to jury deliberations that could have been conducted in the jury room but that must be conducted in another room due to obstacles with using the jury room.

III. THE QUESTION PRESENTED IS IMPORTANT AND WILL RECUR.

The question presented is important and will recur. The question presented is important because the jury deliberation stage of a criminal trial is a pivotal stage of the proceeding since that is where the consequential decision of guilt or innocence is made. To be sure, the jury deliberation stage of a criminal trial is not a critical stage

of a proceeding in the sense that the defendant and counsel must be allowed to be present during the deliberation. But, because it is so central to the most important decision to be made by the jury, and because the jury's decision will likely be one of the most crucial, if not the most crucial trial decision for a defendant, jury deliberations that could have been held in the jury room, but that must occur outside the jury room out of necessity, should be accorded the protection of privacy in order to guarantee that the guilt or innocence determination will be fair. Put differently, even if every other stage of a criminal trial is conducted in flawless fairness, it will still not be possible to say a defendant received a fair trial if the jury's deliberation was tainted by an unwarranted restraint on its ability to freely deliberate in private while reviewing key evidence. Thus, the question presented is important because the jury deliberation stage of a criminal trial is a pivotal stage of the proceeding.

The issue is also likely to recur. The case law cited in this petition demonstrates the frequent recurrence of the question. Furthermore, the issue is likely to recur due to the ever increasing use of video evidence, the high value of video evidence to the truth seeking function, and the failure of court systems to take adequate steps to provide equipment in the jury room for the review by deliberating juries of video evidence. More specifically, the issue is likely to recur because recording cameras are now everywhere. Be they cell phone cameras, surveillance cameras, door bell cameras, body cameras, or vehicle dashboard cameras, these video recording devices are everywhere and in large numbers. Consequently, crimes are increasingly being recorded by these devices. Thus, as reaffirmed by the recent events at the Capitol, video evidence has become central to the investigation and determination of whether a crime has occurred, and to the identification of persons who may have committed

crimes. Thus, the use of video recordings as key evidence at criminal trials is likely to increase.

Further, as demonstrated by this case, video recordings can be particularly valuable in the determination of guilt or innocence. This is so because video evidence is a unique in that it can place a jury at the scene of the crime, and allow the jury to view the crime in the shoes of a direct witness. Thus, for deliberating juries, high quality video evidence can be vastly superior to the unreliable, incomplete, or biased memories of witnesses trying to paint a picture with their testimony. Even a witness with total recall and an illuminating vocabulary cannot match what the eyes see, and what the ears hear. The only other type of evidence that may be as compelling as video evidence to a deliberating jury in a criminal trial is deoxyribonucleic acid evidence. As such, due to its unique quality of allowing a jury to witness the crime, it is likely that deliberating juries will continue to ask to rewatch video evidence.

Lastly, as demonstrated by this case and a number of other cases cited in this petition, court systems are not taking adequate steps to provide equipment in the jury room for the review by deliberating juries of video evidence. Therefore, if court systems continue to deprive juries of video playback equipment in jury rooms, and force juries to rewatch the videos under supervision and with restrictions in the courtroom, as in this case, the issue presented by this case will continue to recur. Accordingly, the question presented by this case is important and likely to recur.

IV. THE DECISION BELOW IS INCORRECT.

The decision below is incorrect for a number of reasons. First, the opinion of the Supreme Court of Illinois is incorrect in its finding that no intrusion into the jury's deliberation occurred because the jury was not deliberating at the time it was viewing

the video. App. 10a-12a. The Supreme Court of Illinois reasoned that no deliberations were occurring at the time because the deliberations had been temporarily suspended by the trial court's order directing everyone to remain silent. *Id.* However, an order that incorrectly chills a jury's deliberation should not be overlooked when the jury was not deliberating due to the incorrect order. The logic of the Supreme Court of Illinois is faulty, dangerous, and contrary to *Olano* because it opens the door to unwarranted intrusion by a trial judge into jury deliberations. The analysis of the Supreme Court of Illinois on this point also failed to recognize that review of a recording by a deliberating jury constitutes "a part of the jury's deliberations" (App. 28a), and a "continuation of the deliberations" (*Magnano*, 181 Wash. App. at 692).

Second, the decision of the Supreme Court of Illinois was incorrect to the extent it failed to offer a reasonable justification for stripping Petitioner of the right to private jury deliberations when evidence that could have been examined in private in the jury room, had to be examined in the courtroom. Instead, the Supreme Court of Illinois based its ruling on a *per se* rule which holds that only deliberations conducted in the jury room are entitled to privacy. App. 12a. This flat rule, however, misinterprets *Olano* because *Olano* did not limit application of the right to private jury deliberations to only the jury room. *Olano*, 507 U.S. at 737.

Moreover, and as previously noted, the logic of the *per se* rule is flawed because, if an intrusion by the trial court would not be tolerated into deliberations being conducted in the jury room, the same type of intrusion should not be tolerated simply because the jury had to examine the evidence in another room due to obstacles with using the jury room. As also explained above, if the right to private jury deliberations

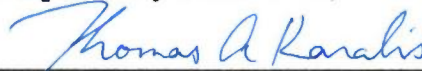
is deemed to apply only in the jury room, the importance of the location where the jury deliberates will be elevated over the importance of the right itself, without justification.

The Supreme Court of Indiana and the Ninth Circuit understood this when they endorsed the use of closed courtrooms for private jury deliberations due to obstacles with reviewing the evidence in the jury room. *Richey*, 426 N.E.2d at 397; *Benna*, 578 F.2d at 271. Accordingly, the decision of the Supreme Court of Illinois is incorrect and should be rejected by this Court because it misapplies this Court's ruling in *Olano*, because it undermines the reliability of the guilt or innocence determination, and because it will further divide the lower courts on the question presented.

CONCLUSION

For the foregoing reasons, petitioner Joseph A. Hollahan respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois.

Respectfully submitted,



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