No. _____

IN THE
Supreme Court of the United States

JAIRO ARNALDO JACOME,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

"Since before the founding of our Republic, courts have universally met the need to educate jurors by orally advising jurors 'in the presence of the parties, the counsel, and all others . . . in matters of law arising upon th[e] evidence.'" *United States v. Becerra*, 939 F.3d 995, 1000 (9th Cir. 2019) (quoting 3 William Blacksone, Commentaries *375).

In this case, the trial court orally instructed the jury, but that instruction contained mistaken references to conspiratorial liability in a non-conspiracy count.

The parties noticed the error after the judge finished the jury charge. However, instead of returning the jury to open court to reinstruct it on that count, the parties simply agreed to correct a written copy of instructions which was provided to the jury. The jury was never informed of the difference between the judge's oral instructions and the written copy of the instructions it received. On plain error review, the Fourth Circuit determined the district court's instructions were "stray misstatements." For this and other reasons, the appellate court affirmed Mr. Jacome's conviction on that count because he did not establish a reasonable probability of a different outcome.

This type of error—and its various iterations—is subject to harmless-error review in several circuit courts. However, in the Ninth Circuit, not instructing a criminal jury in open court is treated as structural error, which is "not subject to harmless-error review." *McCoy v. Louisiana*, 584 U.S. 414, 427 (2018).

The question presented in this matter is

I. Does a district court's failure to instruct a jury in open court result in structural error, automatically producing a violation of a defendant's

substantial rights?

PARTIES TO THE PROCEEDINGS

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

RELATED PROCEEDINGS

United States v. Jacome, No. 8:17-cr-382-PX-14, United States District Court for the District of Maryland. Judgment was entered February 28, 2023.

United States v. Contreras-Avalos, No. 23-4048(L), United States Court of Appeals for the Fourth Circuit. Judgment was entered June 3, 2025.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is published and can be found at *United States v. Contreras-Avalos*, 139 F.4th 314 (4th Cir. 2025). The opinion is set forth at Petitioner's Appendix ("Pet. App.") 1a-26a.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 2025. Mr. Jacome did not seek rehearing. On August 21, 2025, the Chief Justice granted Mr. Jacome's motion to extend the filing time of his petition until October 31, 2025.

Jurisdiction of this Court is pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution (U.S. Const. amend. V) provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution (U.S. Const. amend. VI) provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .

Title 18 U.S.C. § 1959(a) provides:

> Whoever, . . . for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity,

> murders . . . any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished --
>
> (1) for murder, by death or life imprisonment . . .
>
> (5) for attempting or conspiring to commit murder . . . by imprisonment for not more than ten years or a fine under this title, or both . . . .

Rule 52 of the Federal Rules of Criminal Procedure provides:

> (a) Harmless Error**.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> (b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

In 2022, Mr. Jacome was convicted after a two week jury trial of various offenses, including murder in aid of racketeering, a violation of 18 U.S.C. § 1959(a)(1) ("VICAR murder") (hereinafter "Count 5").[1]

In two instances, when instructing the jury on Count 5, the district court mistakenly included language referencing conspiracy liability in this non-conspiracy count. The district court instructed the jury that, "Significantly, unlike the RICO conspiracy statute[2] I described to you in Count One, a violation of the *conspiracy to commit* murder in aid of racketeering statute does not require a pattern of racketeering activity." Pet. App. 9a (citing JA2669).[3] The district court also instructed that "the government must prove beyond a reasonable doubt that the defendant's general purpose in *conspiring to commit* the charged murder was to maintain or increase position in or to gain entrance to the enterprise." Pet. App. 9a (citing JA2670).

The district court concluded the instructions and the jury was excused to the jury room. The district court and the parties reviewed the instructions given, a copy of which was to be provided to the jury for its use during deliberations. Defense counsel remarked that

> Number 62 on page 64 under racketeering fifth element, second paragraph. General purpose, shouldn't that be aiding and abetting rather than conspiracy? . . . [A]s we were reading it, it's just going to be confusing as it is. I think you can just substitute aiding and abetting for conspiracy.

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[1] The operative indictment charged a violation of 18 U.S.C. §§ 1959(a)(1) and 2.
[2] 18 U.S.C. § 1962(d).
[3] The citations to "JA" in this petition refer to the Joint Appendix filed in the Court of Appeals.

JA2682. Government counsel agreed to the change and then remarked there was an additional similar error in the Count 5 oral instruction:

> And, Your Honor, there is one other instance where the conspiracy -- on page 63, Instruction 59, the paragraph that begins significantly, unlike the Rico Statute I described to you in Count One, a violation of the conspiracy to commit murder in aid of racketeering -- it can just read murder in aid of racketeering.
>
> The Court: [] So it should read: Significantly, unlike the RICO Conspiracy Statute I described to you in Count One, a violation of murder in aid of racketeering -- of the murder in aid of racketeering statute does not require a pattern of racketeering. . . .

JA2683. Both changes were made before a written copy of the instructions was provided to the jury. Pet. App. 10a-11a.

The judge did not return the jury to the courtroom to reinstruct on the changes to Count 5, even though the parties agreed that the charge as given was likely "confusing" with the offending conspiracy language included. Indeed, the jury was not alerted in any manner to the changes in the instructions, buried in the seventy (70) pages of instructions which took the judge two-and-a-half hours to read.

Mr. Jacome was convicted on all counts. He was sentenced to life imprisonment on Count 5. Pet. App. 6a. Mr. Jacome appealed to the Fourth Circuit Court of Appeals, arguing, *inter alia*, that the district court's erroneous oral instructions on Count 5 resulted in a fatal variance in violation of the Fifth Amendment because it broadened the basis for conviction to permit conviction for conspiracy to commit VICAR murder.[4]

[4] Count 4 of the operative indictment charged conspiracy to commit VICAR murder, a violation of 18 U.S.C. § 1959(a)(5). JA633. However, the government dismissed that charge at the beginning of trial.

Mr. Jacome argued the written set of instructions provided to the jury did not cure the error, particularly as there was no way to know, without the jury being reinstructed in open court, whether the jury was aware of or relied on the corrected set of written instructions it had been provided.

In a published decision, the Fourth Circuit Court of Appeals affirmed Mr. Jacome's convictions, including his conviction on Count 5. Regarding Mr. Jacome's jury instruction argument, the Fourth Circuit did not decide whether there was plain error in the district court's failure to reinstruct the jury in open court regarding the changed instruction. Instead, the Fourth Circuit chose to decide the argument on the third prong of the plain error test, finding that the district court's instructional errors were "stray misstatements" that did not impact the outcome of the verdict on Count 5. Pet. App. 16a. The decision then analyzed Mr. Jacome's argument under the third prong of the plain error test and determined Mr. Jacome could not establish a reasonable probability of a different outcome. Pet. App. 14a. Among other reasons, the Fourth Circuit noted that "even in the unlikely event that a juror had been confused by the court's oral slip, any confusion would have been cured by the corrected, written jury instructions." Pet. App. 15a (citation omitted).

Mr. Jacome did not file a petition for rehearing. On August 21, 2025, the Chief Justice extended the time for Mr. Jacome to file a petition until October 31, 2025.

REASONS FOR GRANTING THE PETITION

I. This Court should grant review in this case because the error in this case is structural error.

Under this Court's precedent, the error in this case—failure to orally instruct a criminal jury regarding material changes to jury instructions—is structural in nature. The circuit courts are divided on the question of whether this error is structural and are in need of this Court's intervention and direction on this recurring, important issue.

Under this Court's precedent, "[t]he purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" *Weaver v. Massachusetts*, 582 U.S. 286, 294-95 (2017) (citations omitted).

This Court has relied on any of "three broad rationales" in its structural-error cases. *Id.* at 295. First, some errors have been "deemed structural" when "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," such as the defendant's autonomy "to make his own choices about the proper way to protect his own liberty." *Id.* (citation omitted). Second, other errors, such as a defendant's "right to select his or her own attorney," are considered structural because "the effects of the error are simply too hard to measure." *Id.* Third, an error is found to be structural if it "will inevitably signal fundamental unfairness . . . ." *McCoy v. Louisiana*, 584 U.S. 414, 427 (2018) (citations

omitted).

Importantly, this Court had made "one point [ ] critical": that this third category is not necessary for an error to be deemed structural. *Weaver*, 582 U.S. at 296. Moreover, "[t]hese categories are not rigid. In a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural." *Id*.

II. This Court's precedent demonstrates this error is structural.

A failure to instruct the jury on the elements of an offense in open court—specifically regarding a material change to instructions previously given in open court—is structural error. There can be no doubt that this type of error affects the entire framework of a trial.

First, the right to have materially correct jury instructions on the elements of an offense provided in open court protects an "interest" separate from the general interest in "protect[ing] the defendant from erroneous conviction." *Id.* at 295. An oral jury charge certainly protects a defendant's right under the Due Process Clause which guarantees criminal defendants a "fundamental righ[t]" "to personal presence at all critical stages of the trial." *Rushen v. Spain*, 464 U.S. 114, 117 (1983) (*per curiam*). *See also United States v. Gagnon*, 470 U.S. 522, 526 (1985) (defendant's right to be present protected by the Due Process Clause "in some situations where the defendant is not actually confronting witnesses or evidence against him."); *Faretta v. California,* 422 U.S. 806, 819 n.15 (1975) (citation omitted) (defendant has "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings[.]"). *See also* Fed. R. Crim. P. 43(a)(2) ("Unless this rule, Rule 5, or Rule

10 provides otherwise, the defendant must be present at . . . (2) every trial stage, including jury impanelment and the return of the verdict[.]").

The parties and the trial judge believed it important enough to change the two erroneous instructions because the instructions as had been given were, at the very least, "confusing." But the district court's instruction had resulted in a fatal variance, and the agreed-upon solution resulted in an instruction amending what the jury had been told, substituting aiding and abetting language for the offending conspiracy language in Count 5's instruction. These criminal theories of liability are completely different. *See Twitter, Inc. v. Taamneh*, 598 U.S. 471, 496 (2023) (aiding and abetting "lacks the requisite agreement that justifies . . . conspiracy liability."). It is of no measure that the written instruction provided to the jury contained a "correct" charge on Count 5. Without charging the jury in open court with the material correction, there is absolutely no way to know whether the jury noticed the change, buried in the seventy (70) pages of instructions which had used some variation of the word "conspire" at least seventy-five (75) times and which had taken the district judge over two hours to read to the jury.

Additionally, the requirement that a trial judge instruct a jury in open court serves the important societal purpose of ensuring that criminal trials occur in public. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."); *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1993) ("While the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real."). Importantly,

"assuming that jurors are generally aware of the law to be applied is a protection without which a criminal trial cannot reliably serve its function." *United States v. Becerra*, 939 F.3d 995, 1004 (9th Cir. 2019).

Second, the impact of the failure to give the corrected instruction in open court is "necessarily unquantifiable and indeterminate." *Neder v. United States*, 527 U.S. 1, 11 (1999) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993)). There is no way for an appellate court to assess the impact of the error present in this case. Despite the Fourth Circuit's reliance on the fact that jurors had a "correct" written version of the instructions, there is absolutely no way to know whether "the jury noticed that the [70]–page document [it was given] was inconsistent with the oral instructions [it] had heard, and (2) that the jury decided to resolve this conflict in favor of the written instructions." *United States v. Robinson*, 724 F.3d 878, 887 (7th Cir. 2013). For a court to apply a harmlessness standard of review in this circumstance, a "reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done." *Neder*, 527 U.S. at 11.

"The purpose of the structural error doctrine [has been] to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal matter." *Weaver*, 582 U.S. at 295. The error in this case satisfies at least two of this Court's structural error rationales. For this reason, the error in this case was structural in nature, resulting in a violation of Mr. Jacome's substantial rights.

III. The circuit courts are divided on whether this error is structural.

The circuit courts to have addressed this issue are split regarding whether this

error is structural.

Several circuit courts specifically require jury instructions be given in open court. *See Robinson*, 724 F.3d at 887; *United States v. Perry*, 479 F.3d 885, 892 (D.C. Cir. 2007); *United States v. Hutchinson*, 338 F.2d 991, 991 (4th Cir. 1964) ("There can be no substitute for [] an instruction [including the essential elements of the crime charged] to the jury by the judge in the presence of counsel and the defendant."); *United States v. Noble*, 155 F.2d 315, 318 (3d Cir. 1946); *United States v. Starks*, 34 F.4th 1142 (10th Cir. 2022) (district court's failure to reinstruct after government's erroneous statement in closing argument regarding presumption of innocence assessed under plain error review). *See also United States v. Meyer*, 63 F.4th 1024, 1034 n.6 (5th Cir. 2023) (not deciding issue but approvingly citing *Becerra* and *Noble*).

These same appellate courts analyze the failure of a trial court to provide fulsome instructions in open court under a harmless-error analysis. However, the Ninth Circuit takes the position that failure to provide jury instructions in open court is structural error, automatically violating a defendant's substantial rights. *See Becerra*, 939 F.3d at 1000 (citing *Guam v. Marquez*, 963 F.2d 1311, 1314-1316 (9th Cir. 1992)). In the Ninth Circuit, not only is the error structural, but it also satisfies the fourth prong of the plain error test because "assuring public awareness of the charge to the jury and promoting the dignity and formality of a critical stage of the criminal trial are among the underpinnings of the oral instruction requirement." *Id.* at 1006.

IV. This case is a good vehicle to decide this issue.

Mr. Jacome's case is a good vehicle for this Court to decide this important issue,

even if his case is considered under plain error review. "A constitutional error is either structural or it is not." *Neder*, 527 U.S. at 14. The issue is recurring, as evidenced by the cases cited. Moreover, this issue does not need further development of the law by the circuit courts for this Court to decide this important issue which has divided the circuit courts.

CONCLUSION

For the reasons given above, Mr. Jacome's petition for a writ of certiorari should be granted. Alternatively, Mr. Jacome's petition should be held pending other petitions if this Court anticipates that it may grant a writ of certiorari in a different case on the issues raised herein.

Respectfully submitted,

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