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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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 And I want to amend --

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

18 MR. DREEBEN: In this case?

19 JUSTICE GINSBURG: Yes.

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

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

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

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

16 MR. DREEBEN: Justice Alito --

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

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

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

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

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

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

25 JUSTICE KENNEDY: What would that be here?

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

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

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

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

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

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

9 MR. DREEBEN: They did, Justice Breyer.

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

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

22 MR. DREEBEN: No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 made.

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

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

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

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

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

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

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

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

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

1 the motion to quash.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 MR. DREEBEN: And we submit --

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

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

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

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

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

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

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

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

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

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

1 on a rule of automatic reversal.

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

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

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

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

13 MR. DREEBEN: Thank you.

14 CHIEF JUSTICE ROBERTS: Mr. Baggot.

15 ORAL ARGUMENT OF MR. ATMORE L. BAGGOT

16 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

10 MR. BAGGOT: Oh, can you win.

11 JUSTICE BREYER: Yeah.

12 MR. BAGGOT: You can always raise it.

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

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

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

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

25 JUSTICE BREYER: Yeah, we know.

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

3 JUSTICE BREYER: Yes. Zero.

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

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

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

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

13 MR. BAGGOT: The answer is no.

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

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

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

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

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

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

4 MR. BAGGOT: Sir?

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

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

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

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

3 MR. BAGGOT: Well, I believe --

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

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

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

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

25 MR. BAGGOT: The result --

1 JUSTICE SCALIA: Then the trial occurs --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Official

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

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

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

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

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

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

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

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

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

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

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

12 MR. BAGGOT: Sure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 following overt acts.

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

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

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

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

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

1 accusation, what is the Government talking about?

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

7 MR. BAGGOT: The essential facts.

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

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

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

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

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

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

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

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

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

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

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

25 MR. BAGGOT: Between a variance --

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

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

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

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

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

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

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

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

1 this cannot be treated as a simple variance.

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

9 MR. BAGGOT: Right.

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

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

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

24 MR. BAGGOT: Correct.

25 JUSTICE SOUTER: And if that is the nub of

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

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

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

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

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

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

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

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

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

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

16 MR. BAGGOT: Well, if it --

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

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

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

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

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

13 MR. BAGGOT: No, and --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 MR. BAGGOT: Normally, yes, sir.

18 JUSTICE BREYER: Normally, yes.

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

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

1 means.

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

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

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

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

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

22 MR. BAGGOT: No, sir.

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

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

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

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

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

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

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

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

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

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

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

12 Are there any other questions by the Court?

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

15 MR. BAGGOT: Thank you, sir.

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

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

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

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

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

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

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

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

15 (Laughter.)

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

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

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

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

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

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

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

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

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

13 (Laughter.)

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

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

22 MR. DREEBEN: Thank you.

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

25

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