IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 05-998

JUAN RESENDIZ-PONCE :

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Washington, D.C.

Tuesday, October 10, 2006

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

APPEARANCES:

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

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

C O N T E N T S

P R O C E E D I N G S

(10:04 a.m.)

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

Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And I want to amend --

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

MR. DREEBEN: In this case?

JUSTICE GINSBURG: Yes.

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

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

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

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

MR. DREEBEN: Justice Alito --

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

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

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

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

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

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

JUSTICE KENNEDY: What would that be here?

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

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

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

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

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

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

MR. DREEBEN: They did, Justice Breyer.

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

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

MR. DREEBEN: No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

made.

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

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

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

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

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

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

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

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

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

the motion to quash.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. DREEBEN: And we submit --

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

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

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

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

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

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

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

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

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

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

on a rule of automatic reversal.

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Dreeben.

MR. DREEBEN: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Baggot.

ORAL ARGUMENT OF MR. ATMORE L. BAGGOT

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

MR. BAGGOT: Oh, can you win.

JUSTICE BREYER: Yeah.

MR. BAGGOT: You can always raise it.

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

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

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

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

JUSTICE BREYER: Yeah, we know.

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

JUSTICE BREYER: Yes. Zero.

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

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

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

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

MR. BAGGOT: The answer is no.

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

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

JUSTICE BREYER: It does as well in my case.

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

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

JUSTICE ALITO: What if it's perfectly --

MR. BAGGOT: Sir?

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

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

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

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

MR. BAGGOT: Well, I believe --

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

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

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

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

MR. BAGGOT: The result --

JUSTICE SCALIA: Then the trial occurs --

MR. BAGGOT: And he's found guilty.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BAGGOT: It could be. But --
JUSTICE GINSBURG: Is there any doubt about that?
MR. BAGGOT: It could be an overt act. It could be, lying could be a overt act, tying your shoes in the morning with intent to go to --
JUSTICE GINSBURG: Yes, but you knew that -- you had the file. You knew the Government was going to prove this. And you also knew it was an overt act.
MR. BAGGOT: It could have been. But there are many acts.
JUSTICE SOUTER: But your point is not that there was any prejudice here. Your point is that he was entitled to a grand jury?
MR. BAGGOT: He was entitled to a grand jury as an independent institutional body. And the problem I have with the Government's point of view is that it places a judge as a reviewing authority over what a grand jury has done, regardless of the standard that's applied. And of course in -- it's a rare case when you even know what a grand jury did.
CHIEF JUSTICE ROBERTS: You don't have any -- you're not suggesting to us that the grand jury that indicted him for intentionally attempting to enter the United States at or near San Luis would not have

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

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

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

MR. BAGGOT: Sure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

following overt acts.

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

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

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

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

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

accusation, what is the Government talking about?

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

MR. BAGGOT: The essential facts.

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

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

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

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

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

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

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

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

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

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

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

MR. BAGGOT: Between a variance --

JUSTICE STEVENS: Between a variance and an omission?

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

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

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

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

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

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

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

this cannot be treated as a simple variance.

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

MR. BAGGOT: Right.

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

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

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

MR. BAGGOT: Correct.

JUSTICE SOUTER: And if that is the nub of

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

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

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

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

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

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

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

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

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

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

MR. BAGGOT: Well, if it --

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

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

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

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

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

MR. BAGGOT: No, and --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BAGGOT: Normally, yes, sir.

JUSTICE BREYER: Normally, yes.

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

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

means.

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

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

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

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

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

MR. BAGGOT: No, sir.

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

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

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

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

MR. BAGGOT: Yes, that's correct.

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

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

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

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

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

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

Are there any other questions by the Court?

CHIEF JUSTICE ROBERTS: Thank you, Mr. Baggot.

MR. BAGGOT: Thank you, sir.

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

REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

(Laughter.)

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

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

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

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

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

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

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

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

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

(Laughter.)

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

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

MR. DREEBEN: Thank you.

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