

25-5996

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
EIGHT CIRCUIT COURT OF APPEALS

ORIGINAL

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

Jean-Michael Kisi

PETITIONER

vs.

Joseph Joyce, Warden,

North Dakota State Penitentiary

RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. DISTRICT COURT OF NORTH DAKOTA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. WHETHER THE DISTRICT COURT EXCLUDING THE PETITIONER FROM THE COURTROOM WHEN PERSONS DISPLAYED THE STATE'S LAPTOP IN THE DELIBERATION ROOM AND A DISTRICT ATTORNEY RETRIEVED ITEMS OUTSIDE OF THE COURTROOM VIOLATED THE PETITIONER'S CONSTITUTIONAL SIXTH AMENDMENT RIGHT OF PRESENCE, CONFRONTATION, AND FOURTEENTH AMENDMENT DUE PROCESS RIGHT
- II. WHETHER THE EIGHT CIRCUIT COURTS OF APPEALS' DENIAL OF THE PETITIONER'S APPEAL CLAIM THAT THE DISTRICT COURT EXCLUDING HIM FROM HIS TRIAL DURING JURY DELIBERATIONS VIOLATED HIS SIXTH AND FOURTEENTH AMENDMENT CONSTITUTIONAL RIGHTS CONFLICTS WITH THE RELEVANT DECISIONS OF THIS COURT

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

1. State v. Kisi, 2018 ND 147, 913N.W.2d 767, North Dakota Supreme Court
2. State v. Kisi, No. 53-2020-CV-00668. Northwest District Court of North Dakota
3. Kisi v. State, 2023 ND 226, North Dakota Supreme Court. Judgment entered on December 1, 2023.
4. Kisi v. Joyce, No.1:24-CV-92, U.S. District Court of North Dakota. Judgment entered September 24, 2024
5. Kisi v. Joyce, No. 24-3454, United States Eighth Circuit Court of Appeals. Judgment entered February 10, 2025. Petition for rehearing denied on March 20, 2025.

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IN THE SUREME COURT OF THE UNITED STATES PETITION FOR WRIT OF CERTOIRARI. Petition respectfully prays that a writ of certiorari issue to review the judgment

OPINIONS BELOW

The opinion of the United States Eighth Circuit Court of Appeals appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the United States Eighth Circuit Court of Appeals decided my case was February 10, 2025. A timely petition for rehearing was denied by the United States Eighth Circuit Court of Appeals on March 20, 2025, and a copy of the order denying rehearing appears at Appendix B. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- (1) "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in favor, and to have Assistance of Counsel for his defence.". United States Constitution, Amendment VI.
- (2) "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State, shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.". United States Constitution, Amendment XIV.

This case involves the following provision of the constitution of the State of North Dakota:

- (3) "In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf; and to appear and defend in person and with counsel. No person shall be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law.". N.D. Const. art. 1, § 12.

STATEMENT OF CASE

The dispositive issue in this case is whether the improper procedure the trial court used, during the jury deliberation stage of the petitioner's trial, when it closed the record and allowed a person or persons to take the State's laptop, which Williams County assistant district attorney Nathan Madden described as "sort of, I guess you can call it been sanitized", into the deliberation room and also allowed Mr. Madden to retrieve other items from an undisclosed location outside of the courtroom, while the petitioner was not present in the courtroom, prejudiced his Sixth Amendment Confrontation right and Fourteenth Amendment due process right, and entitled him to a new trial.

A. The Trial

The petitioner was on trial in a North Dakota State Court, in Williams County, charged with gross sexual imposition, conspiracy to commit murder, conspiracy to commit gross sexual imposition, and accomplice to attempted murder. The record establishes that at the conclusion of the evidence, at approximately 11:32 am, the trial Court ordered the jury to exit the courtroom and begin deliberations. June 26, 2017. Tr. Vol 5. p. 934. While outside of the jury presence, Williams County assistant district attorney Nathan Madden asked the trial Court, "Well, your honor the State has a laptop that has sort of, I guess you can call it, been sanitized. It's had all of its word processing capabilities removed, network access capabilities removed. My thought is we send it back to the jury so they can play the videos. I will bring a set of computer speakers up. I thought I had them in the bag, but I do not.". No objection was made by the petitioner's defense attorney, Steven Mottinger, before he was addressed by the trial Court and the record was subsequently closed and the proceeding sent into a recess. Tr. Vol 5. p.936.:

[trial Judge] Very well, that's appreciated, and if – Counsel, make sure we've got your numbers so that we can get a hold of you. With that we will close the record.

Shortly after defense attorney Mottinger left the courtroom, the petitioner was taken out of the court room by a bailiff and escorted back to his jail cell to await the verdict. The record shows that before the trial court closed the record and sent the proceeding into a recess, it did not inform the petitioner of its intent to remove him from the courtroom and exclude him from the proceeding before a person or persons took the State's laptop into the deliberation room and assistant State's attorney Mr. Madden retrieved a set of computer from an undisclosed location outside of the courtroom. The trial Court also did not inform the petitioner of his Constitutional right to be present and confront all of the evidence the State presented to the jury during trial. The Jury acquitted the petitioner of conspiracy to commit murder and conspiracy to commit gross sexual imposition and found him guilty of gross sexual imposition and accomplice to attempted murder. During the critical jury deliberations stage of the petitioner's trial, the trial court should have properly brought the jury back into open court, in the presence of the petitioner and his defense counsel, in accordance with 29-22-02, N.D.C.C. and Rule 43(a)(3)(A), N.D.R.Crim.P., to inform the jury of the method in which it could request to rehear or review any evidence during its deliberations. It is a well-settled principle of constitutional law that a criminal defendant has the right to be present at all stages of his trial where his absence might frustrate the fairness of the proceedings. *Faretta v. California*, 422 U.S. 806, 819 n. 15, 95 S.Ct. 2525, 45 L.Ed2d 562 (1975); accord *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed 631 (1987). The trial Court's procedure failed to ensure the privacy and integrity of the jury's deliberation by creating a significant possibility of outside or non-evidentiary extraneous influences and considerations that may have affected the ability of the jurors to be fair and impartial. The trial Court excluding the petitioner from the proceeding when information on the State's unexamined laptop and other items were shown to the jury in the deliberation room violated the petitioner's 6th Amendment Constitutional right to be present and confront evidence at trial and his 14th Amendment Due Process right.

B. Appellate Review

On September, 24, 2024 The U.S. District Court of North Dakota denied the petitioner's 2254 habeas corpus petition on grounds that it was untimely filed. The U.S. District Court of North Dakota did not issue a certificate of

appealability. Pet. App. C. On February 10, 2024 the Eight Circuit Court of Appeals denied the petitioner's appeal. Pet. App. B. On March 20, 2024 the Eight Circuit Court of Appeals denied Kisi's petition for rehearing. Pet. App. A. The Eight Circuit Court was confronted with facts that were materially identical to precedent by this Court. Considering the dispositive issues in the petitioner's case, which are relevant with this Court's decisions in other criminal trials, the Eight Circuit Court of Appeals' decision to deny the petitioner's appeal is contrary to this Court's precedent and not consistent with this Court's well established principle of right; here, that is a defendant's trial right to confrontation which protects the right of presence when the defendant is actually confronting witnesses or evidence before the tier of fact, and presence is also protected by due process when there is a reasonably substantial relation to the opportunity to defend or when absence might frustrate the fairness of the trial proceeding.

FACTUAL REASONS FOR GRANTING PETITION

[¶ 1] The sixth Amendment right of confrontation applies in State criminal proceedings. Pointer v. Texas, (1966), 380 U.S. 400. It extends not only to testimonial presentations, but to any information received by the jury from the prosecutor or any other source. Douglas v. Alabama (1965), 380 U.S. 415; Parker v. Gladden (1966), 385 U.S. 363. The primary issue in the petitioner's case involves is a procedural error by the trial court during the jury deliberation stage of the petitioner's trial on June __, 2017, which violated his Sixth Amendment right to be present during the whole of his trial and right to confront all of the evidence. The trial court's improper procedure also undermined the integrity of the jury deliberation process by potentially exposing the jurors to extraneous contact and prejudicing extrinsic information.

[¶ 2] Due to the trial court's improper procedure during the deliberation stage of the petitioner's trial, several things are unknown in this case:

1. Whether or not any prejudicial extrinsic information was on the State's laptop, which assistant State's attorney Mr. Madden described as "sort of, I guess you can call it been sanitized", or other items that Mr. Madden retrieved outside of open court.
2. Who exactly took the State's laptop to the jury in the deliberation and did any prejudicial communication occur, while the petitioner and his defense counsel were not present in the courtroom.
3. Exactly where, outside of open court, assistant State's attorney Mr. Madden retrieved the State's set of computer speakers or other items
4. Whether assistant State's attorney Mr. Madden actually retrieved a set of computer speakers or some other items, which the trial Court and the defense were not made aware of.
5. Whether or not the set of computer speakers or other items assistant State's attorney Mr. Madden retrieved from outside of the courtroom contained any prejudicial extraneous information.
6. Who the exact person or persons were that took the State's laptop or other items into the deliberation room while the trial record was closed and the petitioner and his defense counsel were not present in the courtroom.

7. What communication or interactions potentially took place in the deliberation room, outside of the petitioner's presence, between the jury and the person or persons that took the State's laptop and other items into the deliberation room.
8. Whether any prejudicial extraneous influence was brought to bear upon the jury, and if it had any impact on their verdict.

[¶ 3] North Dakota has recognized the constitutional right of a defendant to be personally present during the whole of a trial. *State v. Schasker*, 60 N.D. 462; 235 N.W. 345 (N.D. 1931). Under the Sixth and Fourteenth Amendments, all criminal defendants have the right to the assistance of counsel as well as the right to be present in the courtroom during trial. See *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). A criminal defendant may waive these rights if such waiver is knowingly and voluntarily made. See *Allen*, 397 U.S. at 34243, 90 S.Ct. 1057; *Faretta v. California*, 422 U.S. 8006, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Here, no such waiver occurred. As a constitutional matter, the hallmarks of the right to a fair trial are the defendant's right to be present, his ability to confront the witnesses and evidence the State or Government presents against him, and an impartial jury that decides the case solely on the evidence before it. The trial Court's improper procedure during deliberations struck at the core of those rights. The cumulative effect of the trial Court's errors rendered the petitioner's trial fundamentally unfair in violation of the petitioner's Sixth Amendment Confrontation right and Fourteenth Amendment due process right. The United States Eighth Circuit Court of Appeals' denial of this appeal claim by the petitioner is not consistent with the relevant decisions of this Court and therefore should be reversed and this case remanded to the district court for a new trial.

ISSUES

I. WHETHER THE DISTRICT COURT EXCLUDING THE PETITIONER FROM THE COURTROOM WHEN PERSONS DISPLAYED THE STATE'S LAPTOP IN THE DELIBERATION ROOM AND A DISTRICT ATTORNEY RETRIEVED ITEMS OUTSIDE OF THE COURTROOM VIOLATED THE PETITIONER'S CONSTITUTIONAL SIXTH AMENDMENT RIGHT OF PRESENCE, CONFRONTATION, AND FOURTEENTH AMENDMENT DUE PROCESS RIGHT

A. The Confrontational Clause of the Sixth Amendment Guaranteed The Petitioner The Right To Be Present At Any Stage Of The Trial Proceeding When Witnesses were testifying or evidence was being presented

[¶ 4] The Sixth Amendment right of confrontation is a fundamental right, as made applicable to and obligatory on the states by the Fourteenth Amendment. This Court has long held that the right to confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Pointer v. Texas, 380 U.S. 400, 405 (1965). A defendant's right to be present in the courtroom at every stage of his trial is one of the most basic rights guaranteed by the Confrontation Clause of the Sixth Amendment to the United States Constitution. (Illinois v. Allen, 397 U.S. 337, 338, 90 S.Ct. 1057, 25 L.Ed.2d (1970)). The district court erred by not keeping the trial record open and bringing the jury back into open court, in the presence of Kisi and his defense counsel, to inform it of the means in which it could request to rehear any testimony or re-watch any videos that was admitted and presented during the trial. The presence requirement has its roots in the Confrontation Clause of the Sixth Amendment. Illinois v. Allen, 397 U.S. 337, 388, 90 S.Ct. 1057, 1058, 25 L.Ed.2d 353, reh'g denied, 398 U.S. 915, 90 S.Ct. 1684, 26 L.Ed.2d 80 (1970). The Sixth Amendment provides that: In all criminal prosecutions, the accused shall enjoy the right..to be confronted with the witnesses against him....U.S. Const. amend. VI. This constitutional guarantee was made obligatory on the states through the Fourteenth Amendment. Allen, 397 U.S. at 338, 90 S.Ct. at 1058 (citing Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)). North Dakota has a similar guarantee on it's State Constitution: In criminal prosecutions in any court whatever, the party

accused shall have the right ... to appear and defend in person....N.D. Const. art. 1, § 12.

[¶ 5] There is no indication, from the record, that the petitioner and his attorney were still present in the courtroom during the deliberation stage of trial when the incident occurred. Constitutional right to be present is rooted in both the Confrontation Clause of the Sixth Amendment and the Due process Clause. *United States v. Gagnon*, 470 U.S. 522, 526 (1985)(per curiam); *Illinois v. Allen*, 397 U.S. 337, 338 (1970). In *Snyder v. Massachusetts*, 291 U.S. 97, 105-106 (1934), the Court held that a criminal defendant has a right to be present at any trial proceeding for which his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge. In cases involving felony charges, this Court has described the right to be present at trial as scarcely less important to the accused than the right of trial itself. *Diaz v. United States*, 223 U.S. 442, 455 (1912). The North Dakota Supreme Court has also held, "after a case has been submitted to the jury, N.D.C.C. 29-22-05 requires that all communication with jurors be made in the presence of the defendant." *State v. Zimmerman*, 524 N.W.2d 111; *State v. Smuda*, 419 N.W.2d 166 (N.D.1988). In addition, N.D.R.Crim.P. 43(a) requires that the defendant be present ... at every stage of the trial.

[¶ 6] Additionally, N.D.C.C. 29-22-05 states: After the jurors have retired for deliberations, if they desire to be informed on a point of law arising in the cause, or to have any testimony about which they are in doubt or disagreement read to them, they, upon their request, must be conducted into the courtroom by the officer who has them in custody. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the state's attorney and the defendant or his counsel, or after they have been called. Rule 43 of the North Dakota Rules of Criminal Procedure, entitled Defendant's Presence and found under the heading General Provisions therefore applies to appeals from municipal courts as well as to criminal actions initiated in district court. Additionally, Rule 43, N.D.R.Crim.P., provides, in part:

(a) When Required, Unless this rule provides otherwise, the defendant must be present at:

....

(2) Every trial stage, Including jury impanelment and the return of the verdict;

....

(b) When Not Required.

A defendant need not be present under any of the following circumstances:

(1) Misdemeanor Offense. The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and the sentencing to occur in the defendant's absence.

(2) Conference of Hearing on Legal Question, The proceeding involves only a conference of hearing on a question of law.

(3) Sentencing Correction. The proceeding involves the correction of reduction of sentence under Rule 35.

(c) Waiving Continued Presence. The further progress of the trial, including the return of the verdict and the imposition of the sentence, may not be prevented and the defendant waives the right to be present if the defendant, initially present at trial or having pleading guilty:

(1) is voluntary absent after the trial has begun (whether or not the defendant has been informed by the court of the obligation to remain during the trial);

(2) is voluntarily absent at the imposition of sentence; or

(3) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct that justifies the defendant's exclusion from the courtroom.

Under Rule 43(a) the defendant must be present at the actual trial as well as other proceedings in addition to trial. Rule 43(b) specifies when the presence of the defendant is not required. None of those provisions is applicable in this case. Rule 43(c) specifies when the defendant waives the right to be present at trial. Again, none of those provisions is applicable in this case.

[¶ 7] Once deliberations have begun, Rule 43(a)(3)(A), N.D.R.Crim.P., governs the procedure to be followed when a jury has a question for the district court:

If, after beginning deliberations, members of the jury request information on a point of law or request to have testimony read or played back to them, they must be brought into the courtroom. The court's response must be provided in the presence of counsel and the defendant. Rule 43(a)(3)(B), N.D.R.Crim.P., governs the procedure to be followed in order for the district court to respond to a jury's question or request for testimony in a manner other than in open court:

Rule 43(a)(3)(B), N.D.R.Crim.P., governs agreed Manner of Response. In the alternative, after consulting with counsel in the presence of the defendant, the court may respond to a jury's question or request for testimony in a manner other than in open court if agreed to by counsel and the defendant. In this case, the trial record indicates that during the deliberation stage of trial the jury never requested to reheat any testimony, have any video played back, or review any other evidence. It was Assistant district attorney Mr. Madden who made a request to the trial Court to have the State's laptop, which he described as "sort of, I guess you can call it been sanitized.", and a set of computer speakers that he had to retrieve from someplace outside of the courtroom, sent to the deliberation room to show the jury unspecified "videos".

[¶ 8] The trial court erroneously granted William's County assistant district attorney Mr. Madden's request to submit electronic materials into the deliberation room, despite the fact that the jury never requested to review any evidence during it's deliberations, and no alternative manner of communicating or presenting evidence to the jury was agreed to by defense counsel and the petitioner, which is required under Rule 43(a)(3)(B), N.D.R.Crim.P. The trial court should have properly brought the jury back into open court, in accordance with Rule 43(a)(3)(A), N.D.R.Crim.P., to inform it of the methods in which it could request to re-watch or reheat any evidence that was presented during the trial. The trial court's improper procedure not only violated the statutory directive of Art. I § 12 of the North Dakota Constitution, it prejudiced the petitioner's Sixth Amendment Constitutional right to appear and defend in person and with counsel for the whole of his trial when evidence was being presented. The confrontation clause of the Sixth Amendment is a trial right which protects the right of presence in circumstances when a defendant is confronting witnesses or evidence before the tier of fact; therefore the confrontation clause required the petitioner's presence.

B. The District Court Did Not Apprise The Petitioner On His Sixth Amendment Constitutional Rights, Nor Did The Petitioner Waive His Right of Confrontation and Right of Presence

[¶ 9] In cases involving felony charges, this Court has described the right to be present at trial as scarcely less important to the accused than the right to trial itself. *Diaz v. United States*, 223 U.S. 442, 455 (1922). This right extends not only to the confrontation of witnesses or other evidence against the defendant in a felony prosecution, but also to all critical stages of trial. *Diaz v. United States*, 223 U.S. 442, 456, 32 S.Ct. 250, 254, 56 L.E.d. 500 (1912)(quotation marks and citation omitted); see also *Valdez v. United States*, 244432, 454, 37 S.Ct. 725, 732 (1917). These critical stages include the arraignment, the entry of any plea, the impaneling of the jury, the return of the verdict, and the imposition of sentence. See *Canady*, 126 F.3d at 3611; *Fillippon v. Aibion Veiin Slate Co.*, 250 U.S. 76, 81, 29 S.Ct. 435, 436 (1919)(explaining that the right to be present extends from the time the jury is impaneled until it is discharged after rendering the verdict); see also *Shields v. United States*, 237 U.S. 583, 58889, 47 S.Ct. 487, 479 (1927).

[¶ 10] The deliberation phase is a stage of the criminal proceeding critical to its outcome so therefore the petitioner's presence was required, especially since information on the State's laptop and other materials was shown to the jury in the deliberation room. A waiver of a constitutional right must be voluntary, knowing and intelligent, that is, the act of waiver must be shown to have been done with awareness of its consequences. *United States v. Morgan*, 51 F.3d 1105, 1110 (2d Cir.), cert. denied, 516 U.S. 861, 116 S.Ct. 171, 133 L.Ed.2d 112 (1995); See *Johnson v. Zerbst*, 304 U.S. 458, 464, 68 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938); See, e.g, *United States v. Gagnon*, 470 U.S. 522, 529, 105 S.Ct. 1482, 11485-86, 84 L.Ed.2d 486 (1985)(per curiam); (*United States v. Rosario*, 111 F.3d 293, 299 (2d Cir. 1997), petition for cert. filed (July 14, 1997) (No. 97-5196); *Polizzi v. United States*, 926 F.2d 1311, 1319 (2d Cir. 1991).

[¶ 11] The record establishes that prior to the district court closing the record, it did not give the petitioner 'minimal' knowledge regarding the critical nature and purpose of the deliberation stage of trial or his Sixth Amendment Constitutional right to be present during his trial, including the jury deliberation stage, his right to confrontation of any evidence the State presented against him, or inform him of the importance and purpose of these rights and the consequences of his absence. The trial Court failed to inform

the petitioner of it's intent to not bring the jury back into open court, in his and his attorney's presence, in accordance with Rule 43(a)(3)(A), N.D.R.Crim.P., to inform the jury of the methods in which it could request to re-hear or re-watch any evidence that was properly admitted and presented during the trial. The trial Court also did not inform the petitioner of it's intention to close the trial record, exclude him from the trial proceeding and then allow a person or persons to take the State's laptop into the deliberation room, and allow assistant State attorney Mr.Madden to retrieve other items from an undisclosed location outside of the courtroom and have it taken into the deliberation room while the trial proceeding was in a recess. In Parker v. Gladden, 385 U.S. 385 (1966), the court held:

"As we said in *Turner v. Louisiana*, 379 US 466, 472-473, 13 L ed 2d 424, 428, 429, 85 S Ct 546 (1965), the 'evidence developed' against a defendant shall come from the witness stand in public courtroom where there is full judicial protection of the defendant's right of confrontation of cross-examination and of counsel.". Under the circumstances of the petitioner's trial, it would be unreasonable for this Court to find that the petitioner had affirmatively waived his Constitutional right to be present and his confrontation right.

C. The Trial Court's Improper Procedure Potentially Exposed The Jury To Extrinsic Information And Extraneous Influences, Rendering The Verdict at Trial Unreliable

[¶ 12] The Sixth Amendment requires that the jury's verdict must be based solely on the evidence developed at trial, See *Turner v. Louisiana*, 379 U.S. 466, 472, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965). The theory of our system is that the conclusions to be reached in a case will be induced only by the evidence and argument in open court, and not by any outside influence, whether of private talk or public print. *Patterson v. Colorado*, 205 U.S. 454, 462, 27 S.Ct. 556, 51 L.Ed. 879 (1907)(Holmes, J.). [E]xposure to extrinsic information deprives a criminal defendant of the protections of the Sixth Amendment, including his right of confrontation, of cross-examination, and of counsel. *United States v. Santana*, 175 F.3d 57, 65 (1st Cir.1999)(citations and footnotes omitted); see also *id.* (finding that the judge should not have intervened by allowing the jury to observe [extrinsic evidence] after the close of evidence and without the standard safeguards of a criminal trial and vacating the conviction); *Lacy v. Gardino*, 791 F.2d 980, 983 (1st Cir.1986)(finding that defendant's Sixth Amendment rights to confrontation and cross-examination were violated when juror peeled tape off exhibits unmasking information concerning the defendant's prior criminal record); *United States v. Hans*, 738 F.2d 88, 93 (3d Cir. 1984)(trial court committed reversible error by granting jury's request to examine objects not in evidence, after deliberations had begun).

[¶ 13] Here, the jury did not, on their own initiative, make any requests to review any videos or any other evidence during it's deliberations. The trial court granted Williams County assistant State's attorney Mr.Madden's personal request to send the State's laptop, which he described as being "sort of, I guess you can call it been sanitized", and a set of computer speakers that he had to retrieve from an undisclosed location outside of the courtroom, into the deliberation room to show the jury "videos". Assistant district attorney Mr.Madden did not disclose what exact videos he wanted the jury to view during it's deliberations. A laptop computer being "sort of" sanitized is synonymous with a mechanical device that isn't fully sanitized or free from all other programs and applications that were not apart of the properly admitted evidence shown during the petitioner's trial. If the jury had wished to review any video evidence, it could have done so in open court with the defendant present. See *State v. Fellows*, 47 Ohio App.2d 154, 352 N.E.2d 631,

635 (1975), overruled on other grounds in *State v Walker*, 53 Ohio St.2d 192, 374 N.E.2d 132 (1978). The trial Court allowing a mechanical device that a district attorney described as being “Sort of, I guess you can call it been sanitized” to be sent into the deliberation room to show videos to the jury, without first examining the device to ensure that it was free from any extrinsic information or have access to the internet or other programs, was problematic and jeopardized the integrity of the jury deliberation process.

[¶ 14] The trial record shows that the trial court had also approved assistant district attorney Mr. Madden’s request to retrieve a set of computer speakers from an undisclosed location outside of the courtroom. It is unclear, from the record, exactly where Mr. Madden went to retrieve a set of computer speakers, whether Mr. Madden actually retrieved a set of computer speakers or if he retrieved some other devices or materials that the defense was not made aware of, and what information, if any, was on those devices or materials. Because the trial court had closed the record and the trial proceeding was in a recess, it is unknown exactly who took the State’s laptop computer, and other devices or materials assistant district attorney Mr. Madden retrieved outside of the court, into the deliberation room. Lastly, Due to the trial court’s improper procedure, there is no record of any communication that may have occurred between the jury and the person or persons that took the State’s laptop computer and other items into the deliberation room. Some sort of communication likely occurred, considering the fact that the Court did not order anyone in open court to not have any communication with the jury when they went into deliberation room with the State’s laptop and other items, and the jury had not made any requests to the Court to review any evidence that was shown to them during the trial. Some engagement would have also been necessary if the jury asked the person or persons that entered the deliberation room why the laptop and other items were being submitted to them, what information was going to be shown to them on the electronic devices, and how to operate the electronic devices.

[¶ 15] Due to the trial Court’s improper procedure, the record does not indicate what exact information the jury was exposed to inside the deliberation room, while the petitioner was not present in open court. If the Court would have brought the jurors back into open court, in the presence of Kisi and his trial attorney, any extraneous influence or improper communication that occurred would have been preserved in the record, objections could have been made by the defense and curative instructions

requested by the defense and given by the trial Court. The North Dakota Supreme Court ruled that, “[T]he intent of § 29-22-02 is to ensure extraneous influences and communication do not taint jury deliberations.” State v. Weisz, 2002 ND 207, ¶ 7, 654 N.W. 2d 416, see also State v. Bergeron, 340 N.W. 2d 51, 58 (N.D.1983) (“[T]he State and The Court, independently, have an interest and obligation to assure that the jury reaches a verdict free of extraneous influence, strain, or discomfort.”). State v. Pickens, 2018 ND 198, ¶ 20; 916 N.W.2d 612. North Dakota has also held, “We are concerned with the district court’s decision to allow a clerk to present evidence to the jury during its deliberations. Under N.D.C.C § 29-22-02, the court may order someone to have communications with the jury. That part of the statute is not for the purpose of allowing a third person to display evidence to the jury during its deliberations. See, e.g., United States v. Fredricks, 599 F.2d 262, 266 (8th cir.1979)(“[R]equiring a United States Marshall to enter the jury deliberation room to display evidence may influence the jury’s decision in ways not preserved in the record. This type of interaction raises potentially serious concerns about privacy and integrity of jury deliberations.”). Pickens at ¶ 21.

II. THE EIGHT CIRCUIT COURTS OF APPEALS' DENIAL OF THE PETITIONER'S APPEAL CLAIM THAT THE DISTRICT COURT EXCLUDING HIM FROM HIS TRIAL DURING JURY DELIBERATIONS VIOLATED HIS SIXTH AND FOURTEENTH AMENDMENT CONSTITUTIONAL RIGHTS CONFLICTS WITH THE RELEVANT DECISIONS OF THIS COURT

A. The Eight Circuit Court of Appeals overlooked the precedent by this Court which are applicable to the petitioner's case

[¶ 16] In Illinois v. Allen, 397 U.S. 337, 338, rehearing denied, 398 U.S. 915 (1970), the right to be present was labelled “[o]ne of the most basic of rights guaranteed by the Confrontation Clause.” See also, United States v. Hayman, 342 U.S. 205 (1952) (in a “criminal trial where the guilt of the defendant is in issue … his presence is required by the Sixth Amendment.”). The Sixth Amendment also guarantees to a criminal defendant “the right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel,” United States v. Wade, 388 U.S. 218, 217 (1967); see Pointer v. Texas, 380 U.S. 400, 407 (1967). In U.S. v. Ward, 598 F.3d 1054, the Court articulated, “The Supreme Court has long held that, “One of the most basic of the rights guaranteed by the Confrontational Clause [of the Sixth Amendment] is the accused’s right to be present in the courtroom at every stage of his trial.” Illinois v. Allen 397 U.S. 337, 338, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), citing Lewis v United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed 1011 (1892). The right to be present, which was a recognized due process component, is an essential part of the defendant’s right to confront his accusers, to assist in selecting the jury and conducting the defense, and to appear before the jurors who will decide his guilt or innocence.”. Also central to the right of confrontation is the ability of the accused to test the veracity of his accusers’ allegations. “There are few subjects, perhaps, upon which this Court and other Courts have been more nearly unanimous than in the expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal.” Pointer v. Texas, 380 U.S. 400, 405 (1965).

[¶ 17] Even in civil Matters: Certain principles have remained relatively immutable. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government’s case must be disclosed to the

individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of testimony from individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy.

Greene v. McElroy, 360 U.S. 474, 496 (1959) (emphasis added); Willner v. Comm. On Character & Fitness, 373 U.S. 96, 103-04 (1963).

“The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of the informer undetected and uncorrected.” United States ex tel. Knauff v. Shaughnessy, 339 U.S. 537, 551 (1950) (Jackson, J. dissenting)

[¶ 18] N.D.R.Crim.P. Rule 43 requires a defendant’s personal appearance so does the Sixth Amendment and N.D.Const. art. I § 12. This Court has held that, while a defendant has a right under the Sixth Amendment and the Due process Clause to be present at trial, that right may be waived. The defendant may waive his right to be present not only by expressly consenting to a continuation of trial in his absence, See Diaz v. United States, 223 U.S. 442 (1912), but also by mere voluntary absence from his trial, Taylor v. United States, 414 U.S. 17, 19 (1973)(per curiam), and by other types of misconduct, see Illinois v. Allen, 397 U.S. 337 (1970). More recently, in Hemphill v. New York, 959 U.S. 140, 156 (2022), this Court held, in part, “the Confrontation Clause will not bar a defendant’s removal from a courtroom if, despite repeated warnings, he insists that on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Illinois v. Allen, 397 U.S. 337, 343, 90 S.Ct. 1057, 25 L.ED.2d 353 (1970).”. The reasoning of this Court’s decisions holding that a defendant may waive his right to be present during his trial is not applicable in the context of this case since the petitioner did not fail to appear at his trial, expressly waive his right to presence, or otherwise voluntarily waive his right to confront the evidence against him. The petitioner also did not behave in a disruptive or disorderly manner during the trial proceeding.

[¶ 19] Under those circumstances, coupled with the fact that the trial Court did not specifically inform the petitioner about the important nature and purpose of the proceeding, his Constitutional right to presence and right to

confrontation, or the consequences of his absence, it would be unreasonable to conclude that the petitioner had impliedly waived those Constitutional rights during the deliberation stage of his trial. In *Hemphill v. New York*, 959 U.S. 140, 156 (2022), this Court also held, “If Crawford stands for anything, it is that the history, text, and purpose of the Confrontational Clause bar judges from substituting their own determinations of reliability for the method the Constitution guarantees. This commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. *Crawford*, 541 U.S., at 61, 124 S.Ct. 1354. It thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. *Ibid.* [A] mere judicial determination regarding the reliability of evidence is no substitute for constitutionally prescribed method of assessing reliability. *Id.*, at 62, 124 S.Ct. 1354. The upshot is that the role of the trial judge is not, for Confrontation Clause purposes, to weigh the reliability or credibility of testimonial hearsay evidence; it is to ensure that the Constitution’s procedures for testing the reliability of that evidence are followed.”.

[¶ 20] Here, the Eighth Circuit Court overlooked the fact that during the jury deliberation stage of the petitioner’s trial, the trial judge failed to follow those Constitutional procedures that this Court mentioned in *Hemphill*, when it did not bring the jury back into open court, in the petitioner’s presence, to inform the jury of the methods in which it could request to review any evidence; instead, sending the trial proceeding into a recess and permitted a person or persons to enter the deliberation room to show information on the State’s laptop, and other items which Mr. Madden retrieved from an undisclosed location outside of the courtroom, while the petitioner and his attorney were not present in the courtroom. It is undisputed that a criminal defendant is entitled to be tried by an impartial jury. U.S. Const. amends. VI, XIV; *Turner v. State of Louisiana*, 379 U.S. 466, 47172, 85 S.Ct. 546, 549, 13 L.Ed.2d 424 (1965). The requirement that a jury’s verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. *Id.* at 472, 85 S.Ct. at 549 (quoting *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961)). The danger of compromising this integrity is never greater than when the process is contaminated by outside influences. See *id.*; *Gibson v. Clanon*, 663 F.2d 851, 854 (9th Cir, 1980), cert. denied, , 450 U.S. 1035, 101 S.Ct. 1749, 68 L.Ed.2d 231 (1981).

[¶ 21] The record indicates that prior to closing the record and sending the trial proceeding into recess, the trial Court did not follow any proper safeguards or strictly prohibit any person from engaging or having any communication with the jury when they went into the deliberation room with the State's laptop and other materials. The trial Court should have brought the jury back into open court, in the presence of the petitioner and his attorney, in accordance with N.D.C.C. 29-22-05, to inform the jury of the method in which it could re-watch or re-hear any evidence that was properly admitted and presented during the trial. The trial Court's improper procedure failed to ensure the privacy and integrity of the jury's deliberation by creating a significant possibility of outside or non-evidentiary extraneous influences and considerations that may have affected the ability of the jurors to be fair and impartial. For the foregoing reasons, this Court should reverse the judgment of the Eighth Circuit Court of Appeals and remand this case for a new trial to ensure a fair and impartial adjudication of the case.

CONCLUSION

The petitioner respectfully requests that the petition for a Writ of Certiorari be granted.

Respectfully submitted,

Date: _____