

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LEONARDO GARCIA MORALES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the right to presence at critical stages of a criminal trial extend to proceedings before the jury in which the district court discourages the jury from pursuing its request during deliberations to rehear the testimony of the accused?

INTERESTED PARTIES

The caption contains the names of all of the parties interested in the proceedings.

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PETITION FOR WRIT OF CERTIORARI

Leonardo Garcia Morales respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, entered in case number 19-11653 on February 25, 2021.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, unpublished and available at 846 Fed. Appx. 872, is contained in the Appendix (App. 1).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The Court of Appeals issued its decision on February 25, 2021. App. 1–15. This petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies upon the following constitutional and statutory provisions:

U.S. Const. amend. V (due process clause):

No person shall be ... deprived of life, liberty, or property, without due process of law.

U.S. Const. amend. VI (due process clause):

No person shall be ... deprived of life, liberty, or property, without due process of law.

28 U.S.C. 753(b)

(b) Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge. ...

Fed. R. Crim. P. 43:

(a) When Required. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

- (1) the initial appearance, the initial arraignment, and the plea;
- (2) every trial stage, including jury impanelment and the return of the verdict; and
- (3) sentencing.

(b) When Not Required. A defendant need not be present under any of the following circumstances:

- (1) Organizational Defendant. The defendant is an organization represented by counsel who is present.
- (2) 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 sentencing to occur by video teleconferencing or in the defendant's absence.
- (3) Conference or Hearing on a Legal Question. The proceeding involves only a conference or hearing on a question of law.
- (4) Sentence Correction. The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

(c) Waiving Continued Presence.

(1) In General. A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

- (A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;
- (B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or
- (C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) Waiver's Effect. If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

STATEMENT OF THE CASE

Introduction

The district court, confronted with an unexpected action by the United States Marshal's Office to remove the quadriplegic petitioner from the courthouse during trial, proceeded in petitioner's absence to conduct proceedings on the deliberating jury's request to rehear specific testimony, including petitioner's trial testimony in his own behalf. The district court, along with counsel for the government and petitioner, went to the jury room to meet with the jurors, upon the jury's persistence in requesting

a transcript of petitioner’s testimony, so as to dissuade the jury from its request.¹ The jury then relented and withdrew its request and convicted petitioner of the principal charges against him.

Course of Proceedings

Petitioner was prosecuted on a multi-count federal indictment returned in Miami, Florida in October 2017. Petitioner was charged with conspiracy and attempt to obstruct commerce by means of robbery, in violation of 18 U.S.C. § 1951(a), and related charges of conspiracy and attempt to possess a controlled substance with intent to distribute, in violation of 21 U.S.C. §§ 841 and 846. A 15-day jury trial was conducted in half-day increments because of petitioner’s medical condition: petitioner is a quadriplegic with impairment of various bodily functions.

At trial, the government presented evidence that in September 2012, several persons attempted to break into a private residence used as a marijuana grow house in Miramar, Florida. The home owner fired on the would-be robbers and soon thereafter observed petitioner wounded at the scene. Petitioner’s DNA profile was found on evidence recovered at the scene. One admitted participant in the attempted robbery, Alfredo Hernandez, testified that he participated with petitioner in planning the robbery and that he went with petitioner, in petitioner’s van, to the grow house

¹ The proceedings before the jury at the jury room door were not transcribed. App. 11–12.

where they then attempted to conduct a robbery. At the grow house, Hernandez heard shots, took off running, got back in the van, and left, but saw that somebody was on the ground. Hernandez did not see what happened to that person or know what had occurred in relation to the gunfire.

Petitioner testified in his own behalf over the course of two days, denying any intention to commit a drug robbery or the other charged offenses and explaining that he was made a scapegoat by the actual participants in the crime who testified against him; petitioner contended that as a helpless quadriplegic of whom the participants were not afraid, he had been scapegoated by them to deflect their own responsibility for the offenses. The government, on cross-examination, sought to challenge his credibility, but petitioner maintained his innocence. In cross-examination, the government suggested that petitioner's defense of being in the wrong place at the wrong time was untrue, but petitioner maintained his claim of innocence.

On the first full day of jury deliberations, when the district court observed that petitioner was not in the courtroom and upon inquiry by defense counsel, the district court noted that petitioner had been moved out of the courthouse by the Marshal's Office, but the trial court made no determination that any significant delay would have resulted from simply bringing petitioner back into the courtroom. Instead, the district court proceeded in petitioner's absence, discussed with counsel for the parties issues relating to the jury's request for petitioner's testimony and that of a government

witness, brought the jury into the courtroom (in the absence of petitioner) and instructed the jury on the difficulty of producing transcripts. When the jury thereafter sent another note, persisting in its transcript interest, the district court advised counsel to follow him to the jury deliberation room, where the judge engaged the deliberating jurors off the record regarding their request. The jurors relented and withdrew their request for petitioner’s testimony. The proceedings at the jury room were not reported and thus the specific content of the verbal communications is not known.

Following its deliberations, the jury convicted petitioner of conspiracy and attempt to commit Hobbs Act robbery and conspiracy and attempt to possess a controlled substance with intent to distribute. The district court imposed a sentence of 84 months imprisonment.

On appeal, the Eleventh Circuit affirmed petitioner’s convictions, but remanded for resentencing due to a guideline calculation error. App. 15.

Concerning petitioner’s claim of improper exclusion from trial, the Eleventh Circuit described the facts as follows:

After deliberations began, and when Garcia Morales was not present, the jury asked the district court whether it could get transcripts of witness testimony, including Garcia Morales’s testimony. At first, the district court said it would wait for Garcia Morales to be present to address the question. But upon learning that Garcia Morales had been returned to the facility where he was housed during the trial, the district court decided to answer the transcript question given that it “doesn’t really affect any substantive matter.” The district court then informed the

government and Garcia Morales's counsel that it would explain to the jurors that they could get a copy of the transcripts, but that "it is time-consuming, [and] that they should rely on their own recollection," if they could. Garcia Morales's counsel never objected to the district court so advising the jury outside the presence of Garcia Morales.

The district court then told the jurors they should "rely on [their] recollection of the testimony," but that they could receive copies of the transcripts if they so desired. The district court also explained that if the jurors had seen that "the lawyers had some copies of the transcripts" during closing arguments, "that's because they ordered it" before then, and it would still take some time to produce copies for the jury. This prompted the jury to ask, "the attorneys have copies, so why can't we get them?" The attorneys explained to the district court that neither of them had transcripts of witness testimony, only transcripts that had been received in evidence. The district court then asked the attorneys to come stand in the doorway of the jury room and repeat that explanation to the jury, which they did. There is no record of what the attorneys said to the jury at that time, and Garcia Morales was not present for this discussion. The jury then withdrew its request to review a transcript of Garcia Morales's testimony but still asked to review the transcript of another witness's testimony.

App. 3–5.

The Eleventh Circuit, concluding that petitioner's exclusion would be reviewed solely for plain error, because the incomplete record showed no objection by defense counsel, App. 10, found no basis for reversal:

[T]his Court has held that a district court did not violate a defendant's right to be present at every stage of the trial when the court, absent the defendant and his counsel, responded to a jury's request for a transcript by noting that transcripts were not usually prepared during a trial and

that the jury should follow its recollection of the evidence. *United States v. Zieli*, 734 F.2d 1447, 1460 (11th Cir. 1984) In *Zieli*, this Court held that the defendant showed no prejudice as a result of the district court’s “purely ministerial” act. *Id.* In so ruling, we held that “when the judge’s answer to the jury’s inquiry is distinctly responsive to the question; clearly states the law; and no prejudice is shown,” any alleged error is harmless. *Id.*

So too here. Even if Garcia Morales should have been present for the district court’s response to the jury’s inquiry, he has not shown how this affected his substantial rights. He has not explained what objection he would have lodged or how his presence, in addition to that of his counsel (who was present throughout this interaction) would have changed anything. Garcia Morales suggests that the district court somehow convinced the jury to withdraw its request for a transcript of his testimony. But the district court never denied the jury access to any transcript and there is no reason to think that Garcia Morales’s presence would have convinced the jury they needed it.

App. 10–11.

REASONS FOR GRANTING THE PETITION

The circumstances of petitioner’s case are ideal for resolving the scope of the ministerial act exception to the right of a defendant to be present for trial. Petitioner, a quadriplegic who was in custody during the trial, was improperly excluded from a critical stage of trial during which the district court, in repeated interaction with the jury, caused the jury to withdraw its request to rehear petitioner’s trial testimony—testimony that was petitioner’s entire defense to the charges.

The district court’s actions violated petitioner’s fundamental Fifth Amendment rights. There is a risk of prejudice from direct substantive communications between the judge and the jury. *See United States v. Gypsum Company*, 438 U.S. 422, 461 (1978); *see id.* at 462 (“While it is, of course, impossible to gauge what part the disputed meeting played in the jury’s action of returning a verdict the following morning, this swift resolution of the issues in the face of positive prior indications of hopeless deadlock, at the very least, gives rise to serious questions in this regard.”).

A defendant’s right to presence and consultation with counsel regarding key stages in the trial is also well established. *See Snyder v. Massachusetts*, 291 U.S. 97, 105–06 (1938) (due process violation of right to be present at all stages of trial, where fundamental fairness might be thwarted by defendant’s absence; right is “to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge”). A defendant’s right to be present is waivable only under the specific conditions stated in Fed. R. Crim. P. 43. *See United States v. Mezzanatto*, 115 S.Ct. 797, 801–02 (1995) (citing *Crosby v. United States*, 113 S.Ct. 748 (1993)). Rule 43 provides that the defendant can waive his right to be present, but does not provide that his counsel can waive that right in his absence. And counsel made no such waiver, nor was counsel even invited to by the district court, in this case. The right to appear before the jury at all-important stages

of the trial is a right that is designed “to affirm the accused’s individual dignity and autonomy.” *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984).

The Court Reporters Act requires a court reporter to record “verbatim by shorthand, mechanical means, electronic sound recording, or any other method . . . (1) all proceedings in criminal cases had in open court....” 28 U.S.C. § 753(b). There is no exception when the trial court moves the proceedings into the jury room to answer a jury’s questions during deliberations. The responsibility to insure compliance with the statute lies with the court, not the court reporter or the parties. *See United States v. Gallo*, 763 F.3d 1504, 1530 (6th Cir. 1984); *United States v. Garner*, 581 F.2d 481, 488 (5th Cir. 1978). The requirements of 28 U.S.C. § 753(b), the Court Reporters Act, “are mandatory not permissive.” *Veillon v. Exploration Services*, 876 F.2d 1197, 1200 (5th Cir. 1989); *In Re: Progressive Games, Inc.*, 194 F.3d 1329, 1999 WL 187639 at *1 (D.C. Cir. 1999) (unpublished).

The apparent consequence of the district court’s conducting of a critical portion of the trial in the absence of petitioner and in conducting a portion of the proceedings off the record in the jury room during deliberations was to change the jury’s mind about needing to rehear petitioner’s testimony. Shortly after the trial court concluded the proceedings in the jury room, the jury’s request to hear petitioner’s testimony was

withdrawn, and the jury instead maintained only a desire to rehear the testimony of a government witness.

The disabled petitioner was utterly dependent on the trial court to effectuate his right of presence at, and consultation with counsel during, the jury trial, but he was excluded from proceedings by the district court's actions. And in the portion of the proceedings conducted off the record—in the jury room itself—petitioner's testimony ended up excluded from the jury's request. There was no consent or authorization by petitioner or counsel for the actions by the district court. There is no reviewable record of what occurred in the jury room with the judge and the jurors, but such a proceeding is inherently improper and coercive.

The district court violated petitioner's fundamental right to presence at a critical stage of the case. Petitioner was available to be brought over to court, but was not brought over to court; his counsel did not waive his presence, nor did petitioner. The trial court's decisions to exclude petitioner from the trial, to go into the jury deliberation room, to confer with the jury regarding its requests, and to go off the record for the critical improper interaction with the jury were clear and obvious errors. Because there is no record of exactly what the district court told the jurors and how the improper interaction influenced them to be dissuaded from interest in petitioner's testimony, the inference of prejudice is great.

The Eleventh Circuit’s expansion of a “ministerial act” exception to the right of presence in this context allows the exception to swallow the rule. To bring uniformity and procedural regularity to the enforcement of the right of presence at trial, the Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

RICHARD C. KLUGH, ESQ.
Counsel for Petitioner

Miami, Florida
July 2021

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-11653
Non-Argument Calendar

D.C. Docket No. 1:17-cr-20701-MGC-5

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEONARDO MIGUEL GARCIA MORALES,
a.k.a. El Padrino,
a.k.a. El Taliban,
a.k.a. Miguelito,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(February 25, 2021)

Before WILSON, MARTIN, and ROSENBAUM, Circuit Judges.

PER CURIAM:

Leonardo Miguel Garcia Morales appeals his conviction and sentence for conspiracy to commit Hobbs Act robbery. He raises five arguments on appeal. First, he argues the district court constructively amended the indictment in violation of his Fifth and Sixth Amendment rights. Second, he says the district court improperly conferred with the jury about their request for a transcript when Garcia Morales was not present. Third, he argues that his sentence was procedurally defective because the district court gave him a longer sentence on account of conduct for which Garcia Morales was never convicted. Fourth, he says the district court should have granted him a continuance to allow a neurologist to testify at his sentencing. And finally, Garcia Morales says his 84-month sentence is substantively unreasonable in light of his severe medical condition.

After careful review, we find that the district court did not amend the indictment and that the district court's communications with the jury do not warrant a new trial. Therefore, we affirm Garcia Morales's conviction. However, we agree with Garcia Morales that his sentence is procedurally unreasonable because the district court erred in including an offense of which he was acquitted in its calculation of his offense level. We therefore vacate Garcia Morales's sentence and remand for further proceedings consistent with this opinion. Because we vacate Garcia Morales's sentence on this ground, we need not address the other challenges he raised to his sentence.

I.

In 2012, Garcia Morales participated in a plan to rob what he believed to be a marijuana grow house. Instead, Garcia Morales was met by an armed homeowner who shot him repeatedly, leaving him a quadriplegic. Garcia Morales's co-conspirators later robbed a gold courier, but due to his severe injuries, Garcia Morales did not directly participate in that venture.

In 2017, a grand jury indicted Garcia Morales on a number of counts related to the robberies and other conduct. As relevant to this appeal, Count 1 charged conspiracy to commit Hobbs Act robberies for planning to steal from "persons employed by businesses and companies operating in interstate commerce and foreign commerce, and persons engaged in illegal interstate and foreign commerce, namely, narcotics trafficking."

The district court's jury instructions explained that Count 1 charged Garcia Morales with "two separate substantive crimes," conspiring to rob a gold courier and to rob a marijuana dealer. The district court further explained that the government was required to prove that Garcia Morales committed only one of those crimes but that the jury had to be unanimous as to "which of the two crimes" he committed.

After deliberations began, and when Garcia Morales was not present, the jury asked the district court whether it could get transcripts of witness testimony,

including Garcia Morales's testimony. At first, the district court said it would wait for Garcia Morales to be present to address the question. But upon learning that Garcia Morales had been returned to the facility where he was housed during the trial, the district court decided to answer the transcript question given that it "doesn't really affect any substantive matter." The district court then informed the government and Garcia Morales's counsel that it would explain to the jurors that they could get a copy of the transcripts, but that "it is time-consuming, [and] that they should rely on their own recollection," if they could. Garcia Morales's counsel never objected to the district court so advising the jury outside the presence of Garcia Morales.

The district court then told the jurors they should "rely on [their] recollection of the testimony," but that they could receive copies of the transcripts if they so desired. The district court also explained that if the jurors had seen that "the lawyers had some copies of the transcripts" during closing arguments, "that's because they ordered it" before then, and it would still take some time to produce copies for the jury. This prompted the jury to ask, "the attorneys have copies, so why can't we get them?" The attorneys explained to the district court that neither of them had transcripts of witness testimony, only transcripts that had been received in evidence. The district court then asked the attorneys to come stand in the doorway of the jury room and repeat that explanation to the jury, which they

did. There is no record of what the attorneys said to the jury at that time, and Garcia Morales was not present for this discussion. The jury then withdrew its request to review a transcript of Garcia Morales's testimony but still asked to review the transcript of another witness's testimony.

The jury found Garcia Morales guilty on Count 1 of conspiracy to commit the marijuana robbery, but not the gold courier robbery. Garcia Morales's Presentence Investigation Report ("PSR") determined that because Count 1 charged "conspiracy to commit more than one offense," Sentencing Guideline § 1B1.2(d) required that the charge be treated "as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." The PSR recommended a total offense level of 29, including one unit attributed to the gold courier robbery.

Garcia Morales objected to the computation of the offense level because "it includes points for acquitted conduct," namely the gold courier robbery. The district court overruled that objection, finding "by a preponderance" that Garcia Morales assisted in the planning of and shared in the proceeds from the gold courier robbery. The district court then noted that it was "probably going to depart downward for some of the categories, such as his medical condition and such, as him not being overtly involved," and suggested that "in the end it's probably going

to balance out.” The district court sentenced Garcia Morales to 84 months’ imprisonment on all counts.

Garcia Morales timely appealed.

II.

A.

Garcia Morales argues that the district court constructively amended the indictment when it instructed the jury that it needed to find him guilty of conspiring to commit only one of either the gold courier or marijuana robberies. Garcia Morales points out that Count 1 charges him with conspiring to rob “persons employed by businesses and companies operating in interstate commerce and foreign commerce, and persons engaged in illegal interstate and foreign commerce.” And he insists that the district court was not entitled to amend the indictment to change the “and” to an “or.”

We review de novo whether the district court constructively amended the indictment. United States v. Sammour, 816 F.3d 1328, 1335 (11th Cir. 2016).¹ The Fifth Amendment guarantees that a defendant can only be convicted of crimes charged in his indictment. United States v. Holt, 777 F.3d 1234, 1261 (11th Cir.

¹ The government argues that this alleged error is unreviewable because Garcia Morales invited it or, in the alternative, that it should be reviewed only for plain error because he failed to object to the instruction at the charging conference. But we need not decide which level of review applies here, because Garcia Morales’s constructive amendment claim fails even when reviewed de novo. See infra pp. 6–9.

2015). An indictment is constructively amended, and violates that right, when “the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction beyond what [was] contained in the indictment.” Id. (quotation marks omitted). But there is a difference between the elements and the objects of a crime. It is well-settled that “where an indictment charges in the conjunctive several means of violating a statute, a conviction may be obtained on proof of only one of the means, and accordingly the jury instruction may properly be framed in the disjunctive.” United States v. Simpson, 228 F.3d 1294, 1300 (11th Cir. 2000).

Here, it is clear that Count 1 charged a single, multi-object conspiracy. The elements of conspiracy to commit Hobbs Act robbery are: (1) there was an agreement between two or more people, including the defendant, to commit a Hobbs Act robbery; (2) the defendant knew about the conspiratorial goal; and (3) the defendant voluntarily participated in furthering that goal. Brown v. United States, 942 F.3d 1069, 1075 (11th Cir. 2019) (per curiam). Garcia Morales was charged with violating the Hobbs Act by conspiring to steal from legal and illegal enterprises. In other words, Garcia Morales was charged with participating in a single conspiracy that had more than one goal, including the marijuana robbery and the gold courier robbery. This means the government needed to prove that he was aware of and participated in furthering at least one of those goals, but not

necessarily both. See Simpson, 228 F.3d at 1300. The district court properly instructed the jury about how to evaluate the evidence as to whether Garcia Morales participated in a single, multi-object conspiracy.

Garcia Morales first argues that the district court improperly instructed the jury as if he had been charged with multiple conspiracies when he was charged with a single conspiracy. But no one disputes that Count 1 charged Garcia Morales with a single conspiracy. Garcia Morales's repeated insistence that Count 1 "clearly charges a single conspiracy" does not help him in the face of a charge for a single conspiracy with multiple objects.

Garcia Morales places great weight on the fact that the government did not charge him for robbing the gold courier or aiding and abetting in that robbery. He says it is reasonable to infer from that decision that "the grand jury did not charge [him] in Count 1 as a co-conspirator in the gold courier robbery as a stand-alone conspiracy." But it is not uncommon for a defendant to be charged with conspiracy to commit a crime without being charged with the substantive offense. See Ocasio v. United States, 578 U.S. __, 136 S. Ct. 1423, 1430 (2016) ("[A] conspirator may be convicted even though he was incapable of committing the substantive offense himself." (quotation marks omitted)). And again, Garcia Morales was not charged with conspiring to commit the gold courier robbery as a

stand-alone conspiracy. He was charged with participating in a single, overarching conspiracy with two objects.

Garcia Morales also points to the fact that there was insufficient evidence of his knowledge and planning of the gold courier robbery. But this merely explains the jury's verdict regarding that object of the conspiracy. It does not tell us that the grand jury intended to charge him with participating in both, and necessarily both, goals of that single conspiracy. Indeed, the fact that there was considerably more evidence about Garcia Morales's participation in one object of the conspiracy than the other suggests quite the opposite.

Garcia Morales was charged with a single, multi-object conspiracy. The district court was therefore correct in instructing the jury that the government needed to prove Garcia Morales participated in only one object of the conspiracy. It did not constructively amend the indictment by doing so.

B.

Garcia Morales next argues that the district court improperly excluded him from a critical stage of the trial when it discussed the jury's request for trial transcripts without him present and answered one of the jury's questions off the record. He argues that this violated his Fifth and Sixth Amendment Rights, Federal Rule of Criminal Procedure 43, and the Court Reporters Act ("CRA"). He points out that after the off-the-record discussion, the jury withdrew their request

for a transcript of his testimony, and says that neither he nor his counsel ever consented to the district court's decision to have these discussions without Garcia Morales present.

As an initial matter, because Garcia Morales raised this claim for the first time on appeal, we review the constitutionality of the district court's actions for plain error. United States v. Mosquera, 886 F.3d 1032, 1043 (11th Cir. 2018). To succeed on plain error review, a defendant must show “error that is plain; that affects substantial rights; and that seriously affects the fairness, integrity, or public reputation of judicial proceedings.” Holt, 777 F.3d at 1261 (quotation marks omitted).

A criminal defendant has the “right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.” Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 2667 (1987). But this Court has held that a district court did not violate a defendant's right to be present at every stage of the trial when the court, absent the defendant and his counsel, responded to a jury's request for a transcript by noting that transcripts were not usually prepared during a trial and that the jury should follow its recollection of the evidence. United States v. Zielie, 734 F.2d 1447, 1460 (11th Cir. 1984), abrogated in part on other grounds by Bourjaily v. United States, 483 U.S. 171, 107 S. Ct. 2775 (1987), as recognized in United States v.

Chestang, 849 F.2d 528 (11th Cir. 1988). In Zielie, this Court held that the defendant showed no prejudice as a result of the district court’s “purely ministerial” act. Id. In so ruling, we held that “when the judge’s answer to the jury’s inquiry is distinctly responsive to the question; clearly states the law; and no prejudice is shown,” any alleged error is harmless. Id.

So too here. Even if Garcia Morales should have been present for the district court’s response to the jury’s inquiry, he has not shown how this affected his substantial rights. He has not explained what objection he would have lodged or how his presence, in addition to that of his counsel (who was present throughout this interaction) would have changed anything. Garcia Morales suggests that the district court somehow convinced the jury to withdraw its request for a transcript of his testimony. But the district court never denied the jury access to any transcript and there is no reason to think that Garcia Morales’s presence would have convinced the jury they needed it.²

Garcia Morales also claims that the district court violated the CRA when the court responded, outside the deliberation room and off the record, to the jury’s question about why the jurors could not have transcripts if the attorneys had them.

² As we review the alleged violation of Federal Rule of Criminal Procedure 43 for harmlessness, the same analysis applies. That rule requires that the defendant be present at “every trial stage, including jury impanelment and the return of the verdict.” Fed. R. Crim. P. 43(a)(2). To the extent the district court’s actions here technically violated the rule, Garcia Morales has failed to show how he was harmed by the violation.

The CRA requires a reporter to record verbatim all proceedings held in open court in criminal cases. See United States v. Cashwell, 950 F.2d 699, 703 (11th Cir. 1992) (quoting 28 U.S.C. § 753(b)). But not every “failure to record, however small or insignificant, will work a reversal.” United States v. Selva, 559 F.2d 1303, 1306 n.5 (5th Cir. 1977).³ Typically, reversal is warranted in cases with “substantial or significant omissions,” such as when the record is missing voir dire, opening statements, government or defense closing argument, or the entire transcript. See id.

Here, there was no substantial or significant omission from the record. The interaction with the jury was very brief, was in the presence of Garcia Morales’s trial counsel, the district court and counsel gave accurate information in response to the jury’s question, and the court first put into the record what it was going to have the attorneys tell the jury. See United States v. Stefan, 784 F.2d 1093, 1102 (11th Cir. 1986) (holding that the omission of a one hour and forty-five minute bench conference, in such a “long and complex case,” was not a substantial or significant omission). And as we review this claim for harmless, see United States v. Sweat, 555 F.3d 1364, 1367 (11th Cir. 2009) (per curiam), Garcia

³ In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981. Id. at 1209.

Morales has again failed to show how he was harmed by any technical violation of the CRA.

C.

Finally, Garcia Morales argues that his sentence is procedurally unreasonable because his offense level calculation improperly included the gold courier robbery. The government concedes that the district court erred in calculating Garcia Morales's offense level by treating the gold courier robbery as a separate group under Guideline § 1B1.2(d). Nevertheless, the government insists that any error was harmless because the district court stated that it was departing downward one level due to Garcia Morales's limited role in the gold courier robbery.

We agree with the government's concession that the district court erred in treating the gold courier robbery as a separate group under United States Sentencing Guideline § 1B1.2(d). That Guideline states that a "conviction on a count charging conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." USSG § 1B1.2(d). The commentary clarifies that the conviction itself has to establish that the defendant committed each relevant offense. USSG § 1B1.2(d) cmt. n.3. Here, the jury acquitted Garcia Morales of conspiring to commit the gold courier robbery. Thus

the district court was not entitled to treat the gold courier robbery as a separate offense under this guideline.

We conclude this error was not harmless. “An error in the district court’s calculation of the Sentencing Guidelines range warrants vacating the sentence, unless the error is harmless.” United States v. Barner, 572 F.3d 1239, 1247 (11th Cir. 2009). An error is harmless only where “a district judge clearly states that he would impose the same sentence, even if he erred in calculating the guidelines.” Id. at 1248 (emphasis added). The fact that the district court varied downward from the guidelines range is not sufficient to demonstrate harmless error. See United States v. Eason, 953 F.3d 1184, 1195 n.8 (11th Cir. 2020) (finding that a Guidelines calculation error was not harmless where the district court never “stated on the record that the enhancement made no difference to the sentence it imposed.” (quotation marks omitted) (alterations adopted)).

Here, the district court’s statements were not clear enough to assure us that it would have imposed the same sentence regardless of its calculation error. The district court stated that it would “probably” depart downward due to a combination of Garcia Morales’s medical condition and “him not being overtly involved.” These equivocal statements, suggesting that both Garcia Morales’s medical condition as well as his limited role in the gold courier robbery contributed to the downward departure, provide only the weakest of assurance that the error

was harmless. Because the district court erred in calculating Garcia Morales's Guidelines range and never clearly stated that it would impose the same sentence regardless of that error, we conclude that his sentence is procedurally unreasonable. See Barner, 572 F.3d at 1248.

AFFIRMED in part, **VACATED** in part, and **REMANDED** for further proceedings consistent with this opinion.

United States District Court
Southern District of Florida
MIAMI DIVISION

UNITED STATES OF AMERICA

v.
LEONARDO MIGUEL GARCIA MORALES

JUDGMENT IN A CRIMINAL CASE

Case Number - 1:113C 17-20701-CR-GRAHAM-05

USM Number: 16707-104

Counsel For Defendant: Deric Zacca, Esq.
 Counsel For The United States: Ignacio Vasquez, Esq.
 Court Reporter: Jill Filicetti

Date of Original Judgment: April 18, 2019
 (Or Date of Last Amended Judgment)

Reason for Amendment:

Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
 Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36) Modification of Imposed Term of Imprisonment for Retroactive to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

The defendant was found guilty on Counts One, Two, Three and Seven of the Indictment.
 The defendant is adjudicated guilty of the following offenses:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. §1951(a)	Conspiracy to Commit Hobbs Act Robbery	June 4, 2014	1
21 U.S.C. § 846	Conspiracy to Possess with the Intent to Distribute 500 Grams or more of Cocaine and a Detectable Amount of Marijuana	June 4, 2014	2
18 U.S.C. § 1951(a)	Attempted Hobbs Act Robbery	September 30, 2012	3
21 U.S.C. §846	Attempted Possession with Intent to Distribute 500 Grams or more of Cocaine	August 28, 2013	7

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on Count Four of the indictment.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
 April 18, 2019

DONALD L. GRAHAM
 United States District Judge

App. 16 May 13, 2019

DEFENDANT: LEONARDO MIGUEL GARCIA MORALES
CASE NUMBER: 1:13C 17-20701-CR-GRAHAM-05

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **84 months** as to Counts One, Two, Three and Seven of the Indictment to be served concurrently. The sentence imposed shall run concurrently to defendant's term of imprisonment in Broward County Circuit Court docket number 1214525CV10A. The defendant shall receive credit for time served as applicable by statute.

The Court makes the following recommendations to the Bureau of Prisons: That the defendant be designated to a facility close to South Florida, considering his severe (quadriplegic) medical condition.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

DEFENDANT: LEONARDO MIGUEL GARCIA MORALES
CASE NUMBER: 1:113C 17-20701-CR-GRAHAM-05

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **three (3) years** as to Counts One, Two, Three and Seven all terms to run concurrently with each other..

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons. The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: LEONARDO MIGUEL GARCIA MORALES
CASE NUMBER: 1:113C 17-20701-CR-GRAHAM-05

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

No New Debt Restriction - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the United States Probation Officer.

Permissible Search - The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

Unpaid Restitution, Fines, or Special Assessments. If the defendant has any unpaid amount of restitution, fines, or special assessment, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

DEFENDANT: LEONARDO MIGUEL GARCIA MORALES
CASE NUMBER: 1:113C 17-20701-CR-GRAHAM-05

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

<u>Total Assessment</u>	<u>Total Fine</u>	<u>Total Restitution</u>
\$400.00		

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: LEONARDO MIGUEL GARCIA MORALES
CASE NUMBER: 1:113C 17-20701-CR-GRAHAM-05

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A. Lump sum payment of \$400.00 due immediately, balance due

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment is payable immediately to the CLERK, UNITED STATES COURTS and is to be addressed to:

**U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716**

The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.