

## Official

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, :

4                      Petitioner                      :

5 v. : No. 05-998

6 JUAN RESENDIZ-PONCE :

7 - - - - - x

8 Washington, D.C.

9 Tuesday, October 10, 2006

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11                   The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 10:04 a.m.

14      APPEARANCES:

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16 Department of Justice, Washington, D.C.; on behalf of  
17 the Petitioner.

18     ATMORE L. BAGGOT, ESQ., Apache Junction, Ariz.; on  
19     behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in United States versus  
5 Resendiz-Ponce.

6 Mr. Dreeben.

7 ORAL ARGUMENT OF MICHAEL R. DREEBEN

8 ON BEHALF OF THE PETITIONER

9 MR. DREEBEN: Mr. Chief Justice, and may it  
10 please the Court:

11 In Neder versus United States, this Court  
12 held that the omission of an offense element from petit  
13 jury instructions can be harmless error, even though  
14 that omission violates the Sixth Amendment right to a  
15 jury trial. Our submission is that the same analysis  
16 applies to the omission of an offense element from a  
17 grand jury's indictment. Such an error violates the  
18 Fifth Amendment, but it is harmless when the petit jury,  
19 having been properly instructed on all of the elements  
20 of the offense, returns a verdict of guilty beyond a  
21 reasonable doubt.

22 JUSTICE KENNEDY: I'm not quite sure if this  
23 works, but at the trial before a petit jury there's an  
24 opportunity for counsel to object. There isn't an  
25 opportunity to object when the grand jury indictment

1 comes down. Now, I guess you could move to quash.

2 MR. DREEBEN: That's correct, Justice  
3 Kennedy. In fact, parties do move to dismiss  
4 indictments for failure to allege all of the elements of  
5 the offense. That happened here. The motion was  
6 erroneously denied by the trial judge. The trial judge,  
7 under Ninth Circuit law, under the assumption that the  
8 Ninth Circuit has properly interpreted the law, should  
9 have concluded that this indictment failed to allege the  
10 substantial step that was part of the attempt. And if  
11 the judge had done that, then the Government would have  
12 gotten back to the grand jury and obtained a superseding  
13 indictment.

14 Instead what the judge did was deny the  
15 motion, finding that the indictment itself was  
16 sufficient, and then instructed the jury on all of the  
17 elements that the Ninth Circuit requires as part of this  
18 offense. And so we have now a petit jury verdict beyond  
19 a reasonable doubt finding that the attempt did involve  
20 a substantial step towards the completion of the  
21 offense.

22 JUSTICE SOUTER: Isn't the problem that the  
23 motion to quash is going to be made, if counsel is on  
24 his toes, is going to be made at the beginning of the  
25 trial? And we want to induce the court to look very

1 carefully at it at that point, because if the court is  
2 wrong, somebody has to go through an entire trial as a  
3 result of it. And the way to induce the court to be  
4 very careful at the beginning is to say, this is not  
5 harmless error, and you've got to take this very  
6 seriously and you can't take any chance on the, in  
7 effect, the evidence saving you in harmless error  
8 analysis later.

9 MR. DREEBEN: Well, first of all, Justice  
10 Souter, motions like this are typically made long in  
11 advance of trial, as this one was. Waiting until the  
12 day of trial is far from the optimum practice.

13 JUSTICE SOUTER: Well, I'm sure that's  
14 right. But that simply reinforces my point.

15 MR. DREEBEN: Well, I think what it  
16 reinforces is that the judge has enough time to look at  
17 it and conscientiously attempt to get the law right  
18 without the need for the court to apply the heavy hand  
19 of automatic reversal.

20 JUSTICE GINSBURG: But you concede that the  
21 error would always be harmless if you have a trial  
22 before a petit jury, and all of the elements are  
23 instructed to be found by the jury?

24 MR. DREEBEN: Yes, Justice Ginsburg, that is  
25 our position.

1 CHIEF JUSTICE ROBERTS: That doesn't  
2 necessarily make sense. You can imagine a situation  
3 where the probable cause and the eventual evidence that  
4 supports guilt is adduced after the indictment and the  
5 prosecutor says, you know, we're going to find that  
6 evidence once we get into it, we don't have it now, but  
7 indict anyway without it.

8 In other words, what's your response to the  
9 situation where there's no probable cause on an element  
10 at the time of the indictment, but that evidence is  
11 later adduced and is a sufficient basis to convict?

12 MR. DREEBEN: My response, Mr. Chief  
13 Justice, is the same response that this Court gave in  
14 United States versus Mechanik, where it was confronted  
15 with an analogous problem. And that was in that case, a  
16 violation of the rule that allowed two witnesses to  
17 testify at the same time before the grand jury.

18 And the Court was specifically confronted  
19 with the question: Was this harmless error because the  
20 petit jury has now found guilt beyond a reasonable  
21 doubt? And it answered that question yes. And en route  
22 to that answer, it said, we could logically be persuaded  
23 that what we're supposed to do is compare the evidence  
24 in front of the grand jury to the error and see whether  
25 the error was prejudicially consequential for the grand

1 jury's decision. But we're not going to do that, the  
2 Court explicitly said in *Mechanik*, because once there is  
3 a finding of beyond a reasonable doubt, the question of  
4 probable cause is shown a fortiori and --

5 JUSTICE SCALIA: Excuse me, you mean you can  
6 never decide this question until after the trial is  
7 completed and you see whether the jury convicts beyond a  
8 reasonable doubt?

9 MR. DREEBEN: No, Justice Scalia, the  
10 district court should decide this question in advance of  
11 trial when it's properly raised and, if the indictment  
12 is defective, dismiss it. And this Court has recognized  
13 that trial judges don't need incentives of an automatic  
14 reversal rule to get them to comply with the law.

15 And I want to amend --

16 JUSTICE GINSBURG: Did the U.S. Attorney in  
17 this case oppose the motion to quash the indictment?

18 MR. DREEBEN: In this case?

19 JUSTICE GINSBURG: Yes.

20 MR. DREEBEN: Yes. And the Ninth Circuit's  
21 ruling that this indictment was defective was really --  
22 bolt out-of-the-blue might be too strong. But it was an  
23 extension of its prior precedents in a way that wasn't  
24 directly foreseeable. The United States Attorney's  
25 office had every reason to believe, based on language in

1 prior Ninth Circuit cases, that alleging an attempt to  
2 enter was adequate to allege the offense.

3 JUSTICE ALITO: Mr. Dreeben, this touches on  
4 what troubles me about this. I wonder whether we can  
5 answer the generic question that you presented, whether  
6 the omission of an element of a criminal offense from  
7 the indictment can constitute harmless error, without  
8 considering the nature of the alleged defect here.

9 I don't know how you can answer -- if you  
10 look at whether the alleged defect here is susceptible  
11 to harmless error analysis, or whether if we were to  
12 agree with you, in fact, it is harmless, how you can  
13 answer those questions without reaching a conclusion  
14 about whether there was any defect in the indictment in  
15 the first place.

16 MR. DREEBEN: Justice Alito --

17 JUSTICE ALITO: And it doesn't seem to me  
18 that there's any defect in this indictment. It charges  
19 -- it recites the language of the statute, it uses the  
20 word "attempt" which has a very well-settled meaning in  
21 the law. Any lawyer would understand exactly what is  
22 required for an attempt. It sets out the factual basis  
23 of the charge. So I don't know how you would get to  
24 the -- how you can answer the second question without  
25 getting into the first question.



1           MR. DREEBEN: We did not challenge in our  
2   certiorari petition, which this Court granted, the Ninth  
3   Circuit's holding that in order for an attempt to be  
4   accomplished there needs to be a substantial step, and  
5   in an indictment under section 1326, there needs to be  
6   an allegation of what that substantial step is.

7           JUSTICE KENNEDY: I have the same problem.  
8   It's such a difficult requirement to get a hold of. I  
9   mean, he drives the car, he walks, he breathes. I mean,  
10  all of these things enable him to get into the country.  
11  I just don't understand the basis for the rule.

12          MR. DREEBEN: Well, it is common law --

13          JUSTICE KENNEDY: He wasn't forced to go  
14  over. He did it on his own. It seems to me that's --

15          MR. DREEBEN: Well, that's certainly the  
16  Government's position, Justice Kennedy. But it is well  
17  settled in the common law that attempts require a  
18  substantial step towards the completion. There are  
19  variations that different jurisdictions use. That's the  
20  Model Penal Code formulation. The Ninth Circuit I think  
21  has gone beyond where some other courts have gone, as  
22  Justice Alito was noting, by saying that the indictment  
23  needs to spell out the factual basis for that  
24  substantial step.

25          JUSTICE KENNEDY: What would that be here?

1 That he drove the car to the border? That he got out of  
2 the car? That he presented a document? What -- if you  
3 could do it over again, what would the indictment say?

4 MR. DREEBEN: The indictment would have to  
5 say that he attempted to enter the United States and  
6 took a substantial step towards the completion of that  
7 crime, to wit he approached the border and came to the  
8 guard and presented false identifications to the guard  
9 and lied about his intended destination.

10 JUSTICE ALITO: If you went back to the --  
11 if you went back to the very demanding nineteenth  
12 century criminal pleading laws, criminal pleading laws,  
13 they would say that where you use a legal term that has  
14 a well-0established meaning such as attempt, you don't  
15 need to spell out the definition of that, of that  
16 concept. It's enough to use the term. So what the  
17 Ninth Circuit has done is to resurrect, you know, to go  
18 back to something that's more demanding than would have  
19 been required in a nineteenth century indictment and  
20 frame that as a violation of the Fifth Amendment.

21 MR. DREEBEN: Well, Justice Alito, I'm not  
22 going to defend what the Ninth Circuit did here, but I  
23 will be clear about the following: There is a generic  
24 legal issue at stake in this case that we face in the  
25 Ninth Circuit and in other courts around the country

1 because indictments are not always written perfectly.  
2 And whether it's an element that the Ninth Circuit has  
3 improperly read into it or an element that a court has  
4 properly read into a statute, we do face the situation  
5 where --

6 JUSTICE BREYER: As to the element, I  
7 thought that what the Ninth Circuit talked about was  
8 overt act. They didn't use the words "overt act."

9 MR. DREEBEN: They did, Justice Breyer.

10 JUSTICE BREYER: Yes, all right. I thought  
11 that comes out of conspiracy law; it doesn't even out of  
12 attempt law. Then I thought it's unlikely -- but here  
13 you can correct me. The U.S. Code is filled with the  
14 word "attempt." Just opening it at random, there are  
15 attempts to assault and steal mail matter, there are  
16 attempts to steal the mail matter, there are attempts to  
17 rob a bank, attempts here, attempts there.

18 Is it the Government's practice whenever  
19 they charge a violation of any of these provisions to  
20 not just use the word "attempt," but to use the words  
21 "substantial step"?

22 MR. DREEBEN: No.

23 JUSTICE BREYER: I would have thought the  
24 answer was no. And therefore, this isn't just a small  
25 error of a technical sort. The Ninth Circuit is

1 completely wrong and not even close. And therefore, if  
2 they're not even close, can the Government come up here  
3 where there's an obvious error and they decide, the  
4 Government, that it would like to have a declaration by  
5 this Court on a matter that they think is quite  
6 interesting and important to them in a lot of other  
7 cases where they can't win the cases easily?

8 That's, I'm putting it a little pejoratively  
9 because I'm trying to get you to see what I'm driving  
10 at. It's like a hoked-up case. Why not? I'm using it  
11 pejoratively only so that you can see what I'm worried  
12 about.

13 MR. DREEBEN: We didn't really have a lot of  
14 choice about it. I mean, the Ninth Circuit decided to  
15 read the statute this way and it reversed the  
16 conviction. There's not a circuit split under section  
17 1326. We have to bring thousands of indictments in the  
18 Ninth Circuit, so we're not exactly going to set up test  
19 cases to risk our convictions based on the Ninth  
20 Circuit's rule.

21 JUSTICE GINSBURG: But you're making the  
22 concession only for purposes of this case. That is, in  
23 another case you would be free to say the word "attempt"  
24 is good enough; you don't have to spell out in the  
25 indictment a particular overt act.

1                   MR. DREEBEN: Justice Ginsburg, it's not  
2   unusual for this Court to decide a case where the  
3   Government does not challenge the underlying  
4   constitutional ruling and make some remedial argument.  
5   Two very notable examples are United States versus Leon,  
6   where the Government did not challenge the underlying  
7   Fourth Amendment claim that was found to be valid by the  
8   lower court, but instead simply asked for a modification  
9   of the exclusionary rule; and another example is Rose  
10  versus Clark, which involves a fairly analogous issue to  
11  this one, whether it can be harmless error to fail to  
12  incorporate into the jury instructions the actual  
13  element and instead rely on a mandatory rebuttable  
14  presumption. In that case the State did not challenge  
15  whether the instruction violated the Constitution. This  
16  Court didn't decide it. Instead, what it decided was  
17  the remedial question of harmless error, which is an  
18  important question and I submit doesn't change in  
19  character depending on the nature of the underlying  
20  error.

21                  JUSTICE STEVENS: We've done it before,  
22  there's no doubt about it. But the better practice  
23  usually is to have a case in which the issue really  
24  presents the hard question. And you're asking us to  
25  make a ruling in this case that would govern failure to

1     allege an aggravating circumstance in a death case, for  
2     example, which has a different atmosphere to the whole  
3     case when you're facing that kind of an issue.

4             MR. DREEBEN:   It may have a different  
5     atmosphere, but I don't think that it has any different  
6     legal analysis behind it.

7             JUSTICE STEVENS:  A judge's reaction to a  
8     case is often affected by just exactly what's involved.  
9     And here it's just hard to see how anyone could claim  
10    any particular prejudice out of the error in this  
11    particular case or, really, it's arguable that there's  
12    no defect in the indictment at all because it was  
13    adequate notice to the defendant of what he's charged  
14    with.  This is much like a case in the State systems  
15    where you have notice pleading.  It doesn't seem very  
16    prejudicial.

17            But you put it in a different context, you  
18    might have a different reaction to the case.

19            MR. DREEBEN:  Well, I think our fundamental  
20    submission here is that with respect to the probable  
21    cause determination, there is no prejudice because of  
22    the petit jury's verdict.  With respect to notice, we  
23    would acknowledge that a defendant could argue that the  
24    defect in a grand jury indictment in a particular case  
25    could fail to give him adequate notice such that he

1 might have a case-specific claim of prejudice and be  
2 able to overturn the conviction. On the facts of this  
3 case, I agree with you, Justice Stevens, that would not  
4 be a very strong argument. There really is no reason to  
5 think that there was any notice problem with this very  
6 discrete transaction which was alleged in the indictment  
7 as occurring on a particular date in a particular place.

8 JUSTICE BREYER: Does this come up very  
9 often? I think the case -- the issue you want to raise,  
10 because I would think normally there's a motion before  
11 the trial, well before the jury is empanelled. The  
12 defendant says: I want you to dismiss this; the  
13 indictment's inadequate. And if that's even close, I  
14 would think normally the prosecutor would go back and  
15 say: Fine, I'll get a superseding indictment, and that  
16 would end the problem. And it seems to me so likely to  
17 happen that the chances of the judge wrongly ruling  
18 against the defendant and then it goes through a whole  
19 trial almost never happens.

20 MR. DREEBEN: Justice Breyer, I think that  
21 an empirical perspective might be helpful here. And I  
22 think an empirical perspective, if you look around the  
23 circuits and you see the number of issues, cases, in  
24 which this issue is raised, it becomes clear that there  
25 are a large number of situations in which mistakes get

1 made.

2 I mean, we're talking about a Federal system  
3 here in which 70 to 80,000 cases are indicted a year.  
4 Mistakes will happen, and they will happen both by the  
5 trial judge and by the prosecutor.

6 And there will be situations in which the  
7 circuits change the law or the interpretation of the law  
8 after the decision in question. I think that this is a  
9 good example of that, where the Ninth Circuit extended  
10 its prior precedents to find that an indictment that  
11 didn't allege the overt act was inadequate.

12 And then the Government is stuck, and the  
13 rule of automatic reversal, which the Court may appear  
14 to think in this case is particularly disproportionate  
15 since the indictment looks fine, functions identically  
16 even if there's a conceded violation that every member  
17 of the Court would say yes, there's a missing element  
18 here.

19 The fundamental problem is that the grand  
20 jury sits to decide probable cause. It does not decide  
21 whether the defendant is actually guilty.

22 CHIEF JUSTICE ROBERTS: Well, it sits to  
23 decide whether people should be indicted, and yes,  
24 they're supposed to determine whether there's probable  
25 cause, but historically a significant role for the grand



1 jury has been not to indict people even though the  
2 Government had the evidence to indict them.

3 MR. DREEBEN: Well, I actually do not agree  
4 that there's any stronger evidence, Mr. Chief Justice,  
5 that grand juries didn't indict when the Government had  
6 adequate evidence than there is historical evidence that  
7 petit juries did not convict when there's proof beyond a  
8 reasonable doubt. In both instances, you can point to  
9 historical instances in which grand juries and petit  
10 juries played a role of in effect nullifying when there  
11 was adequate evidence.

12 But it's clear from the Neder decision that  
13 that history has not led to the conclusion that this  
14 Court cannot evaluate petit jury defects for  
15 harmlessness, and the same conclusion ought to be true a  
16 fortiori for the grand jury.

17 JUSTICE SOUTER: The trouble with your a  
18 fortiori argument it seems to me is this: If we accept  
19 your argument, then whenever a judge is asked to rule on  
20 a motion to quash, if the judge is in any doubt, the  
21 judge is going to be induced by your rule to deny the  
22 motion to quash and wait and see what happens at trial.  
23 And if in fact they get to trial and they don't prove  
24 the element, then it can either be thrown out because an  
25 element has not been proven or he can go back and revive

1 the motion to quash.

2 If on the other hand the Government gets its  
3 act together at that point and does put in evidence on  
4 the element, it's going to be harmless error. And so  
5 the price of, it seems to me, of your rule is that  
6 someone will always be put to trial if there is any  
7 question about how the judge should rule on the motion  
8 to quash, whereas if we go the other way the judge will  
9 grant the motion to quash and the Government can go back  
10 to the grand jury and get another indictment.

11 It seems to me that something is seriously  
12 lost in that situation if we go your way.

13 MR. DREEBEN: Well, Justice Souter,  
14 experience doesn't show that, in fact, district courts  
15 don't grant these motions. They grant them, as Justice  
16 Breyer indicated, when the indictment is not sufficient.

17 JUSTICE SOUTER: I'm sure they do grant  
18 them. But I'm concerned about the, we'll say, the  
19 doubtful case or the judge who can't make up his mind.  
20 Under your rule the price of that uncertainty is always  
21 going to be to subject somebody to trial.

22 MR. DREEBEN: Well, I do think we can assume  
23 that Article III judges are a hearty enough species so  
24 that they can make up their minds and they can rule.  
25 But to the extent that there is a risk here that judges

1 might reserve the motion, that is the same risk that the  
2 Court fessed up to and acknowledged in the Mechanik  
3 case, where in fact the judge did reserve the motion.

4 JUSTICE SOUTER: And it seems to me that the  
5 prejudice to the defendant in the two -- as between the  
6 two situations simply is not comparable.

7 In Mechanik you had a situation in which two  
8 witnesses putting in whatever evidence they were putting  
9 in were in the jury room and, yes, one could influence  
10 the other, et cetera. Here, we're talking about a  
11 situation in which it may very well be that the  
12 defendant should never be put to trial at all. And your  
13 rule says if there's any question about it, put him to  
14 trial, judge.

15 MR. DREEBEN: Well, given that this issue  
16 arises only when you have a petit jury verdict of guilty  
17 beyond a reasonable doubt, it seems overwhelmingly  
18 likely that any grand jury would have found probable  
19 cause.

20 JUSTICE GINSBURG: Do we know -- do we have  
21 the grand jury transcripts, so do we know that, in fact,  
22 evidence was put before the grand jury that false  
23 identifications were presented at the border?

24 MR. DREEBEN: The grand jury transcript is  
25 not in this record, Justice Ginsburg, and we do not

1 suggest that the Court adopt a rule in which it reviews  
2 the adequacy of the evidentiary showing before the grand  
3 jury. There are important values in grand jury secrecy.  
4 They will, of course, be compromised at the trial stage  
5 if witnesses testify and the testimony is turned over in  
6 that context.

7 But more important than the practical aspect  
8 is exactly the logic that the Court used in *Mechanik*.  
9 The point of the grand jury indictment is to determine  
10 is there enough to take this person to trial. Once the  
11 person has been taken to trial and been found guilty  
12 beyond a reasonable doubt, we know that if the  
13 Government went back to the grand jury it would be able  
14 to get an indictment.

15 JUSTICE ALITO: How far would you go with  
16 the *Mechanik* logic? Suppose that someone is charged by  
17 information with a felony without the person's consent  
18 and for some reason the trial judge refuses to dismiss  
19 the information and then the person is convicted. Would  
20 you say that because the petit jury returned a verdict  
21 that the fact that the person was charged with a felony  
22 by information calls for no remedy?

23 MR. DREEBEN: No, I would not go that far,  
24 Justice Alito. I would draw the same line that this  
25 Court drew in the *Midland Asphalt* case where it was

1 looking at a somewhat analogous problem of an  
2 interlocutory appeal and the same line that it drew in  
3 Neder itself. In Neder the Court said if the judge  
4 directs a verdict of guilty, that's an impermissible act  
5 and it cannot be rendered harmless no matter how  
6 overwhelming the evidence is.

7 In the Midland Asphalt case, this Court  
8 dealt with whether the language of the Fifth Amendment  
9 created a right not to be tried. And it does say "No  
10 person shall be held to answer absent an indictment  
11 issued by a grand jury," and the Court said if you have  
12 a defect that causes an indictment not to be an  
13 indictment or, as in your hypothetical, Justice Alito,  
14 no indictment at all, or if you have a defect that  
15 causes the grand jury not to be a grand jury, those are  
16 the kind of fundamental errors that would give rise to a  
17 right not to be tried such that you could take an appeal  
18 before trial, an interlocutory appeal.

19 And I would submit that the same kind of  
20 principle would apply here.

21 JUSTICE KENNEDY: So it's just a  
22 metaphysical inquiry, when is an indictment not an  
23 indictment? It's not some other standard of what's  
24 fundamentally unfair or, from the Sixth amendment,  
25 whether or not there's notice?

1                   MR. DREEBEN: I'm borrowing the language  
2     from the Midland Asphalt opinion, but I think that it  
3     was a poetic way of putting the point that if you don't  
4     have --

5                   JUSTICE KENNEDY: You say poetic, I said  
6     metaphysical. When is an indictment not an indictment?

7                   MR. DREEBEN: When you don't have one.

8                   JUSTICE SCALIA: Now why would there be any  
9     difference then? That's a question I was about to put  
10    to you. What if there is no indictment at all? Why  
11    couldn't you say the same thing? Well, you know, the  
12    only purpose of getting it is to see if there was  
13    probable cause and you now have a conviction beyond a  
14    reasonable doubt.

15                  MR. DREEBEN: You could push the logic of  
16    that argument that far.

17                  JUSTICE SCALIA: I don't think it's pushing  
18    it, I think it's there.

19                  MR. DREEBEN: Just as in the Neder case, you  
20    could say that it would be harmless error if a judge  
21    directed a jury verdict when the evidence was  
22    overwhelming on all of the elements. But the Court did  
23    draw a distinction between those two situations. And I  
24    think that it's one that responds to a kind of common-  
25    sense view of how fundamental an intrusion is there.

1 JUSTICE BREYER: Doesn't an indictment have  
2 as its purpose in part to tell the defendant what crime  
3 he's being accused of committing? Isn't that -- so  
4 that's why I thought it would be quite clear, wouldn't  
5 it, or helpful to say that to the Ninth Circuit? And so  
6 an error is when it doesn't do that? And an error is  
7 when it leaves out an element, and he doesn't know what  
8 crime is being committed, he's accused of. So suppose  
9 you had an indictment that really did that. Now he  
10 doesn't know what crime he's accused of. And then you  
11 go to the trial and so forth and now we have to go into  
12 at what point did he work out what crime he was being  
13 accused of, rather hard to say.

14 MR. DREEBEN: Well, chances are he did know  
15 what crime he was accused of.

16 JUSTICE BREYER: Well, yes, of course the  
17 chances are. But there's a possibility he didn't.

18 MR. DREEBEN: And we submit --

19 JUSTICE BREYER: So if he didn't and  
20 therefore the indictment was faulty in that respect,  
21 then what? Are you going to say we have to track  
22 down -- I mean what it's reminding me of is like trying  
23 to say whether he got an adequate lawyer, didn't get an  
24 adequate lawyer, who knows, that kind of problem.

25 MR. DREEBEN: Well, it isn't quite like

1    that, I hope, Justice Breyer. I mean, notice defects  
2    are very commonly alleged by defendants and courts know  
3    how to look for prejudice. They know how to say whether  
4    the defendant was denied an opportunity to prepare his  
5    defense or misled by the indictment in some fashion or  
6    another. And that's a very common case by case sort of  
7    prejudice inquiry that fits with the nature of the  
8    violation.

9                   JUSTICE BREYER: -- me until halfway through  
10   the trial that it was robbery I was being accused of  
11   because they left robbery out of the indictment.

12                  MR. DREEBEN: Well, what you get are cases  
13   where there needs to be an effect on interstate commerce  
14   and it's not alleged and then the Government comes up  
15   with proof. I'm not saying that there is going to be a  
16   vast pool of cases in which defendants would validly be  
17   able to show prejudice from lack of notice; and that's  
18   because we do have many other means in the criminal  
19   justice system to alert the defendant to what he's  
20   facing.

21                  There's discovery, there's the opportunities  
22   for a bill of particulars to be filed. Those are the  
23   kinds of conventional harmless error inquiries that are  
24   appropriate when you have a claim that the indictment  
25   fails to give adequate notice. But what is not



1 appropriate is for the Ninth Circuit to impose a rule on  
2 the Government and on the system of justice that says we  
3 will automatically reverse, because there are important  
4 values at stake here whenever a rule of automatic  
5 reversal is contemplated. And this was true in the  
6 Mickens versus Taylor case where the Court rejected a  
7 rule of automatic reversal when a judge didn't ask a  
8 question in response to an obvious conflict --

9 JUSTICE KENNEDY: I'm still not sure of your  
10 test. It's whether or not it's fundamentally unfair,  
11 whether or not there's notice, which sounds like more  
12 Sixth Amendment than Fifth. Or whether it's not an  
13 indictment, a rose is a rose type of thing.

14 MR. DREEBEN: There are two aspects to our  
15 rule, Justice Kennedy. The first is that to the extent  
16 that the claim of a defective indictment goes to the  
17 question of was there probable cause, that error and  
18 that constitutional value is not a basis for reversal  
19 once a petit jury has found guilt beyond a reasonable  
20 doubt on the same point.

21 To the extent that the defect in the  
22 indictment goes to inadequate notice, a defendant can  
23 make such a claim post trial that the indictment  
24 prejudiced him because it was inadequately framed. But  
25 that should be done on a case-specific basis rather than

1 on a rule of automatic reversal.

2 JUSTICE SCALIA: Mr. Dreeben, if we disagree  
3 with you here, could this defendant be retried? Could  
4 he be reindicted?

5 MR. DREEBEN: Yes, Justice Scalia. I don't  
6 believe there would be any double jeopardy bar to  
7 reindicting him since he is the one who's challenged his  
8 conviction.

9 I'd like to reserve the remainder of my  
10 time.

11 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
12 Dreeben.

13 MR. DREEBEN: Thank you.

14 CHIEF JUSTICE ROBERTS: Mr. Baggot.

15 ORAL ARGUMENT OF MR. ATMORE L. BAGGOT

16 ON BEHALF OF THE RESPONDENT

17 MR. BAGGOT: Mr. Chief Justice, if it please  
18 the Court:

19 The structure created by the Constitution of  
20 this country provides a single means of charging a  
21 person with a Federal criminal offense. The intention  
22 of the framers of the Constitution was that a group of  
23 ordinary citizens would take time away from their  
24 families, their businesses, and their other concerns for  
25 the purpose of deciding whether the requirements of the

1 Fifth Amendment have been met by a Government  
2 prosecutor, and in, in a few words, whether a trial  
3 should proceed. Or not.

4 JUSTICE KENNEDY: You could say the same  
5 thing about a petit jury. And in Neder we use the  
6 harmless error standard.

7 MR. BAGGOT: Absolutely, but the proceedings  
8 before a grand jury are secret. We never know what  
9 happened inside a grand jury. It's a closed door  
10 proceeding. It is an independent body. It is not  
11 subject to any appeals or reviews by the trial judge.  
12 The only thing that we know what happened behind those  
13 closed doors was the document that emerges, which is the  
14 indictment which becomes public knowledge. Nothing else  
15 is known about what happened in that jury room.

16 Now, I'll take a guess as to what happened.  
17 The Government told the grand jury that the overt act  
18 requirement was not necessary, or perhaps, I'll take  
19 another guess, they stated to the grand jury what they  
20 stated to the district judge, that the indictment does  
21 in fact state the overt act when plainly it doesn't.

22 JUSTICE BREYER: Suppose -- suppose we found  
23 out. Somebody told what happened, and it was a crime of  
24 bank robbery or it's an assault of a mailman, a postman.  
25 And you know, it turns out they didn't present one word

1 of evidence, not a word that says that this individual  
2 who was assaulted had anything to do with the mail.  
3 There's complete absence of any evidence whatsoever on a  
4 major element of the offense. And now, suppose we get  
5 finished with the trial. Plenty of evidence.  
6 Conviction. Can you go back and raise that?

7 MR. BAGGOT: I believe it would be raised --

8 JUSTICE BREYER: No. No. I mean can you  
9 win.

10 MR. BAGGOT: Oh, can you win.

11 JUSTICE BREYER: Yeah.

12 MR. BAGGOT: You can always raise it.

13 JUSTICE BREYER: I mean, you see, I'm saying  
14 is that error? Is that correctible error? I'm saying  
15 there is an absolute error. It is far worse than here.  
16 We know for a certainty there was no evidence whatsoever  
17 presented to the grand jury on a major element of the  
18 crime.

19 MR. BAGGOT: You're assuming somehow the  
20 transcript has been disclosed.

21 JUSTICE BREYER: Yes, I assume we know that.  
22 Take that as a given. We know.

23 MR. BAGGOT: The doors are open, they're not  
24 closed.

25 JUSTICE BREYER: Yeah, we know.

1           MR. BAGGOT: We know what happened and  
2 basically there's zero evidence.

3           JUSTICE BREYER: Yes. Zero.

4           MR. BAGGOT: Your Honor, the history of this  
5 Court's treatment of grand jury is that they may  
6 consider any evidence; they may consider --

7           JUSTICE BREYER: Yes, but what is the answer  
8 to my question, yes or no? I'm saying after the --

9           MR. BAGGOT: I believe in that situation the  
10 petit jury's verdict would stand.

11          JUSTICE BREYER: That's right. So the  
12 answer is no?

13          MR. BAGGOT: The answer is no.

14          JUSTICE BREYER: And if you can't raise  
15 that, which is a major area because there's a harmless  
16 error is what it really amounts to, why isn't the same  
17 true here where the error is far more likely to be  
18 simply technical and make no difference given the  
19 adequacy of the evidence?

20          MR. BAGGOT: Because the Constitution  
21 contemplates that the grand jury be independent, that  
22 its decision --

23          JUSTICE BREYER: It does as well in my case.

24          MR. BAGGOT: -- not be reviewed, that  
25 there's no appeal, there's no review process for what

1 the grand jury did behind its closed doors, whether we  
2 open the doors or not.

3 JUSTICE ALITO: What if it's perfectly --

4 MR. BAGGOT: Sir?

5 JUSTICE ALITO: I'm sorry. What if it's  
6 perfectly clear that the error is simply a clerical  
7 error? Let's take a case where somebody is charged with  
8 possession of a firearm by a convicted felon. And  
9 before the grand jury, we look at the transcript, we see  
10 that the prosecutor introduced evidence of five  
11 judgments of convictions for felony offenses. And the  
12 jury is properly charged that they have to find that  
13 this individual was a convicted felon. And there's  
14 simply -- and then when the case is tried at, when the  
15 case is tried the defense even stipulates that the  
16 person is a convicted felon.

17 But there's a clerical mistake in preparing  
18 the indictment. And it doesn't recite the fact that the  
19 defendant was previously convicted of a felony. It's  
20 your position that there must be a reversal there?

21 MR. BAGGOT: Your Honor, if there is a  
22 clerical error, Rule 36 gives the trial judge the  
23 ability, and the power, and the authority to correct an  
24 error which is purely clerical. I refer you to the case  
25 of Contreras-Rojas, which was this exact defense.

1 JUSTICE ALITO: But what if it comes up on  
2 appeal? Nothing is done until it comes up on appeal.

3 MR. BAGGOT: Well, I believe --

4 JUSTICE ALITO: Which is exactly in the  
5 posture of this case.

6 MR. BAGGOT: Well, Rule 36 says the court  
7 may correct clerical errors at any situation. But that,  
8 your question presupposes that we know what happened in  
9 the grand jury room, that it should have been an  
10 indictment, they intended it to be in the indictment --

11 JUSTICE GINSBURG: How do you distinguish  
12 the mail -- the letter carrier case that Justice Breyer  
13 posed, because there you said even though there was no  
14 evidence at all of what this person was, if the petit  
15 jury found it, that would not be subject to review. I  
16 don't think you answered Justice Breyer and he said if  
17 you concede that, the failure to introduce any evidence  
18 that this person was a letter carrier.

19 JUSTICE SCALIA: I would like to even  
20 sharpen Justice Breyer's hypothetical. Let's assume  
21 that the indictment did set forth what the overt act  
22 was. It did. But there was no evidence of that overt  
23 act introduced before the grand jury. What would the  
24 result of that be?

25 MR. BAGGOT: The result --

1 JUSTICE SCALIA: Then the trial occurs --

2 MR. BAGGOT: And he's found guilty.

3 JUSTICE SCALIA: He's convicted. And I  
4 think you're going -- your position is that conviction  
5 would stand.

6 MR. BAGGOT: My position is the conviction  
7 would stand, yes, sir.

8 JUSTICE SCALIA: That doesn't seem to me to  
9 make a lot of sense.

10 MR. BAGGOT: Well, the grand jury is  
11 independent. There is no review from the grand jury.  
12 The petit jury is an independent institutional body.  
13 The function of the grand jury is not only to find  
14 probable cause, rightly or wrongly, but the function of  
15 the grand jury is also to select the charge. And  
16 specifically since your decision in Recuenco versus  
17 Washington that sentencing enhancements are to be  
18 treated the same way as basic elements of the offense to  
19 be charged also, the grand jury's role is going to be  
20 even better.

21 My position is simply that there is no  
22 review whatsoever from the grand jury. If you're  
23 unhappy, you're a defendant, you're unhappy with what  
24 the grand jury did, you say there's no evidence, you go  
25 to trial, you get acquitted. That's the only review



1    there is of the grand jury and what they did.  If  
2    there's an error the case must go back to the same grand  
3    jury or conceivably another grand jury.  There's no  
4    jeopardy at that stage.  There's no constitutional  
5    complications.  And the Government is free to go back.  
6    Quite frankly, I'm very surprised the Government did not  
7    just go back and amend the indictment -- not amend it,  
8    but supersede the indictment and allege an overt act.

9                   The basic problem we have here is that there  
10   are so many acts committed by everybody which could be  
11   in furtherance of a crime.  And the problem is going to  
12   trial that we don't know which act the Government was  
13   talking about.  They told us in motion proceedings that  
14   the entry itself was the overt act.  But the court of  
15   appeals ruled that that cannot be an overt act.  So  
16   possibly Mr. Resendiz was entitled to judgment as a  
17   matter of law.

18                   JUSTICE BREYER:  Can't you ask for a bill of  
19   particulars?

20                   MR. BAGGOT:  I could have done that, yes.

21                   JUSTICE BREYER:  Well, then you would have  
22   had no problem.

23                   MR. BAGGOT:  But bill of particulars are not  
24   favored motions.  And what is to -- that would still be  
25   the Government speaking on behalf of the grand jury.

1 JUSTICE GINSBURG: Were you, were you  
2 surprised at trial by the evidence that the defendant  
3 had submitted two false identifications? Was the first  
4 time you heard about that at trial?

5 MR. BAGGOT: Your Honor, Justice Ginsburg, I  
6 would submit that the prejudice to the defendant at the  
7 jury trial, the petit jury, was a slight prejudice. The  
8 real problem I feel was on appeal, that if the  
9 Government had alleged --

10 JUSTICE GINSBURG: But were you, was there  
11 any element of surprise in this trial? Did you not know  
12 beforehand that the Government was going to present  
13 evidence of two false identifications?

14 MR. BAGGOT: No, I knew that, Your Honor.

15 JUSTICE GINSBURG: So there was no lack of  
16 notice; there was no surprise.

17 MR. BAGGOT: In our court we have complete  
18 discovery. They copy the file for it and hand it to us.  
19 So we know everything they know. But what we did not  
20 know is what the Government would rely on as their overt  
21 act. They said it was the entry itself. The court of  
22 appeals ruled as a matter of law, rightly or wrongly,  
23 that that cannot be an overt act, because it simply --

24 JUSTICE GINSBURG: Well, surely submitting  
25 false identification could be a overt act.

1 MR. BAGGOT: It could be. But --

2 JUSTICE GINSBURG: Is there any doubt about  
3 that?

4 MR. BAGGOT: It could be an overt act. It  
5 could be, lying could be a overt act, tying your shoes  
6 in the morning with intent to go to --

7 JUSTICE GINSBURG: Yes, but you knew that --  
8 you had the file. You knew the Government was going to  
9 prove this. And you also knew it was an overt act.

10 MR. BAGGOT: It could have been. But there  
11 are many acts.

12 JUSTICE SOUTER: But your point is not that  
13 there was any prejudice here. Your point is that he was  
14 entitled to a grand jury?

15 MR. BAGGOT: He was entitled to a grand jury  
16 as an independent institutional body. And the problem I  
17 have with the Government's point of view is that it  
18 places a judge as a reviewing authority over what a  
19 grand jury has done, regardless of the standard that's  
20 applied. And of course in -- it's a rare case when you  
21 even know what a grand jury did.

22 CHIEF JUSTICE ROBERTS: You don't have  
23 any -- you're not suggesting to us that the grand jury  
24 that indicted him for intentionally attempting to enter  
25 the United States at or near San Luis would not have

1 indicted him if the indictment had gone further and  
2 said, and he submitted false IDs?

3 MR. BAGGOT: There are, there certainly are  
4 scenarios under which they would have indicted him, yes,  
5 sir.

6 JUSTICE ALITO: You think that the -- that  
7 the indictment had to specify which of the many things  
8 that he did, or the several things that he did when he  
9 approached the border constituted the overt act that the  
10 Ninth Circuit -- he walked up to the border and he did a  
11 number of things to try to get into the United States.

12 MR. BAGGOT: Sure.

13 JUSTICE ALITO: And you think that the  
14 indictment has to specify that walking up wasn't a  
15 substantial step, but presenting the documents might  
16 have been, whether it was walking up, presenting the  
17 documents, lying to the agent? You have to go into that  
18 level of detail in order to satisfy the Fifth Amendment?

19 MR. BAGGOT: Rule 7(c)(1) of the Rules of  
20 Procedure states that the indictment must state the  
21 essential facts. It need not be a memorandum of law  
22 just spelling out the elements of the crime in a general  
23 sense, but it must state the essential facts. In the  
24 Court's case of Hamling it says very clearly, the  
25 language of the statute must be accompanied by such

1 statement of facts and circumstances as will inform the  
2 accused of the specific offense coming under the general  
3 description which is charged.

4 JUSTICE BREYER: That's a separate  
5 requirement. I don't know if it's constitutional or not  
6 constitutional, but I didn't think that requirement was  
7 at issue here.

8 The requirement of stating the facts is not  
9 the requirement of setting out the elements of the law.  
10 At least that's my understanding. Now, you can correct  
11 me if I'm wrong.

12 MR. BAGGOT: Well, Your Honor, based upon  
13 your Hamling decision, I believe that's what the Court  
14 said, that there must be an allegation of facts under  
15 the decision in United States versus --

16 JUSTICE BREYER: No, I'm not denying that.  
17 I just didn't think that had anything to do with this  
18 case. I mean, I thought that the object of the  
19 indictment initially was to set forth what crime the  
20 person was accused of and inform him of that.

21 You are saying, and then there is another  
22 requirement, which seems a little vague. It's been hard  
23 for me to find out, to pin this down, and it's the one  
24 you state, which is that it says in addition in the rule  
25 you have to have facts.

1 I don't know if those are the same. I  
2 thought they were two separate things.

3 MR. BAGGOT: Well, Your Honor, one of the  
4 functions of the grand jury indictment is to provide  
5 notice to the accused of the exact offense with which he  
6 is charged. Here, clearly we knew he was charged with  
7 1326, with attempting. What we did not know is which of  
8 the many, many acts that the Government suggested at  
9 various times, which of the many acts they proved at  
10 trial, would be the overt act. As I say, the appeal was  
11 unfair. It's not so much the trial was unfair. It was  
12 the appeal that was unfair.

13 JUSTICE GINSBURG: Does the Government have  
14 to pick one overt act and say that's it, when it  
15 introduces evidence of a whole string of them?

16 MR. BAGGOT: Well, I don't see how we can  
17 really address it unless they tell us what they're  
18 talking about. And I would point out as of today the  
19 Government has still not identified a single act that is  
20 their overt act.

21 JUSTICE KENNEDY: Well, can't you allege  
22 that the means by which it was done are unknown, but  
23 that it was by one or more of the following?

24 MR. BAGGOT: Yes, you could. Many times in  
25 conspiracy indictments they will allege any of the

1 following overt acts.

2 JUSTICE BREYER: That's exactly what I -- I  
3 tried to read some treatises on this, and the more I  
4 read, the more confused I got.

5 I started out thinking, well, it's  
6 sufficient if you have bank robbery you say on October  
7 14, 2004, in the city of such and such, at the corner of  
8 such and such, where there is a bank, the defendant  
9 walked into the bank and he, he attempted or he did by  
10 force or threat of force, take property belonging to  
11 someone else, or whatever it is, and that that would be  
12 sufficient. And that you don't have to say, and in  
13 addition he, you know, what the force consisted of, did  
14 it consist of a knife, or a gun, or a fist. Can you  
15 give me some enlightenment, at least if you think that's  
16 relevant here?

17 MR. BAGGOT: I don't think that's relevant  
18 because that's going into excessive detail. The  
19 requirement is that the essential fact --

20 JUSTICE BREYER: If it's excessive detail,  
21 the central fact, then why isn't on such and such a date  
22 at such and such a time he attempted to?

23 MR. BAGGOT: Because he did many things in  
24 furtherance of the attempt according to the Government's  
25 proof, and we had a right to know, to have notice of the

1 accusation, what is the Government talking about?

2 JUSTICE BREYER: All right. Then why, if  
3 that's so, why wouldn't that apply as well if they said  
4 he attempted to and committed an overt act in -- that is  
5 a substantial step. And then you're saying in addition,  
6 they have to list the particular facts.

7 MR. BAGGOT: The essential facts.

8 JUSTICE BREYER: I couldn't find any case in  
9 this Court that said that. I mean, I found in Hamling a  
10 case that went the other way, a general statement. They  
11 said all you have to do is say obscenity, you don't have  
12 to say how obscene or in what way it's obscene, et  
13 cetera.

14 MR. BAGGOT: But in the Russell case they  
15 said that you have to provide the essential facts, what  
16 was the nature of the committee hearing, what was the  
17 subject --

18 JUSTICE BREYER: Yeah. Yeah. Yeah. And  
19 then Russell seems lost from sight for quite a while, or  
20 isn't followed a lot.

21 JUSTICE KENNEDY: But you come back and you  
22 tell Justice Breyer, well, that's because we had no  
23 notice. But that's a different argument than the fact  
24 that there was no indictment. Notice can be cured by a  
25 bill of particulars, by the fact that you've had a



1 chance to contest the evidence at trial, that there was  
2 no error. That's a quite different rationale than  
3 saying that this is not an indictment.

4 MR. BAGGOT: Well, it's not an indictment  
5 because it did not allege the essential facts.

6 JUSTICE KENNEDY: But that, it seems to me,  
7 is your argument, not lack of notice.

8 MR. BAGGOT: Well, it didn't provide a  
9 notice of what the essential facts was. Those are  
10 overlapping concepts, certainly, but we did not know  
11 what the facts --

12 JUSTICE STEVENS: May I ask this question.  
13 Should the test for the missing element be different for  
14 the test for the wrong element? In other words, suppose  
15 the indictment alleged he walked up to the border and  
16 the evidence showed he rode a bicycle. There's a  
17 variance. Would that present a different legal issue  
18 than if they just leave the overt act entirely out?

19 MR. BAGGOT: That presents a different legal  
20 issue because a variance means they alleged A, they  
21 proved B. Here they did not allege A. Nothing was  
22 alleged.

23 JUSTICE STEVENS: Why should the test for  
24 judging the two be different?

25 MR. BAGGOT: Between a variance --

1 JUSTICE STEVENS: Between a variance and an  
2 omission?

3 MR. BAGGOT: Well, when you have a variance  
4 the question is how much is the variance, how far off is  
5 the variance.

6 JUSTICE STEVENS: Well, it's clearly  
7 different. He rode a bicycle instead of walking.

8 MR. BAGGOT: Well, he's given notice that  
9 he's approaching the border with intent to commit this  
10 crime.

11 JUSTICE STEVENS: So here you've got notice  
12 he made an attempt, but you didn't tell us whether he  
13 rode the bicycle or he walked.

14 MR. BAGGOT: But then the question becomes  
15 is it material, is the variance material, is it far off  
16 from what alleged? Here nothing was alleged.

17 JUSTICE STEVENS: See, the problem I'm  
18 trying to think through is why should there be a  
19 different rule between those two situations. It seems  
20 to me they're equally likely to produce prejudice or  
21 lack of notice and a failure to comply with the letter  
22 of the Constitution.

23 MR. BAGGOT: Well, the prime variance case  
24 is Stirone versus United States in the 1960s, where the  
25 Court very simply said that where nothing is alleged

1 this cannot be treated as a simple variance.

2 JUSTICE SOUTER: But why isn't your answer  
3 to Justice Stevens that in the case in which there is no  
4 allegation of an element at all there isn't a sufficient  
5 indictment to charge him for anything, whereas in the  
6 case of the variance on your theory, as I understand it,  
7 there is an indictment and the question is simply  
8 whether he was misled by the variance and prejudiced?

9 MR. BAGGOT: Right.

10 JUSTICE SOUTER: So why isn't the answer is  
11 in one case there's an indictment, and in the other case  
12 there isn't?

13 MR. BAGGOT: Well, the extent is -- it's a  
14 question that can't be answered in the abstract. It's a  
15 question of how material the variance was.

16 JUSTICE SOUTER: No, but why isn't your  
17 answer to him that in the case in which there is a  
18 variance you have an indictment; in the case that you're  
19 talking about there is none? And the reason I press you  
20 on that is that I thought the essence of your case was  
21 that there is no indictment here, i.e., the grand jury  
22 function has not been performed and he is entitled to  
23 the grand jury function before he goes to trial.

24 MR. BAGGOT: Correct.

25 JUSTICE SOUTER: And if that is the nub of

1 your position, then I would have thought your answer to  
2 Justice Stevens was what I suggested. If that's not  
3 your answer to Justice Stevens, then I'm not sure that I  
4 understand your case.

5 MR. BAGGOT: Well, Your Honor, our case is  
6 simply that where a material element is omitted the  
7 grand jury -- something went wrong in the grand jury  
8 proceeding, and the only remedy for that is to return  
9 it, the case, to the grand jury and let them have a  
10 second go --

11 JUSTICE SOUTER: What is the result of what  
12 went wrong? How do you characterize the grand jury  
13 product in the case in which, as you put it, something  
14 goes wrong?

15 MR. BAGGOT: Constitutionally deficient and  
16 did not fulfill the requirements of the Fifth Amendment.

17 JUSTICE SOUTER: An insufficient -- in other  
18 words, there is no indictment charging a crime? Is  
19 that --

20 MR. BAGGOT: That's correct, Your Honor, no  
21 crime, and the reason for that -- I'll go one step  
22 further -- is because there's no way of knowing whether  
23 the Government --

24 CHIEF JUSTICE ROBERTS: But that's not an  
25 element. You talk about essential facts and material --

1 I mean, the statute makes it a crime to intentionally  
2 attempt to enter the United States having previously  
3 been deported and all that. It doesn't say anything  
4 about presenting false identification. So why are those  
5 essential facts when they're not part of what the  
6 statute prohibits?

7 MR. BAGGOT: Because that is -- there must  
8 be facts to show what the overt act was. Just providing  
9 a legal memorandum of what the elements of the offense  
10 are doesn't do any good. What the Constitution  
11 contemplates is that the essential facts be laid out.

12 JUSTICE GINSBURG: Suppose this indictment  
13 charged not an attempt to enter, but unlawful entry.  
14 Then the indictment would be sufficient, right? There  
15 wouldn't be any problem with it?

16 MR. BAGGOT: Well, if it --

17 JUSTICE GINSBURG: It charged, not an  
18 attempt, but an unlawful entry. Anything missing from  
19 the indictment?

20 MR. BAGGOT: No, because that's a general  
21 intent crime. There's no specific intent and no  
22 requirement that he perform any overt act.

23 JUSTICE ALITO: And the defendant could be  
24 convicted of an attempt under such an indictment, could  
25 he not?

1           MR. BAGGOT: Under such an indictment, under  
2   this case he could not, because he was under the  
3   constant surveillance of the INS at the time and in law  
4   that is not a legal indictment, not a legal reentry, an  
5   illegal reentry. It's one of those quirks in the law,  
6   and that's why they charged the attempt, to avoid these  
7   questions of whether he was under the constant control  
8   and surveillance of the immigration authorities, which  
9   he was. He never got by secondary. So that's why the  
10  charge was attempt as opposed to unlawful entry.

11           JUSTICE ALITO: But in that situation, you  
12  wouldn't know what the substantial step was, would you?

13           MR. BAGGOT: No, and --

14           JUSTICE ALITO: The indictment wouldn't tell  
15  you what the substantial step was.

16           MR. BAGGOT: And there wouldn't be any need  
17  either because it's not a specific intent crime and  
18  there's no requirement --

19           JUSTICE ALITO: If the defendant was  
20  convicted of the lesser included offense of attempt  
21  under an indictment charging the completed offense?

22           MR. BAGGOT: Attempt is not a lesser  
23  included. The Congress has intended to make attempt on  
24  the same level as the substantive offense. That is the  
25  way the case law has been coming out. So whether he

1 enters, whether he attempts, or whether he's found in  
2 the United States are all on an equal par. It's not a  
3 lesser included.

4 JUSTICE SCALIA: Well, I don't understand  
5 that. You're saying it's a separate offense, but a  
6 lesser included offense is a separate offense. It just  
7 happens to be embraced within some other offense.

8 MR. BAGGOT: Well, it has the same guideline  
9 punishment. It has the same treatment as the unlawful  
10 entry. And they're treated -- we have case law in our  
11 circuit that says, I think it is Corrales Beltran, that  
12 says the attempt is a substantive offense, even though  
13 it sounds contradictory.

14 JUSTICE SCALIA: What does that mean, if  
15 you're tried for illegal entry and the Government  
16 doesn't prove the illegal entry because you're under  
17 supervision when you get in, the jury could not convict  
18 of attempt?

19 MR. BAGGOT: If he was charged that way,  
20 they probably could, yes. There could be a two-count  
21 indictment or there could be alternatives. But that  
22 wasn't this case.

23 JUSTICE SCALIA: And that would be okay,  
24 just charge with attempt without setting forth the overt  
25 acts for the attempt?

1                   MR. BAGGOT: Well, they would have to set  
2 out the overt act and the essential facts that  
3 constitute the overt act.

4                   JUSTICE BREYER: Suppose that it's an  
5 assault and the indictment says on such and such a day,  
6 at such and such a time, he assaulted the postman,  
7 right? You also have to say what, that he waved his  
8 fist or that he had a knife? You have to say that in  
9 the indictment?

10                  MR. BAGGOT: No, I don't think so.

11                  JUSTICE BREYER: No. All right. So I  
12 thought normally essential facts means simply the  
13 facts -- you can state the essential facts by writing  
14 the statute and normally that tells you. Now, is that  
15 true? One case that seems to go the other way is  
16 Russell.

17                  MR. BAGGOT: Normally, yes, sir.

18                  JUSTICE BREYER: Normally, yes.

19                  MR. BAGGOT: That's correct. However, in  
20 this case there is a peculiar meaning to the word  
21 "attempt" that when Congress used the word "attempt"  
22 they meant to bring with that word its requirements  
23 under the common law.

24                  JUSTICE BREYER: Why more than any other  
25 word in the statute? "Attempt," people know what that



1 means.

2 MR. BAGGOT: Well, they do and they don't.

3 JUSTICE BREYER: And they also know what  
4 "assault" means. And if you tried, you could spell out  
5 "assault." They know what "robbery" means, but you  
6 could spell it out.

7 So why does the Ninth Circuit think this one  
8 you have to spell out, but all the other words you don't  
9 have to?

10 MR. BAGGOT: Well, that's why they had an en  
11 banc determination, because the judges were in disarray  
12 over that question. But at the time of this trial of  
13 the en banc decision in the Ninth Circuit,  
14 Gracidas-Ulibarry, had established concretely that the  
15 intent of the legislature was to incorporate the common  
16 law meaning of the word "attempt."

17 JUSTICE SCALIA: Mr. Baggot, could I come  
18 back to your answer to my earlier question. You said  
19 you could only be convicted of the lesser included  
20 offense if the lesser included offense is set forth  
21 explicitly in the indictment. Are you sure of that?

22 MR. BAGGOT: No, sir.

23 JUSTICE SCALIA: Are you sure that's the  
24 law?

25 MR. BAGGOT: No, but here under 1326 it's

1 quite different. The intent of the legislature was that  
2 the attempt would itself be a substantive offense.

3 JUSTICE SCALIA: As I said in my previous  
4 question, every lesser included offense is itself a  
5 substantive offense. That doesn't distinguish attempt  
6 from anything else. And my understanding is if you're  
7 charged with a greater offense, the lesser can be a  
8 subject of conviction even though it's not explicitly  
9 set forth in the indictment.

10 MR. BAGGOT: Yes, that's correct.

11 JUSTICE SCALIA: And if that is the case  
12 here, then it seems to me he could have been convicted  
13 of attempt without ever having had set forth in the  
14 indictment the overt act that you demand.

15 MR. BAGGOT: Well, that's a good point. But  
16 under our -- all I can tell you, Justice Scalia, is that  
17 under our case law the attempt is considered a  
18 substantive offense. That's been the law --

19 JUSTICE GINSBURG: But substantive offense  
20 is one thing. Lesser included, I think you said earlier  
21 it couldn't be a lesser included because it's subject to  
22 the same punishment. So it is not lesser?

23 MR. BAGGOT: Under this statute, under 1326,  
24 that's the ruling of our circuit.

25 Your Honor, in conclusion, I'd just like to

1 emphasize that if the Government's position is adapted,  
2 what you will have is judges reviewing the decision of  
3 the grand jury whether or not to allege certain  
4 elements, essential elements of offenses. That is  
5 challenging the independence of the grand jury, which is  
6 part of the structure set up by the Constitution, that  
7 the grand jury is a separate institution. Anything that  
8 the grand jury does, any mistakes that are made, need to  
9 be returned to the grand jury and not be reviewed by a  
10 single judge, a panel of judges, or an en banc or any  
11 court.

12 Are there any other questions by the Court?

13 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
14 Baggot.

15 MR. BAGGOT: Thank you, sir.

16 CHIEF JUSTICE ROBERTS: Mr. Dreeben, you  
17 have three minutes.

18 REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN  
19 ON BEHALF OF THE PETITIONER

20 MR. DREEBEN: Thank you, Mr. Chief Justice.

21 JUSTICE SCALIA: Mr. Dreeben, is attempt a  
22 lesser included offense of the substantive offense of  
23 illegal reentry?

24 MR. DREEBEN: It's a substantive offense.  
25 It is an attempt offense. I wouldn't necessarily

1 describe it as lesser included, but Rule 31 of the  
2 Federal Rules of Criminal Procedure does allow a trial  
3 judge to submit an attempt offense to the petit jury  
4 when attempt is a violation of the substantive law.

5 I should say that the Government's position  
6 is that there does not need to be a separate charge of  
7 attempt in the indictment in order to permit Rule 31 to  
8 operate, but there is a circuit split over whether  
9 lesser included offenses can be submitted to the jury  
10 unless they are included in the indictment.

11 So we're not operating under a uniform rule  
12 that would always allow us to do that, and I'm not sure  
13 which way the Ninth Circuit goes on that, although I  
14 could hazard a guess.

15 (Laughter.)

16 The problem that we have here is that we are  
17 living under a rule of law in the Ninth Circuit and in  
18 at least one other circuit that forces the Government to  
19 pay a tremendous penalty when a mistake is made in an  
20 indictment, and it does happen. Justice Souter, I can  
21 assure you that judges dismiss plenty of indictments for  
22 failure to dismiss -- state elements, but they don't get  
23 them all.

24 JUSTICE SOUTER: But Mr. Dreeben, isn't the  
25 point that the tremendous cost that you refer to is a

1    tremendous cost that the Government pays by its choice  
2    to go to trial, as opposed to going back to the grand  
3    jury and making sure that it has an adequate indictment?

4               MR. DREEBEN: Well, the Government is often  
5    quite confident that it's correct. And I think if you  
6    put yourself in the position of the prosecutors in this  
7    case, you can see why that's true. But there are myriad  
8    rules and sub-rules of substantive law that this Court  
9    will never review, that require the Government to  
10   conform with various pleading obligations. They're all  
11   below the radar screen. But when you have a rule of  
12   automatic reversal like this, they jump up to  
13   prominence. And the reason that they do is because the  
14   entire criminal justice system, victims, witnesses, the  
15   judge, the prosecutors, the defense bar, jurors,  
16   everybody is being asked to go through a trial that was  
17   conducted on an error-free basis by hypothesis, simply  
18   because there was a mistake at the charging phase. And  
19   the petit jury's verdict we submit makes it clear that  
20   that mistake does not entitle the judicial system to say  
21   let's throw it all out and start again simply as a  
22   prophylactic mechanism.

23              JUSTICE KENNEDY: If you concede there was  
24   an error, is there anything to prevent us from saying we  
25   don't accept that concession, and have you rebrief and

1     argue the question of whether or not an overt act is  
2     required?

3                 MR. DREEBEN: Well, I hope that if the Court  
4     does not choose to decide the question on which it  
5     granted certiorari, that it does hold that the Ninth  
6     Circuit's substantive rule of law here is incorrect, and  
7     that there was nothing wrong with the indictment.

8                 JUSTICE KENNEDY: But can we do that in the  
9     face of your concession without having reargument?

10                MR. DREEBEN: Oh, I think this Court can do  
11     anything it chooses, regardless of the Government's  
12     concession.

13                (Laughter.)

14                But we're not conceding that the Ninth  
15     Circuit was correct. We simply didn't challenge it  
16     because the important question for us is the rule of law  
17     on harmless error. This pleading rule is something that  
18     we can comply with. It may be wrong, but it's  
19     something, like many wrong rules of law, we live with.

20                CHIEF JUSTICE ROBERTS: Thank you,  
21     Mr. Dreeben. The case is submitted.

22                MR. DREEBEN: Thank you.

23                (Whereupon, at 11:01 a.m., the case in the  
24     above-entitled matter was submitted.)

25

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