No. 05-998

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

JUAN RESENDIZ-PONCE

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES**

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## QUESTION PRESENTED

Whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error.

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 425 F.3d 729.

## JURISDICTION

The judgment of the court of appeals was entered on October 11, 2005. On January 3, 2006, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 8, 2006. The petition was filed on that date and granted on April 17, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.

**STATEMENT**

After a jury trial in the United States District Court for the District of Arizona, respondent was convicted of attempting to reenter the United States after deportation, in violation of 8 U.S.C. 1326(a). He was sentenced to 63 months of imprisonment, to be followed by three years of supervised release. J.A. 65-71. The court of appeals reversed and remanded, reasoning that the indictment omitted an element of the offense and that the omission constituted a "fatal flaw" necessitating automatic reversal. Pet. App. 1a-10a.

1. On August 28, 2002, respondent, a Mexican national, was convicted in state court of kidnapping his former stepdaughter (who was also the mother of his 3-year-old child). While respondent was jailed for that offense, he admitted that he had previously been deported from the United States and that he had thereafter reentered the country without first obtaining permission to do so. On October 15, 2002, respondent was again removed from the country. Pet. App. 2a; J.A. 37-44; Presentence Report ¶ 18.

On June 1, 2003, respondent approached the port of entry at San Luis, Arizona, and presented a permanent resident card and driver's license to Agent Nancy Vela of U.S. Customs and Border Protection (CBP). Both forms of identification actually belonged to respondent's cousin, Antonio Resendiz. Respondent claimed that he was a legal resident and told Agent Vela that he was going to Calexico, California. Because Agent Vela believed that respondent did not resemble the person on the identification cards, she referred him to CBP Agent Sean Bly for secondary inspection. When Agent Bly asked respondent about his intended destination, he said

that he was going to Phoenix. Respondent was thereafter detained. Pet. App. 2a; J.A. 29-37.

2. On July 30, 2003, a grand jury in the District of Arizona indicted respondent on one count of attempting to reenter the United States after deportation, in violation of 8 U.S.C. 1326(a). The indictment made the following allegations:

> On or about June 1, 2003, JUAN RESENDIZ-PONCE, an alien, knowingly and intentionally attempted to enter the United States of America at or near San Luis in the District of Arizona, after having been previously denied admission, excluded, deported, and removed from the United States at or near Nogales, Arizona, on or about October 15, 2002, and not having obtained the express consent of the Secretary of the Department of Homeland Security to reapply for admission.

J.A. 8. The indictment also stated that respondent was being charged under 8 U.S.C. 1326(a) and that the government was seeking a sentencing enhancement under 8 U.S.C. 1326(b)(2), which provides for a higher maximum sentence where the prior removal followed a conviction for an aggravated felony. J.A. 8.

3. Before trial, respondent moved to dismiss the indictment. Under Ninth Circuit law, one element of the offense of attempted unlawful reentry is that "the defendant committed an overt act that was a substantial step towards reentering without [the] consent [of the Attorney General]." *United States* v. *Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (2000) (en banc). In his motion to dismiss, respondent contended that the indictment "fail[ed] to allege an essential element, an overt act, or to state the essential facts of such overt act." Mot. to Dismiss 3.

After a hearing, the district court denied the motion. J.A. 26-27.

At trial, the government introduced testimony from Agents Vela and Bly, together with other evidence, demonstrating that respondent had presented false identification at the border and made contradictory statements concerning his intended destination. See J.A. 29-37, 61-64. After the district court denied the defense's motion for an acquittal, the defense rested without presenting any witnesses. See J.A. 47. At the close of the evidence, the district court instructed the jury that the government was required to prove beyond a reasonable doubt, *inter alia*, that respondent had "attempted to enter the United States * * * by intentionally committing an overt act that was a substantial step towards reentering the United States." J.A. 49. In closing arguments, the government contended that respondent met that requirement by presenting false identification at the border and making contradictory statements concerning his intended destination, see J.A. 52; the defense contended that respondent had made no further attempt to enter *after* he had presented the identification and made the relevant statements, see J.A. 57. The jury returned a guilty verdict, and the district court enhanced respondent's sentence on the ground that respondent's prior removal followed his conviction for kidnapping, an aggravated felony. Pet. App. 3a. Respondent was sentenced to 63 months of imprisonment, to be followed by three years of supervised release. J.A. 65-71.

4. The court of appeals reversed and remanded for dismissal of the indictment. Pet. App. 1a-10a. The court first noted that the commission of an "overt act that was a substantial step toward reentering" is an "essential element" of the crime of attempted unlawful reentry, *id.*

at 3a-4a (citation omitted), and that "[t]he indictment in this case does not explicitly allege an overt act," *id.* at 4a. The court rejected, *inter alia*, the government's argument that the indictment *implicitly* alleged that respondent had committed an overt act. *Id.* at 5a-6a.

Relying on its earlier decision in *United States* v. *Du Bo*, 186 F.3d 1177 (9th Cir. 1999), the court of appeals then held that, where a defendant makes a timely objection at trial, "[f]ailure to allege an essential element of the offense is a fatal flaw not subject to mere harmless error analysis." Pet. App. 6a. "The purpose of this rule," the court explained, "is to secure the basic institutional purpose of the grand jury, by ensuring that a defendant is not convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury that indicted him." *Ibid.* (internal quotation marks and citation omitted). While there were "a number of * * * acts that the government might have alleged as a substantial step toward entry into the United States," the court reasoned, "the indictment merely alleged that [respondent] 'attempted to enter' the United States, which simply repeats the ultimate charge against him." *Id.* at 7a. The court thus concluded that "failure to allege any specific overt act that is a substantial step toward entry is a fatal defect in an indictment for attempted entry following deportation under 8 U.S.C. § 1326." *Ibid.*

Judge Reavley, sitting by designation, concurred. Pet. App. 7a-10a. He stated that he was obligated to concur "because of this circuit's precedent," but that he "fail[ed] to see any other reason for this holding." *Id.* at 7a. Judge Reavley contended that "[t]he indictment charged [respondent] with 'knowingly and intentionally' attempting to enter the country in violation of § 1326 and thus fairly implied that he committed an overt act in

doing so." *Id.* at 9a. He further noted that "[t]he judge directed the jury to convict [respondent] under § 1326 only if it found beyond a reasonable doubt that he 'intentionally committed an overt act that was a substantial step towards reentering the United States.'" *Ibid.* Judge Reavley therefore concluded that "[t]he indictment should pass muster and would do so in other circuits." *Ibid.*

5. Shortly after the panel's decision in this case, the Ninth Circuit denied the petition for rehearing en banc in another case in which the government sought reconsideration of the rule that the omission of an offense element from a federal indictment constituted structural error necessitating automatic reversal. See *United States* v. *Omer*, 429 F.3d 835 (2005), petition for cert. pending, No. 05-1101 (filed Feb. 28, 2006). Judge Graber, joined by Judges Kozinski, O'Scannlain, Bybee, Callahan, and Bea, dissented from the denial of rehearing en banc. *Id.* at 835-843. She contended that an "absolute rule" of automatic reversal "makes no sense." *Id.* at 835. Judge Graber reasoned that the court of appeals' rule was inconsistent with this Court's decision in *Neder* v. *United States*, 527 U.S. 1 (1999), which held that the omission of an offense element from the petit jury's instructions does not constitute structural error. 429 F.3d at 840-841. "The situation in *Neder*," Judge Graber explained, "presents a close parallel to the omission of an element from an indictment and leaves us with an incongruity: Omission of an element from an indictment is subject to automatic reversal, but omission of the same element from a jury instruction is not." *Id.* at 840. "[T]he right to a grand jury finding of probable cause as to each element of the offense," she continued, "is no more important, no more central to the fundamental

fairness of a prosecution, than the right to a petit jury's finding that each element was proved beyond a reasonable doubt." *Ibid.*

Judge Graber also rejected the proposition that "there is no way to evaluate, or to cure, any prejudice caused by the omission of an element from an indictment." 429 F.3d at 840. To the contrary, she reasoned, "it is possible (and, indeed, commonplace) to review the omission of an element from a grand jury's indictment for harmless error." *Ibid.* Judge Graber observed that, under this Court's decisions—most notably, *United States* v. *Mechanik*, 475 U.S. 66 (1986)—most errors in grand jury proceedings are subject to harmless-error analysis. 429 F.3d at 840-841. And she noted that this Court's decision in *United States* v. *Cotton*, 535 U.S. 625 (2002), which held that the omission of a sentence-enhancing fact from a federal indictment did not constitute reversible *plain* error, "rebut[s] the idea that omission of an element from an indictment *always* renders a criminal proceeding unfair." 429 F.3d at 841.

## SUMMARY OF ARGUMENT

Like most other constitutional errors, the omission of an element of a criminal offense from a federal indictment, in violation of the Grand Jury Clause of the Fifth Amendment, is amenable to harmless-error analysis. This Court has held that an error is intrinisically harmful, or "structural," only in a limited number of contexts in which the error infects the entire trial process or otherwise renders the trial fundamentally unfair. That is not the case with the indictment error at issue here. Such an error is harmless when it is clear beyond a reasonable doubt that the grand jury would have deter-

mined that there was probable cause with regard to the omitted element.

In *Neder* v. *United States*, 527 U.S. 1 (1999), the Court held that the omission of an offense element from the petit jury's instructions does not constitute structural error. It logically follows that the omission of an offense element from a federal indictment is not structural error either. If anything, the latter type of omission constitutes an even weaker candidate for classification as a structural error than the former. In light of the considerably greater protections afforded to the accused at trial, it would be anomalous to conclude that the failure to submit an offense element to the grand jury would automatically require reversal of a defendant's conviction when the failure to submit an offense element to the petit jury would not.

This Court's decisions concerning grand jury errors likewise suggest that the omission of an offense element from a federal indictment is amenable to harmless-error review. The Court has generally held that errors occurring at the grand jury stage are subject to harmless-error analysis. The sole exception—purposeful racial discrimination in the grand jury's selection—is readily distinguishable from the error at issue here. The Court has also held that a materially identical error—the omission of a sentence-enhancing fact from the indictment—did not constitute reversible plain error because such an error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. That holding supports the conclusion that such an error would not be structural, insofar as it suggests that such an error would not automatically or inherently affect a defendant's substantial rights.

Nothing in the notice-giving function of indictments or in the historical operation of the grand jury supports a rule of automatic reversal. Deficiencies in notice are readily amenable to analysis for prejudice, and, as this case illustrates, are often not prejudicial. Moreover, the possibility of "nullification" by the grand jury does not preclude harmless-error analysis of the error at issue here, just as the power of a petit jury to nullify does not preclude harmless-error analysis of the omission of an offense element from the petit jury's instructions.

Finally, the error in this case was clearly harmless. The relevant inquiry is whether it is clear beyond a reasonable doubt that, but for the error, the grand jury would still have returned an indictment. In engaging in that inquiry, a reviewing court may consider the entirety of proceedings before the trial court. Where the petit jury is fully apprised of the need to find an element omitted from the indictment and then finds that the element has been proved beyond a reasonable doubt, the omission of the element from the indictment is harmless. In light of the petit jury's guilty verdict, a contrary rule would effectively grant defendants a windfall. In this case, because the petit jury plainly found that the omitted element had been proved beyond a reasonable doubt, the error at issue was harmless.

## ARGUMENT

### THE OMISSION OF AN ELEMENT OF A CRIMINAL OFFENSE FROM A FEDERAL INDICTMENT IS SUBJECT TO HARMLESS-ERROR REVIEW

The Grand Jury Clause of the Fifth Amendment states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." This Court

has held that the Grand Jury Clause requires that every element of a criminal offense be charged in a federal indictment. See, *e.g.*, *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998); *United States* v. *Miller*, 471 U.S. 130, 136 (1985); *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). That requirement ensures that the grand jury has considered all of the elements of the offense before deciding to indict. Cf. *United States* v. *Calandra*, 414 U.S. 338, 343 (1974) (noting that the responsibilities of the grand jury include "the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions"); *Stirone* v. *United States*, 361 U.S. 212, 218 (1960) (asserting that "the very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge").[1]

Under the court of appeals' view of the elements of the offense of attempted unlawful reentry in violation of 8 U.S.C. 1326(a), the indictment in this case was constitutionally deficient because it did not allege the commission of an overt act that was a substantial step toward unlawful reentry. The government has not challenged that holding before this Court.[2] The court of appeals

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[1] This Court has repeatedly assumed, though it has never squarely held, that the grand jury must find that there is probable cause to believe that the accused has committed the charged offense (and thus that there is probable cause to believe that each of the offense elements has been satisfied). See, *e.g.*, *United States* v. *Mechanik*, 475 U.S. 66, 70 (1986); *Calandra*, 414 U.S. at 343; *Branzburg* v. *Hayes*, 408 U.S. 665, 686-687 (1972).

[2] Specifically, in its petition for certiorari, the government did not seek review of (1) the court of appeals' holding that the commission of

erred, however, in its additional holding that the omission of an offense element from a federal indictment requires automatic reversal. Like most constitutional errors, the omission of an offense element from a federal indictment is subject to harmless-error analysis. Such an error should be found harmless when a reviewing court concludes that it is clear beyond a reasonable doubt that the grand jury would have determined that there was probable cause to believe that the omitted offense element had been satisfied.

### A. Most Constitutional Errors Are Subject To Harmless-Error Review

The widespread adoption of harmless-error rules in American jurisprudence occurred in the early twentieth century, arising out of concern that appellate courts were reversing criminal convictions on the basis of mere technical errors. See *Kotteakos* v. *United States*, 328 U.S. 750, 759-760 (1946). In *Chapman* v. *California*, 386 U.S. 18, 22 (1967), this Court first held that constitutional errors, like non-constitutional errors, may be harmless and thus do not necessarily require reversal. The Court has since recognized that "most constitutional errors can be harmless." See *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991). In cases involving constitutional error, the harmless-error doctrine, which applies when the defendant has made a timely objection that the trial court erroneously rejects, requires an appellate court to disregard the error where it is clear beyond a reasonable doubt that the error did not affect the out-

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an overt act was an element of the offense of attempted unlawful reentry or (2) its holding that the indictment did not sufficiently allege that element by simply alleging that the defendant had engaged in an "attempt[]" to reenter unlawfully.

come of the proceedings. See, *e.g.*, *Neder* v. *United States*, 527 U.S. 1, 7 (1999); cf. Fed. R. Crim. P. 52(a) (stating that "[a]ny error * * * that does not affect substantial rights must be disregarded").[3]

This Court has treated a "very limited class" of fundamental constitutional errors as so intrinsically harmful that they require reversal without inquiry into whether they had an effect on the outcome. *Johnson* v. *United States*, 520 U.S. 461, 468 (1997). Errors have been classified as intrinsically harmful, or "structural," when they "infect the entire trial process," *Brecht* v. *Abrahamson*, 507 U.S. 619, 630 (1993); "necessarily render a trial fundamentally unfair," *Rose* v. *Clark*, 478 U.S. 570, 577 (1986); or affect "[t]he entire conduct of the trial from beginning to end" and "the framework within which the trial proceeds," *Fulminante*, 499 U.S. at 309, 310. In *Johnson*, 520 U.S. at 468-469, and *Neder*, 527 U.S. at 8, this Court identified six examples of structural error: (1) a biased trial judge, see *Tumey* v. *Ohio*, 273 U.S. 510 (1927); (2) the complete denial of counsel, see *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); (3) the denial of self-representation at trial, see *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984); (4) the denial of a public trial, see *Waller* v. *Georgia*, 467 U.S. 39 (1984); (5) racial

[3] Where the error at issue is not of constitutional dimension, the reviewing court is instead required to determine whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos*, 328 U.S. at 776. The same standard applies where the error at issue is of constitutional dimension but is being reviewed in the context of a federal habeas proceeding. See *Brecht* v. *Abrahamson*, 507 U.S. 619, 638 (1993). In the federal system, when the defendant has failed to make a timely objection, the defendant is required to carry the burden of establishing plain error. See, *e.g.*, *United States* v. *Cotton*, 535 U.S. 625, 631-634 (2002); *Johnson* v. *United States*, 520 U.S. 461, 466 (1997); *United States* v. *Olano*, 507 U.S. 725, 734-735 (1993).

discrimination in the selection of a grand jury, see *Vasquez* v. *Hillery*, 474 U.S. 254 (1986); and (6) the administration of a defective reasonable-doubt instruction, see *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993).

### B. The Omission Of An Offense Element From A Federal Indictment Is Analogous To The Omission Of An Offense Element From The Petit Jury's Instructions, Which Is Subject To Harmless-Error Review

Consistent with the principle that most constitutional errors are subject to harmless-error review, the Court has noted that, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Rose*, 478 U.S. at 579. The omission of an offense element from a federal indictment does not implicate the defendant's right to counsel or the impartiality of the adjudicator. Nor is there any basis for concluding that the "strong presumption" in favor of harmless-error review has been overcome. In *Neder*, *supra*, this Court held that the omission of an offense element from the petit jury's instructions does not constitute structural error. 527 U.S. at 8-15. It necessarily follows from that holding that the omission of an offense element from a federal indictment is not structural error either.

1. In *Neder*, the error at issue was the failure to submit the element of materiality to the jury in a tax-fraud case. 527 U.S. at 4. The Court reasoned that "[t]he error at issue here * * * differs markedly from the constitutional violations we have found to defy harmless-error review." *Id.* at 8. "Unlike such defects as the complete deprivation of counsel or trial before a biased judge," the Court explained, "an instruction that

omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9. To the contrary, the Court noted that "[the defendant] was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel," and "a fairly selected, impartial jury was instructed to consider all of the evidence and argument in respect to [the defendant's] defense against the tax charges." *Ibid.* The Court therefore concluded that "the omission of an element is an error that is subject to harmless-error analysis." *Id.* at 15.

2. There is no justification for treating the failure to submit an offense element to the grand jury differently from the failure to submit an element to the petit jury. The omission of an element from the indictment does not "infect the entire trial process" or "necessarily render a trial fundamentally unfair." *Neder*, 527 U.S. at 8 (citations omitted). Nor is the grand jury's function of protecting against unfounded prosecution "fundamentally undermine[d]," *id.* at 19, when the grand jury finds probable cause with regard to all but one of the elements of the offense, and when a reviewing court concludes that any rational grand jury would have found probable cause with regard to the omitted element as well. Instead, much as in *Neder*, application of harmless-error analysis to the omission of an offense element from the indictment appropriately balances "society's interest in punishing the guilty" against the constitutional right to an indictment by a grand jury. *Id.* at 18 (quoting *Connecticut* v. *Johnson*, 460 U.S. 73, 86 (1983) (plurality opinion)). The harmless-error doctrine thereby "serve[s] a very useful purpose insofar as [it] block[s] setting aside [the defendant's conviction] for small errors or

defects that have little, if any, likelihood of having changed the result of the trial." *Chapman*, 386 U.S. at 22.

If anything, the type of omission at issue here constitutes an even weaker candidate for structural error than the type of omission in *Neder*, for three primary reasons. First, the Fifth Amendment right to an indictment by a grand jury, unlike the Sixth Amendment right to a trial by a petit jury, has not been incorporated against the States through the Fourteenth Amendment as an essential requirement of fundamental fairness. Compare *Hurtado* v. *California*, 110 U.S. 516, 538 (1884) (right to indictment by a grand jury), with *Duncan* v. *Louisiana*, 391 U.S. 145, 147-158 (1968) (right to a trial by a petit jury). In fact, the Fifth Amendment right to indictment by a grand jury is one of the few protections in the Bill of Rights which have not been incorporated. See *Albright* v. *Oliver*, 510 U.S. 266, 272-273 (1994); *Alexander* v. *Louisiana*, 405 U.S. 625, 633 (1972). Fewer than half of the States require grand jury indictments as a matter of state law—and several of those States require grand jury indictments only for charges that could result in a capital sentence or life imprisonment. See 1 Sara Sun Beale et al., *Grand Jury Law and Practice* §§ 1:1, 1:7, at 1-3, 1-32 & n.1.1 (2d ed. 1997 & Supp. 2005) (Beale). It would be unusual if a constitutional right that does not even apply in a state prosecution were held to be so fundamental that its infringement in a *federal* prosecution would automatically require reversal.

Second, the grand jury's return of an indictment is only the opening act in a criminal proceeding; the main act is the trial. In *Hurtado*, the Court rejected the view that a grand jury indictment is required as a matter of due process, reasoning that any proceeding that leads to

charges against a defendant is "merely * * * preliminary" and "can result in no final judgment, except as the consequence of a regular judicial trial." 110 U.S. at 538; see *United States* v. *Williams*, 504 U.S. 36, 51 (1992); *Respublica* v. *Shaffer*, 1 Dall. 236, 237 (Pa. 1788). The grand jury is not the final arbiter of the facts, but instead merely determines whether there is probable cause to believe that the accused committed the crime; the government must still prove at trial, beyond a reasonable doubt, that the accused is guilty. An error that is confined to the grand jury stage thus does not inherently undermine a later criminal conviction; to the contrary, such an error may effectively be rendered moot by subsequent developments at the trial stage. See pp. 35-38, *infra*.

Third, although the grand jury undoubtedly performs a vital protective function, the petit jury provides far greater protection for the accused. See *United States* v. *Cotton*, 535 U.S. 625, 634 (2002); *United States* v. *R. Enters., Inc.*, 498 U.S. 292, 298 (1991). Whereas the accused has the right to a public trial, see U.S. Const. Amend. VI; *Waller*, 467 U.S. at 46, the grand jury operates in secret, and the accused ordinarily has no right to disclosure of matters occurring before the grand jury, see Fed. R. Crim. P. 6(d) and (e). In grand jury proceedings, moreover, the prosecutor has no obligation to present exculpatory evidence, see *Williams*, 504 U.S. at 51-55, and the accused has no right to present evidence at all, see *Calandra*, 414 U.S. at 343-344. The prosecutor may even present evidence that would not be admissible at trial. See, *e.g.*, *id.* at 349-355 (evidence obtained in violation of the Fourth Amendment); *Costello* v. *United States*, 350 U.S. 359, 361-364 (1956) (inadmissible hearsay). The grand jury ultimately decides to

indict by majority vote, see Fed. R. Crim. P. 6(a) and (f), whereas the petit jury in a federal case must unanimously vote to convict, see Fed. R. Crim. P. 31(a). And if a grand jury decides not to indict, the prosecutor may try again before the same (or a different) grand jury, see *Ex parte United States*, 287 U.S. 241, 250-251 (1932), whereas the Double Jeopardy Clause bars a prosecutor from retrying a defendant for the same offense, see U.S. Const. Amend. V. In light of the considerably greater protections afforded to the accused at trial, it would be highly anomalous to conclude that the failure to submit an offense element to the grand jury would necessitate reversal of a defendant's conviction when the failure to submit an offense element to the petit jury would not.

### C. This Court's Decisions Concerning Grand Jury Errors Support The Conclusion That The Omission Of An Offense Element From A Federal Indictment Is Subject To Harmless-Error Review

This Court's decisions applying harmless-error and plain-error analysis to grand jury errors further demonstrate that the omission of an offense element from a federal indictment does not require automatic reversal.

1. a. This Court has indicated that errors occurring at the grand jury stage are generally amenable to harmless-error analysis. In *United States* v. *Mechanik*, 475 U.S. 66 (1986), two witnesses appeared simultaneously before the grand jury, in violation of Federal Rule of Criminal Procedure 6(d). The Court rejected the proposition that "a violation of Rule 6(d) requires automatic reversal of a subsequent conviction regardless of the lack of prejudice." 475 U.S. at 71. The Court noted that Rule 52(a) "provides that errors not affecting substantial rights shall be disregarded," *ibid.*, and con-

cluded that "[w]e see no reason not to apply this provision to [an error] occurring before a grand jury just as we have applied it to such error occurring in the criminal trial itself," *id.* at 71-72. The Court explained that "[t]he reversal of a conviction entails substantial social costs," *id.* at 72, and added that, while reversal may be appropriate when an error "has deprived a defendant of a fair determination of the issue of guilt or innocence," "the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial," *ibid.* The Court ultimately determined that the error at issue was harmless in light of the petit jury's subsequent guilty verdict. *Id.* at 73.

This Court's decision in *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988), further supports the proposition that grand jury errors are generally susceptible to harmless-error review. In *Bank of Nova Scotia*, the Court held that, "as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." *Id.* at 254. That case involved a number of errors at the grand jury stage, including simultaneous appearances by multiple witnesses before the grand jury, in violation of Rule 6(d), and the improper disclosure of grand jury materials to government employees and potential witnesses, in violation of Rule 6(e). *Id.* at 257-258. Invoking its supervisory authority, the district court dismissed the indictment. *Id.* at 253. In holding that dismissal was unwarranted, the Court emphasized that Rule 52(a) struck a "balance * * * between societal costs and the rights of the accused"—a balance that was no less applicable in the context of grand jury errors than in other contexts. *Id.* at 255. The Court explained that the relevant inquiry, in the context of non-

constitutional grand jury errors, was whether the error "substantially influenced" the grand jury's decision to indict. *Id.* at 256. Applying that standard, the Court ultimately determined that none of the errors warranted dismissal of the indictment, concluding that some errors "plain[ly] * * * could not have affected the charging decision" and that, as to others, "the effect, if any, on the grand jury's decision to indict was negligible." *Id.* at 259-260.

b. The only case in which this Court has characterized a grand jury error as "structural" is *Vasquez*, *supra*. That case involved purposeful racial discrimination in the selection of the grand jury. In holding that such discrimination constituted structural error, the Court relied on an "unbroken line of case law" rejecting the argument that a conviction may stand despite such discrimination. 474 U.S. at 261. The Court reasoned that, in cases involving discrimination in the selection of the grand jury, automatic reversal was "the only effective remedy for [the] violation," *id.* at 262, and added that, "[w]hen constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm," *id.* at 263. The Court further observed that "discrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review." *Id.* at 263-264.

In *Vasquez*, the Court did also assert that "[t]he grand jury is not bound to indict in every case where a conviction can be obtained." 474 U.S. at 263 (citation omitted). Based on that premise, the Court reasoned that, "even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the

indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come." *Ibid.* The Court's reasoning on this point, however, constituted dictum and cannot compel the broader conclusion that all grand jury errors (or all *constitutional* grand jury errors) necessitate automatic reversal. This Court's subsequent decisions in *Mechanik* and *Bank of Nova Scotia* make clear not only that principles of harmless-error review generally apply to errors occurring at the grand jury stage, but also that *Vasquez* is limited to the unique context of discrimination in the selection of grand jurors.

In *Mechanik*, the Court discussed *Vasquez* at length without so much as citing the above reasoning, see 475 U.S. at 70-71 n.1, and concluded that the considerations on which *Vasquez* was based "have little force outside the context of racial discrimination in the composition of the grand jury," *id.* at 71 n.1. Similarly, in *Bank of Nova Scotia*, the Court characterized *Vasquez* as involving an "isolated exception[]" to the harmless-error rule, 487 U.S. at 256, and noted that, with regard to the constitutional error at issue in *Vasquez*, "other remedies were impractical and it could be presumed that a discriminatorily selected grand jury would treat defendants unfairly," *id.* at 257 (citing *Mechanik*, 475 U.S. at 70-71 n.1). Because the omission of an offense element is not a "special problem" akin to a biased (or discriminatorily selected) decisionmaker, *Mechanik*, 475 U.S. at 71 n.1, the error at issue in this case more closely resembles the errors in *Mechanik* and *Bank of Nova Scotia* than it does the error in *Vasquez*.

2. The conclusion that the omission of an offense element from a federal indictment can constitute harmless error is further supported by this Court's decision in *Cotton*, *supra*, which held that a similar error did not constitute reversible plain error. The error in *Cotton* was the failure to allege a sentence-enhancing fact (*i.e.*, drug quantity) in the indictment (accompanied by the failure to obtain a finding on that fact from the petit jury). Because the defendants in *Cotton* did not preserve their objection at trial, the case involved the federal plain-error doctrine, which applies when the defendant fails to make a timely objection in the district court. See Fed. R. Crim. P. 52(b). Under that doctrine, a reviewing court asks whether (1) there is error; (2) the error is plain; (3) the error affects substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Johnson* v. *United States*, 520 U.S. at 466-467. The third component of the plain-error inquiry—namely, whether the error affects substantial rights—largely tracks the harmless-error inquiry applicable when a defendant did make a timely objection at trial.[4]

In *Cotton*, the Court ultimately held that the fourth component of the plain-error inquiry was not satisfied in that case because any error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. 535 U.S. at 632-633. In so holding, the Court specifically reserved the question whether the third component of the plain-error inquiry was satisfied be-

[4] The primary difference between the harmless-error inquiry and the third component of the plain-error inquiry is that, in the latter context, the *defendant* bears the burden of proving that the error affects his substantial rights. See *United States* v. *Dominguez Benitez*, 542 U.S. 74, 82-83 (2004); *Olano*, 507 U.S. at 734-735.

cause such an error affected the defendants' substantial rights. *Id.* at 632. Notwithstanding that reservation, the Court's analysis of the fourth factor strongly supports the view that the third component was not satisfied either: the finding that the trial evidence on the omitted fact was "overwhelming" and "uncontroverted," *id.* at 633, points toward the conclusion that any grand jury error was not outcome-determinative. At a minimum, the Court's holding that the error at issue did not satisfy the fourth component necessarily means that the error did not *automatically* or *inherently* affect the defendants' substantial rights. It follows that the error was not structural, insofar as a structural error is one that "*necessarily* render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, 527 U.S. at 9.[5]

Moreover, in *Cotton*, the Court eliminated one of the premises on which the Ninth Circuit's rule of automatic reversal originally rested: namely, that defects in an indictment deprive a court of subject-matter jurisdiction over the ensuing prosecution. See *United States* v. *Du Bo*, 186 F.3d 1177, 1180 (9th Cir. 1999) (stating that,

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[5] Significantly, in *Neder* itself, the Court relied on its earlier decision in *Johnson* v. *United States*, *supra*, which considered whether an error identical to the one at issue in *Neder* (*i.e.*, the failure to instruct the petit jury on an offense element) constituted reversible plain error. In *Johnson*, as in *Cotton*, the Court held that the error did not satisfy the fourth component of the plain-error inquiry. See 520 U.S. at 470. In *Neder*, the Court noted that, "[a]lthough reserving the question whether the omission of an element *ipso facto* 'affect[s] substantial rights,' we concluded [in *Johnson*] that the error did not warrant correction in light of the 'overwhelming' and 'uncontroverted' evidence supporting materiality." 527 U.S. at 9 (citations omitted). So too here, the Court's decision in *Cotton* "cuts against the argument that [the error at issue] will *always* render a trial unfair." *Ibid.*

where an indictment "lacks a necessary allegation," it "does not properly allege an offense against the United States" and "leaves nothing for a petit jury to ratify") (internal quotation marks and citations omitted). Specifically, the Court overruled its earlier decision in *Ex parte Bain*, 121 U.S. 1 (1887), to the extent that it held that indictment defects were jurisdictional. See *Cotton*, 535 U.S. at 630 (explaining that "*Bain*'s elastic concept of jurisdiction is not what the term 'jurisdiction' means today, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case") (internal quotation marks and citation omitted). *Cotton* thus reinforces the conclusion that the omission of an offense element from a federal indictment does not automatically require reversal, whether on jurisdictional grounds or otherwise.

### D. Notice Concerns Do Not Mandate Treating Indictment Errors As Structural

A claim that an indictment's omission of an element impairs the notice-providing function of the charging instrument cannot support a rule of automatic reversal. The court of appeals did not base its rule of automatic reversal on any deficiency in notice provided by the indictment. While the court mentioned in passing that respondent had a right "to be apprised of what overt act the government will try to prove at trial," Pet. App. 6a, it ultimately justified its rule of automatic reversal by explaining that "[t]he purpose of this rule is to secure the basic institutional purpose of the grand jury," *ibid.* To the extent that a function of the grand jury requirement is to give notice, that function plainly is not one that only the grand jury can perform, and the extraordinary remedy of automatic reversal is therefore not war-

ranted for any failure to provide sufficient notice in the indictment.

1. The Constitution requires that, in a federal or state prosecution, a defendant be given notice of the nature of the charge against him. Notice is expressly guaranteed in the Sixth Amendment, which provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to * * * be informed of the nature and cause of the accusation." But it is also rooted in fundamental principles of due process, see, *e.g.*, *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948) (noting that "[n]o principle of procedural due process is more clearly established than that notice of the specific charge * * * [is] among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal"), and to some extent, in federal prosecutions, in the Grand Jury Clause itself, see *Hamling*, 418 U.S. at 117.[6] The purpose of that requirement is sufficiently to "apprise the accused of the crime with which he stands charged," so as to enable him to prepare his defense. *United States* v. *Mills*, 32 U.S. (7 Pet.) 138, 142 (1833); see *Hamling*, 418 U.S. at 117; *United States* v. *Cruikshank*, 92 U.S. 542, 557-558 (1876). Consistent with that purpose, lower courts have typically held that a charging document will meet the constitutional notice requirement if it merely sets out the "essential facts" underlying the charged offense; it is not necessary that a charging document allege factual details on every element of the offense in order to provide adequate notice. See 4 Wayne R. LaFave et al., *Criminal Procedure* § 19.3(a),

[6] In federal prosecutions, that requirement is also reflected in Federal Rule of Criminal Procedure 7(c)(1), which provides, *inter alia*, that an indictment must contain "a plain, concise, and definite written statement of the essential facts constituting the offense charged."

at 766 (2d ed. 1999) (LaFave) (noting that "[a]n element of a crime very often can be pleaded without providing any specific factual reference").

2. An indictment's omission of an element of a crime does not necessarily mean that a defendant's right to receive notice has been so impaired that reversal is warranted on that basis. An indictment that identifies the basic time and nature of a crime, and that identifies the statute alleged to be violated, puts the defendant on notice that the government intends to prove each and every element in order to obtain a conviction. A defendant faced with such an indictment ordinarily will be able to frame a defense based on that information. Moreover, where an indictment provides insufficient factual detail to inform the defendant of the nature of the charge, it would be particularly inappropriate to apply a rule of automatic reversal because the defendant has other means of receiving notice of the factual allegations that the government intends to prove at trial. Most significantly, the defendant may file a motion for a bill of particulars, in which the defendant lists a series of questions concerning the charged offense that he wants the government to answer. See, *e.g.*, Fed. R. Crim. P. 7(f). A court is required to issue a bill of particulars where "it is necessary that defendant have the particulars sought in order to prepare the defense and in order that prejudicial surprise will be avoided." 1 Charles Alan Wright, *Federal Practice and Procedure: Criminal* § 129, at 652 (3d ed. 1999) (citing cases). In addition, the defendant may be able to obtain information concerning the factual specifics of the government's case through pretrial discovery. See, *e.g.*, Fed. R. Crim. P. 16(a).

The explicit notice requirement of the Sixth Amendment is violated only if a defendant can show not only

that the indictment was deficient because it provided insufficient factual detail, but also that the defendant suffered actual prejudice from that deficiency. See, *e.g.*, *United States* v. *Wydermyer*, 51 F.3d 319, 325 (2d Cir. 1995). There is no reason for taking a different approach to alleged Grand Jury Clause violations based on impairments of the notice-giving function of a federal indictment.

3. This Court's decision in *Stirone*, *supra*, does not require a different conclusion. In *Stirone*, the Court held that the Fifth Amendment was violated, and automatic reversal warranted, when the government proved an element at trial based on a factual theory that deviated from the factual theory advanced in the indictment. *Id.* at 217. *Stirone* was decided before this Court first recognized that harmless-error analysis was applicable to constitutional errors. See *Chapman*, 386 U.S. at 22. The opinion's analysis thus does not justify an expansive application of automatic reversal principles. Indeed, this Court has not included *Stirone* in its list of cases constituting the class of errors deemed "structural." See *Neder*, 527 U.S. at 8; *Johnson* v. *United States*, 520 U.S. at 468-469.

In any event, *Stirone* is distinguishable on its facts. Whereas in *Stirone* the indictment may have affirmatively misled the defendant to anticipate that an element would be proved by a particular means, and thus produced surprise when the government altered its theory at trial, in this case respondent does not claim that the factual theory on which he was convicted *conflicted* with the factual theory advanced in the indictment (and passed upon by the grand jury); instead, he contends only that the indictment failed sufficiently to *inform* him of the factual theory on which the government intended

to proceed. Given that *Stirone* assumed that a conviction could be valid when an indictment is "drawn in general terms" rather than specifying the particular theory of proving an element, 361 U.S. at 218, that decision cannot support the view that *any* deficiency in notice automatically requires reversal.[7]

4. There is no difficulty with evaluating a claim of deficient notice for its prejudicial effect. Here, for example, there is no indication that respondent suffered any surprise that impeded the preparation of his defense. Although respondent knew that an "overt act" was an element of the offense of attempted unlawful reentry under 8 U.S.C. 1326(a), respondent made no effort before trial to determine the specific "overt act" on which the government intended to rely (*e.g.*, by filing a motion for a bill of particulars). Nor can respondent identify any particular way in which the failure to specify in the indictment the "overt acts" on which the government ultimately relied at trial—*i.e.*, respondent's presentation of false identification at the border and his contradictory statements concerning his intended destination—actually hampered the preparation or presentation of his defense. Indeed, respondent's defense to the "overt act" element ultimately rested solely on the asserted legal insufficiency of the government's evidence. As this case illustrates, in the context of claimed inadequate notice—in which it is easy to assess any prejudice flowing from an error, and in which the error will often be clearly harmless—there is no warrant for applying the rarely employed tool of automatic reversal.

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[7] For the reasons discussed above, see pp. 11-23, *supra*, *Stirone* also does not justify the conclusion that a grand jury's failure to consider a particular mode of proof requires automatic reversal. See 361 U.S. at 218-219.

### E. Historical Evidence Concerning The Role Of The Grand Jury Does Not Suggest That The Omission Of An Offense Element From The Indictment Constitutes Structural Error

There is no basis in the history of the institution of the grand jury for the conclusion that the omission of an offense element from a federal indictment constitutes structural error. That history confirms that the role of the grand jury is to indict whenever there is probable cause to believe that the accused committed the charged crime. While there is some evidence to suggest that grand juries have occasionally refused to return indictments even when probable cause has been established, it does not follow that the failure to instruct the grand jury on one element of the crime should be treated as intrinsically harmful.

1. a. Although the grand jury may have originated in Norman times (if not earlier), see 3 LaFave § 8.2(a), at 11, it is commonly considered to be "an English institution," and "[t]here is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor." *Costello*, 350 U.S. at 362. Starting in the seventeenth century, the English grand jury began to function as a body that protected the innocent from unfounded charges. For example, in 1681, grand juries refused to indict two political enemies of King Charles II, the Earl of Shaftesbury and Stephen Colledge, for treason. See *United States* v. *Navarro-Vargas*, 408 F.3d 1184, 1190-1191 (9th Cir.), cert. denied, 126 S. Ct. 736 (2005). Reflecting that practice, commentators observed that the role of the grand jury was to protect against unsubstantiated charges. Blackstone wrote that the function of the grand jury was to deter-

mine "whether there be sufficient cause to call upon the party to answer [the accusation]," and added that "[a] grand jury * * * ought to be thoroughly persuaded of the truth of an indictment so far as their evidence goes, and not to rest satisfied merely with remote probabilities." 4 William Blackstone, *Commentaries on the Laws of England* *303. Another leading figure described grand juries as "our only Security, in as much as our Lives cannot be drawn into jeoperdy * * * unless such a number of our honest Country Men shall be satisfied in the truth of the Accusations." John Somers, *The Security of English-Mens Lives* 23 (1681).[8]

b. Like their English counterparts, grand juries in the American colonies refused to return indictments when there was insufficient evidence to support the underlying charges. Colonial grand juries, however, occasionally went further and refused to indict even when there was apparently sufficient evidence. Perhaps most notably, three successive New York grand juries refused to indict John Peter Zenger, a newspaper publisher, for libeling the Governor. See James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* 1-35 (Stanley Nider Katz ed., 1963) (Alexander). Not long before the Revolution, moreover, Massachusetts grand juries refused to indict the leaders of the Stamp Act riots, and later refused to indict the editors of the Boston Gazette on similar libel charges. See Richard D. Younger, *The People's Panel: The Grand Jury in the United States, 1634-1941*, at 28 (1963) (Younger).

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[8] See also Henry Care, *English Liberties* 252 (4th ed. 1719) (describing the grand jury's role as "preserv[ing] the Innocent from the Disgrace and Hazards which ill Men may design to bring them to, out of Malice, or through Subornation, or other sinister Ends").

c. As initially drafted, the Constitution contained no provision for the establishment of federal grand juries. During the debates on ratification, however, various delegates to the state conventions expressed concern about the absence of a grand jury requirement. At the Massachusetts convention, one delegate argued that an express grand jury requirement was necessary to prevent "the most innocent person in the commonwealth" from being "dragged from his home [and] his friends" and being subjected to "long, tedious, and perhaps painful imprisonment" before ultimately being acquitted at trial. 5 *The Founders' Constitution* 260 (Philip B. Kurland & Ralph Lerner eds., 1987) (statement of Abraham Holmes). John Hancock subsequently proposed language to codify such a requirement, and that language was adopted, with slight modification and little discussion, as the Grand Jury Clause of the Fifth Amendment. See 1 Beale § 1:4, at 1-18 to 1-19; Jon Van Dyke, *The Grand Jury: Representative or Elite?*, 28 Hastings L.J. 37, 39 (1976).[9]

At least in the immediate aftermath of the adoption of the Constitution, American grand juries continued occasionally to refuse to return indictments even when the evidence was apparently sufficient. Federal grand juries refused to indict individuals who were charged with aiding the French in their war against the British, in violation of the Neutrality Proclamation of 1793, see Younger 49, and grand juries in Kentucky and Mississippi refused to indict former Vice President Aaron Burr for treason (although a grand jury in Virginia subsequently did return an indictment), see *Navarro-Vargas*,

[9] Only three of the original 13 States expressly guaranteed the right to indictment by grand jury in their own constitutions. See 1 Beale § 1:4, at 1-17 & n.7.

408 F.3d at 1193. In the years that followed, however, "dramatic confrontations between prosecutors and jurors in grand jury proceedings * * * bec[a]me rare." *Id.* at 1195.

d. While the evidence suggests that grand jury nullification sometimes occurred even after the adoption of the Constitution, there is no reason to believe that it was ever formally sanctioned. Grand jury charges dating from the earliest days of the Republic—including instructions delivered by members of this Court, sitting on circuit—reflect the understanding that a grand jury has a "duty" to indict upon finding that there is probable cause to believe that the accused has committed the charged offense.[10] Moreover, the model grand jury charge approved by the Judicial Conference of the United States directs grand jurors that "you should vote to indict where the evidence presented to you is sufficiently strong to warrant a reasonable person's belief that the person being investigated is probably guilty,"

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[10] See, *e.g.*, *Charge to Grand Jury*, 30 F. Cas. 992, 993 (C.C.D. Cal. 1872) (No. 18,255) (Field, J., in chambers) (noting the grand juror's "duty to the government, or more properly speaking, to society, to see that parties against whom there is just ground to charge the commission of crime, shall be held to answer the charge"); *Charge to Grand Jury—Neutrality Laws*, 30 F. Cas. 1021, 1023 (No. 18,267) (C.C.D. Ohio 1851) (McLean, J., in chambers) ("If it shall appear from the evidence that shall be given, that any of our citizens have violated the above law, it will be your duty to indict them."); 2 *The Documentary History of the Supreme Court of the United States, 1789-1800*, at 30 (Maeva Marcus ed., 1988) (charge by Jay, C.J., to the grand jury of the Circuit Court for the District of New York in 1790) ("In a word Gentlemen your Province and your Duty extend (as has been before observed) to the Inquiry and Presentment of all offences of every kind committed against the United States in this District or on the high Seas by Persons in it.").

and cautions grand jurors not to "judge the wisdom of the criminal laws enacted by Congress" or to "consider punishment in the event of conviction." Judicial Conference of the United States, *Model Grand Jury Charge* ¶¶ 9, 10, 25 (2005) <http://www.uscourts.gov/jury/charge.html>.

The oaths administered to grand jurors have similarly required decisions based on the evidence, rather than on personal predilection. As this Court has noted, "in this country as in England of old the grand jury has * * * pledged to indict no one because of prejudice and to free no one because of special favor." *Costello*, 350 U.S. at 362. The traditional version of the oath directs that "you shall present no one for envy, hatred, or malice; neither shall you leave any one unpresented for fear, favor or affection, hope of reward or gain, but shall present all things truly as they come to your knowledge, according to the best of your understanding." George J. Edwards, *The Grand Jury* 96-97 (1906) (citation omitted). The model oath in the federal benchbook contains materially identical language. See Federal Judicial Center, *Benchbook for U.S. District Court Judges* 204 (4th ed. 2000).

Accordingly, this Court has repeatedly stated that the role of the grand jury is to protect the "innocent" against unfounded accusations—not to protect individuals who are probably guilty. See, *e.g.*, *Williams*, 504 U.S. at 51 (stating that "the grand jury sits * * * to assess whether there is adequate basis for bringing a criminal charge"); *United States* v. *Dionisio*, 410 U.S. 1, 16-17 (1973) (contending that "[the grand jury's] mission is to clear the innocent, no less than to bring to trial those who may be guilty"); *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962) (noting that, "[h]istorically, [the grand

jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution").[11] That characterization of the role of the grand jury is entirely accurate. A grand jury has the *duty* to return an indictment upon finding that there is probable cause to believe that the accused has committed the charged offense—even if it is true, as a practical matter, that the grand jury has the raw *power* not to indict if it so chooses.

2. Even assuming that grand juries legitimately may engage in nullification by refusing to return indictments even when probable cause has been established, it does

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[11] To the extent that the Court suggested in *Vasquez* that it would be legitimate for a grand jury not to indict even when there was sufficient evidence to do so, see 474 U.S. at 263 (stating that "[t]he grand jury is not bound to indict in every case where a conviction can be obtained"), that suggestion is erroneous. The Court quoted from, and relied exclusively on, Judge Friendly's dissenting opinion in *United States* v. *Ciambrone*, 601 F.2d 616 (2d Cir. 1979). The only relevant historical source cited by Judge Friendly was a state-court grand jury charge advising that "[t]he grand jury may even refuse to indict although its attention is called to a clear violation of law." *Charge of John Raymond Fletcher, Associate Judge, Seventh Judicial Court of Maryland, to the Grand Jury for Calvert County on May 7, 1955*, 18 F.R.D. 211, 214 (Md. Cir. Ct. 1955). As discussed in the text, however, that instruction was contrary to prevailing practice. Judge Friendly also cited three judicial opinions: *United States* v. *Cox*, 342 F.2d 167, 189-190 (5th Cir.) (Wisdom, J., concurring specially), cert. denied, 381 U.S. 935 (1965); *In re Kittle*, 180 F. 946, 947 (S.D.N.Y. 1910); and *United States* v. *Asdrubal-Herrera*, 470 F. Supp. 939 (N.D. Ill. 1979). None of those opinions, however, cites any other historical source showing that the grand jury had unfettered discretion not to indict when probable cause was found. The closest is the discussion in *Asdrubal-Herrera* of the grand jury's refusal to indict Lord Shaftesbury in 1681. *Id.* at 942. That example at most suggests that a grand jury has an unreviewable *power* not to indict when probable cause exists—not that the grand jury has an unfettered *right* not to indict.

not follow that the failure to instruct the grand jury on one element of the crime should be treated as intrinsically harmful. Such an error does not materially affect the grand jury's ability to engage in nullification. The grand jury may still conclude, even in the absence of a particular offense element, that the underlying charge was being pursued for political (or other illegitimate) reasons or that the conduct at issue should not be treated as criminal. Indeed, the omission of an offense element may actually *increase* the likelihood of nullification by jurors who believe that the remaining elements should not constitute a criminal offense. More broadly, a rule that treated the omission of an offense element from a federal indictment as structural error based on the possibility of grand jury nullification would effectively give legal approval to such nullification, in contravention of the principle that nullification is a practice to be tolerated rather than encouraged. Cf. *United States* v. *Thomas*, 116 F.3d 606, 615 (2d Cir. 1997) (noting that "the power of juries to 'nullify' or exercise the power of lenity is just that—a power; it is by no means a right or something that a judge should encourage or permit if it is within his authority to prevent").

If the power of a grand jury to engage in nullification meant that the omission of an offense element from a federal indictment automatically requires reversal, moreover, a similar conclusion would presumably be required concerning the omission of an offense element from the petit jury's instructions. As with grand juries, there is some evidence to suggest that petit juries have occasionally refused to convict defendants even when their guilt has seemingly been established at trial: indeed, after John Paul Zenger was charged by information, he was famously acquitted, see Alexander 22, as

were almost all of the defendants who were successfully indicted for violating the Neutrality Proclamation of 1793, see Younger 49. As this Court's decision in *Neder* demonstrates, however, the power of a petit jury to engage in nullification does not preclude harmless-error analysis. Cf. *United States* v. *Kerley*, 838 F.2d 932, 938 (7th Cir. 1988) (noting that "jury nullification is just a power, not also a right, as is shown among other things by the fact * * * that a trial error which favors the prosecution is harmless if no *reasonable* jury would have acquitted, though an actual jury might have done so.") (citation omitted). Likewise, the power of a grand jury to engage in nullification, in the face of evidence establishing probable cause, does not preclude a court from reviewing the omission of an element from the indictment for harmless error—and concluding that any error was harmless because a rational grand jury would have determined that there was probable cause with regard to that element.

### F. The Omission Of The "Overt Act" Element From Respondent's Indictment Was Harmless

Under a proper application of harmless-error analysis, the error at issue in this case was harmless.

#### *1. The test for harmlessness should focus on whether a properly instructed grand jury would have found probable cause*

In assessing whether an error is harmless, the fundamental question is whether the error caused prejudice to the defendant. See, *e.g.*, *United States* v. *Olano*, 507 U.S. 725, 734 (1993) (noting that, in order to "affect[] substantial rights" for purposes of Rule 52, "in most cases * * * the error must have been prejudicial": *i.e.*, by "affect[ing] the outcome of the district court proceed-

ings"). In cases involving trial errors, this Court has frequently stated that the test for harmless-error analysis is whether it is clear beyond a reasonable doubt that, but for the error, the petit jury would have returned the same verdict. See, *e.g.*, *Neder*, 527 U.S. at 17 (stating that, "where a reviewing court concludes beyond a reasonable doubt that * * * the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless"); *Chapman*, 386 U.S. at 24 (requiring "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"). It necessarily follows that, in a case involving a grand jury error, the test for harmless-error analysis is whether it is clear beyond a reasonable doubt that, but for the error, the grand jury would still have returned an indictment. In engaging in that analysis, a reviewing court is not limited to the record of proceedings before the grand jury. Rather, consistent with this Court's directive in harmless-error cases to examine the entire record of proceedings before the court below, see, *e.g.*, *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986); *United States* v. *Lane*, 474 U.S. 438, 448 n.11 (1986); *United States* v. *Hasting*, 461 U.S. 499, 509 n.7 (1983), a reviewing court should consider the trial record as well.

Where the error at issue involves the grand jury's failure to find that there is probable cause to believe that an offense element has been satisfied, that error is harmless where the petit jury subsequently is properly instructed and finds that the element in question has been proved beyond a reasonable doubt. In *Mechanik*, the Court relied on the petit jury's verdict in holding that the simultaneous appearance of two witnesses before the grand jury, in violation of Rule 6(d), was harm-

less. At the outset, the Court acknowledged that the error at issue "had the theoretical potential to affect the grand jury's determination whether to indict these particular defendants for the offenses with which they were charged." 475 U.S. at 70. Nevertheless, the Court reasoned, "the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt." *Ibid.* The Court therefore concluded that, "[m]easured by the petit jury's verdict, * * * any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt." *Ibid.*

Notably, the Court considered, and rejected, the argument that "the indictment should not be compared to the evidence produced by the Government at *trial*, but to the evidence produced before the *grand jury*." *Mechanik*, 475 U.S. at 71. The Court explained that, "even if this argument were accepted, there is no simple way after the verdict to restore the defendant to the position in which he would have been had the indictment been dismissed before trial." *Ibid.* The Court noted that the defendant "will already have suffered whatever inconvenience, expense, and opprobrium that a proper indictment may have spared him." *Ibid.* "In courtroom proceedings as elsewhere," the Court added, "'the moving finger writes; and, having writ, moves on.'" *Ibid.* The Court concluded that "reversal of a conviction after a trial free from reversible error cannot restore to the defendant whatever benefit might have accrued to him from a trial on an indictment returned in conformity with Rule 6(d)." *Ibid.*

The Court's analysis in *Mechanik* applies with equal force to the omission of an offense element from the indictment, and the guilty verdict of a properly instructed petit jury thus renders such an omission harmless. It is theoretically possible (if unlikely) that, although the petit jury found that the element at issue had been proved beyond a reasonable doubt, the grand jury would not have found that there was probable cause to believe that the element had been satisfied—either because the government did not have sufficient evidence as to that element at the time of the indictment, or because the government simply failed to present its evidence with regard to that element to the grand jury. It does not follow, however, that reversal would be appropriate in those circumstances. To the contrary, reversal would serve no valid purpose, because the government would presumably be able to reindict the defendant (in light of the fact that, by the time of trial, the government had sufficient evidence as to the omitted element to convince the petit jury that the element had been established beyond a reasonable doubt), and because the government would presumably be able to obtain a conviction in any subsequent retrial (in light of the fact that the defendant has already been convicted in an entirely error-free trial). Where a correctly instructed petit jury returns a guilty verdict, therefore, the omission of an offense element from the indictment is harmless.

***2. The evidence in this case establishes that a rational grand jury would have found probable cause***

Although this Court's "usual practice" is to remand for application of the harmless-error standard, *Yates* v. *Evatt*, 500 U.S. 391, 407 (1991), it would be appropriate for the Court to apply that standard itself in this case,

because it is clear that the petit jury found that the omitted element had been proved beyond a reasonable doubt. Cf. *Neder*, 527 U.S. at 16 (determining that the error at issue was harmless because the evidence on the omitted element was "so overwhelming"). Although the district court denied respondent's pre-trial motion to dismiss the indictment on the ground that it did not explicitly allege that respondent had committed an "overt act," see J.A. 8, the district court instructed the petit jury that the government was required to prove beyond a reasonable doubt, *inter alia*, that respondent had "attempted to enter the United States * * * by intentionally committing an overt act that was a substantial step towards reentering the United States," J.A. 49. Because the petit jury was correctly instructed concerning the offense element at issue (and subsequently returned a guilty verdict), the omission of that element from the indictment is necessarily harmless. The court of appeals therefore erred by reversing respondent's conviction based on that omission.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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