No. 07-1281

In The Supreme Court of the United States

DAVID KAY and DOUGLAS MURPHY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When an indictment omits an element of the offense, must it be dismissed, or may such an error instead be excused as harmless?

2. When the text, structure, and legislative history of a criminal statute are all ambiguous, is the rule of lenity applicable, or instead is that principle limited merely to cases in which the court can only "guess" at Congress's intent?

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization of more than 11,500 attorneys, in addition to more than 28,000 affiliate members from all fifty states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the role and duties of lawyers representing parties in administrative, regulatory, and criminal investigations. In furtherance of this and its other objectives, NACDL files a number of amicus curiae briefs each year, addressing a wide variety of criminal justice issues.

NACDL has recently submitted amicus briefs to this Court on aspects of the questions presented

[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for all parties received notice of NACDL's intention to file this amicus brief ten days before the due date. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court under Rule 37.2(a).

here. In *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007), NACDL contended that the omission of an element of a criminal offense from a federal indictment cannot constitute harmless error. In *Burgess v. United States*, 128 S. Ct. 1572 (2008), NACDL urged application of the rule of lenity to federal mandatory minimum sentences. In *Resendiz-Ponce*, the Court found that the indictment contained all elements of the charged offense and thus did not reach the harmless error question. In *Burgess*, the Court found the text of the statute unambiguous and thus did not address application of the rule of lenity. NACDL continues to believe that these issues are central to the federal criminal justice system. It views this case as an opportunity to resolve the important questions left undecided in *Resendiz-Ponce* and *Burgess* and to provide essential guidance to courts and litigants.

ARGUMENT

1. NACDL supports the petition here because the majority view in the circuits--that the omission of an element from an indictment may be harmless error--presents a fundamental threat to the "substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Stirone v. United States*, 361 U.S. 212, 217 (1960); *see, e.g., Russell v. United States*, 369 U.S. 749, 770 (1962) (vague indictment deprives the defendant "of a basic protection which the guaranty of the intervention of a grand jury was designed to secure"). If courts are permitted to surmise after the fact what the grand jury *would have found* if presented with a proper indictment, or *must have*

found based on the evidence before it, the Fifth Amendment right not to be tried for serious offenses except on indictment by the grand jury will be significantly weakened.

The omission of an element of an offense from the indictment constitutes "structural error," as this Court has explained that term, and thus cannot be reviewed for harmless error. *See, e.g., United States v. Du Bo*, 186 F.3d 1177, 1179-80 (9th Cir. 1999). Omission of an element has each of the three characteristics that, alone or in combination, cause an error to be "structural": the omission has consequences that are necessarily difficult to assess, especially given the secrecy that shrouds grand jury proceedings, *see id.* at 1179; it necessarily renders the criminal proceeding fundamentally unfair, because it permits the defendant to be "held to answer" at trial without having been charged with an offense by the grand jury, *see id.* at 1180; and the harmless error inquiry is irrelevant to remedying the constitutional error, because the interest to be protected does not necessarily turn upon the ultimate reliability of the grand jury or trial proceeding, *see id.* at 1180 n.2. *See generally United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006) (addressing grounds for finding structural error).

The courts that have applied harmless error analysis to indictments that omit an element of the offense have taken too crabbed a view of what constitutes "structural error." Those courts have generally concluded that because this Court held in *Neder v. United States*, 527 U.S. 1 (1999), that

failure to instruct the petit jury on an element of the offense may constitute harmless error, it necessarily follows that the omission of an element from the indictment may be harmless. *See, e.g., United States v. Allen*, 406 F.3d 940, 943-45 (8th Cir. 2005) (en banc), *cert. denied*, 127 S. Ct. 826 (2006); *United States v. Higgs*, 353 F.3d 281, 304-07 (4th Cir. 2003). But *Neder* and similar cases address the "commission of a constitutional error at trial alone." *Washington v. Recuenco*, 548 U.S. 212, 218 (2006). Those cases do not consider the unique role of the grand jury in our constitutional structure or the critical differences between grand jury and trial proceedings. *See Du Bo*, 186 F.3d at 1180 n.2. We respectfully urge the Court to take the opportunity that this case presents to address the application of "structural error" in the grand jury context.

2. This case affords an excellent vehicle for the Court to resolve the uncertainty in its own decisions and in the lower courts over proper application of the rule of lenity. The Fifth Circuit found that the text of the so-called "business nexus" requirement in 15 U.S.C. § 78dd-1(a)(1) and -2(a)(1) is ambiguous. Resorting to snippets of legislative history, however, including the legislative history of amendments to the FCPA that Congress declined to adopt,[2] the court of appeals refused to apply the rule of lenity. The court found the rule applicable only where, "after seizing everything from which aid can be derived, a court can make no more than a guess as to what Congress intended." *United States v.*

[2] *See United States v. Kay*, 359 F.3d 738, 752-53 (5th Cir. 2004).

Kay, 513 F.3d 432, 445 (5th Cir. 2007) (quotation and brackets omitted), *modified on other grounds*, 513 F.3d 461 (5th Cir. 2008). This case thus squarely presents the question whether the rule of lenity applies as a "last resort," when the court's only alternative is to "guess" at the meaning of the statute, as the court of appeals held, or, by contrast, whether the rule applies whenever the "text, structure, and history [of the statute] fail to establish that the Government's position is unambiguously correct." *United States v. Granderson*, 511 U.S. 39, 54 (1994); *see, e.g., Scheidler v. NOW*, 537 U.S. 393, 409 (2003); *Cleveland v. United States*, 531 U.S. 12, 25 (2000).

This case also offers the opportunity to resolve a more fundamental question: whether courts can *ever* resort to legislative history to resolve ambiguity in the statutory text, or whether instead the rule of lenity applies (and bars resort to legislative history) whenever the text of a penal statute remains ambiguous after the court has applied all available canons of statutory construction. Because the relevant statutory text is indisputably ambiguous here, the rule of lenity requires that the business nexus element be interpreted in petitioners' favor unless, as the court of appeals held, resort may first be had to legislative history.

Three Justices of this Court have declared that "it is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history." *United States v. R.L.C.*, 503 U.S. 291, 308 (1992) (Scalia, J., joined by Kennedy

and Thomas, JJ., concurring in the judgment); *see id.* at 311 (Thomas, J., concurring in the judgment) (agreeing that "the use of legislative history to construe an otherwise ambiguous penal statute against a criminal defendant is difficult to reconcile with the rule of lenity," but emphasizing that courts may use "well-established principles of statutory construction" in determining whether text is ambiguous) (quotation omitted). The plurality in *R.L.C.*, consisting of Chief Justice Rehnquist and Justices White, Stevens, and Souter, concluded that Justice Scalia's view of the rule of lenity "is an issue that is not raised and need not be reached in this case." *Id.* at 306 n.6.

The issue left unresolved in *R.L.C.*--whether the rule of lenity precludes resort to legislative history when the statutory text is ambiguous--is squarely presented here. That issue goes directly to the core purpose of the rule. "'The rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal.'" *R.L.C.*, 503 U.S. at 309 (Scalia, J., joined by Kennedy and Thomas, JJ., concurring) (quoting *Liparota v. United States*, 471 U.S. 419, 427 (1985)); *see, e.g., McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.) (before imposing criminal punishment, "it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.").

Presuming knowledge of the text of the criminal code is consistent with the principle of fair

warning embodied in *McBoyle* and its progeny. The code is readily available to lawyers and nonlawyers alike; anyone who wishes to do so may consult potentially applicable penal statutes before acting. Legislative history, by contrast, is often inaccessible to nonlawyers and--as this case well illustrates--may itself be open to varying interpretations. More fundamentally, statutes have the force of law, knowledge of which must generally be presumed in any ordered society; legislative history does not. "[B]ecause no one can plausibly conclude that a committee report or the floor statements of selected legislators provides [fair warning], the use of such material seems utterly incompatible with the rule [of lenity] or the civilized interests it protects." *United States v. Laton*, 352 F.3d 286, 314 (6th Cir. 2003) (Sutton, J., dissenting); *see R.L.C.*, 503 U.S. at 309 (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in the judgment) ("It may well be true that in most cases the proposition that the words of the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction . . . albeit one required in any system of law; but necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports.").

Moreover, descents into legislative history, as this case illustrates, are certain to render the rule of lenity a practical nullity. The malleability of legislative history will nearly always provide some basis, however tenuous, to conclude that ambiguous statutory language can be stretched to cover the defendant's alleged conduct, especially when the alternative is a reversal of a conviction on due

process grounds. Allowing the use of legislative history to resolve textual ambiguity in penal statutes therefore invites result-oriented decisions and a continual expansion of criminal liability.

Because of the importance of the rule of lenity in preserving the principle of fair warning and the uncertainty that now surrounds its application in the federal criminal system, we submit that the Court should grant the writ and use this case to provide the needed clarity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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