No. 05-998

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v.

JUAN RESENDIZ-PONCE,

Respondent.

On Writ of Certiorari
To the United States Court Of Appeals
For the Ninth Circuit

BRIEF OF RESPONDENT

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SUMMARY OF RESPONDENT'S ARGUMENT

1. The Fifth Amendment provides the only means of charging a person with commission of a crime against the government. When a grand jury indictment is "constitutionally deficient", as admitted in this matter, it is not in compliance with the Fifth Amendment. Unlike most other constitutional errors, the Fifth Amendment provides an explicit remedy, namely, that a person "shall not be held to answer". The Federal Rules Of Criminal Procedure cannot negate or otherwise override a constitutional imperative. Whatever force Rule 52(a) may have against the Fifth Amendment remedy, it is counterbalanced by Rule 34(a)(1) which requires an arrest of judgment if "the indictment ... does not charge an offense". As described recently in *United States* v. *Gonzales-Lopez*, 548 U.S. __ 126 S.Ct. 2557, 2564 n.4 (2006), an error is denominated structural if "the harmless error inquiry is irrelevant to remedying the constitutional error". Here, the Fifth Amendment applies to the guilty as well as the innocent. Neither may be held to answer if the indictment is constitutionally deficient.

This Court has recognized that the Fifth Amendment contains a "right not to be tried" independent of any prejudice or unfairness in the merits trial, in its decision in *Midland*

Asphalt v. *United States*, 489 U.S. 794 (1989). Where an indictment contains a "fatal flaw" or "fatal defect", it ceases to be an indictment and falls under the categorization of "a defect so fundamental that it causes ... the indictment no longer to be an indictment" and gives rise to "the constitutional right not to be tried". (Id.802). (Emphasis supplied). To define a crime, it is necessary that the indictment include "every fact that is by law a basis for imposing or increasing punishment". *Apprendi* v. *New Jersey*, 530 U.S. 466, 501 (2000)(Thomas, J. concurring). An indictment invalid on its face due to omission of an element is no accusation at all. It may not be the basis for imposing punishment.

Since the earliest days of the Republic, a solid line of precedent has established that automatic reversal of a verdict is the required remedy when a reviewing court determines that the indictment does not charge any offense. The government cannot point to any precedent for its novel view that a single judge, or a reviewing panel, can hypothesize what a grand jury might have done had they been present and listened to the evidence presented to the petit jury. The Solicitor's view that the charge can be adapted to whatever evidence might have been presented at the merits trial, is contrary to common fairness as well as more than a century of precedent.

2. Alternatively, under recent decisions, applicability of the procedural rule (Rule 52(a)), turns on whether preserved constitutional error affects the "structure" of the entire case or whether it may be characterized as a component part, which is "trial error". A second dimension in the analysis is whether the severity of the error can be evaluated against the backdrop of the entire case and excised, which is "reviewability". Respondent

contends that where there is not any offense charged, there is no "structure" at all. And, no court can review the significance of the failure to identify an element where the element has never been identified. At best, the government argument is simply that "surely the grand jurors would have selected some discrete act if the matter had been properly presented to them".

The difficulty with the government position is that there is no way to ascertain which of many acts a reasonable grand jury would have selected as the overt act. Nor is there any way to discern how respondent would have reacted as to whether the selected act was in furtherance of his plan to illegally reenter the United States after having been deported. In short, the omission in this case is more like *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) where the jury instruction on reasonable doubt required an unwarranted guess as to what the petit jury would have concluded if it had been properly instructed. The error was ruled to be "structural" and unreviewable. In contrast, omission of a single element from a jury instruction can be evaluated in the context of whether the trial turned on that particular element and/or whether a second trial would simply be an instant replay of the first trial. *Neder* v. *United States*, 527 U.S. 1 (1999).

3. Finally, the overt act identified by the government outside of the indictment was prejudicial because as a matter of law it could not be an overt act. In her closing argument, the prosecutor belatedly identified reentry into the United States as the long hidden overt act. The unchallenged decision of the Court Of Appeals was that as a matter of law an overt act "cannot be identified with the ultimate question of guilt or innocence".

United States v. Resendiz-Ponce, 425 F.3d 729 (9th Cir. 2005). Thus, there was "prejudice".

LEGAL ARGUMENT

I. PROCEDURAL RULE 52(a) CANNOT VALIDATE A CONSTITUTIONALLY DEFICIENT INDICTMENT OVER THE FIFTH AMENDMENT PERSONAL GUARANTEE THAT "NO PERSON SHALL BE HELD TO ANSWER"

The Constitution authorizes only a single means of initiating a federal criminal prosecution. *United States* v. *Calandra*, 414 U.S. 338 (1974). The Fifth Amendment states:

> No person shall be held to answer for a ... infamous crime, unless on a presentment or indictment of a Grand Jury, ...; nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb.

Under the circumstances of this case, the Solicitor has conceded that the "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". (U.S, Br. at 10, note 2).

A cardinal rule is to view the clause in question in the context in which it occurs and in its cluster of guarantees. *United States* v. *Balsys*, 524 U.S. 666, 673 (1998). Viewed as a whole, the Fifth Amendment is specifically designed to provide individual guarantees as against the federal government. It is not designed for the convenience of the government. As part of the Bill Of Rights, the Grand Jury Clause was "manifestly intended mainly for the security of personal rights". *Ex Parte Bain*, 121 U.S. 1, 6 (1886).

Its historical development was described in *Duncan* v. *Louisiana*, 391 U.S. 145, 155 (1968): “Objections to the Constitution because of the absence of a bill of rights were met by immediate submission and adoption of the Bill Of Rights”.

Another familiar rule of interpretation is that no word, phrase, or sub-clause is intended to be without meaning. Since the Grand Jury Clause contains its own particular remedy, namely, that he shall “not be held to answer”, that phrase must have been intended to have some meaning.

This Court has ruled that the phrase “no person shall be held to answer” confers a “right-not-to-be-tried” independent of the merits of a matter in two separate instances. In *Midland Asphalt* v. *United States*, 489 U.S. 794, 802 (1989) the Court held that: “a defect so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried”. (Emphasis supplied). In *Midland*, an isolated breach of grand jury secrecy did not give rise to the “right not to be tried”. There, the court contrasted Rule 6 violations with the Fifth Amendment “explicit ... constitutional guarantee that trial will not occur”. The Court observed “a crucial distinction between a right not to be tried and a right whose remedy requires dismissal of charges”. (Id.801). Similarly, in *United States* v. *MacDonald*, 435 U.S. 850 (1978) the Court ruled that denial of the right to Speedy Trial did not cause the indictment “no longer to be an indictment” but said of the issue in the present case:

> Dismissal of the indictment is the proper sanction ... when his indictment is defective.... Obviously, however, this has not led the court to conclude that such defendants can pursue interlocutory appeals.
>
> (435 U.S. at 860, note 7).

The question of what causes an indictment "no longer to be an indictment" has never been squarely addressed other that the *MacDonald* footnote above. A circuit court decision directly in point is *United States v. Bird*, 342 F.2d 1045 (9th Cir. 2003). It squarely concluded that: "the Government's failure to allege an essential element of a charged offense is a fundamental defect in an indictment that gives rise to a right not to be tried" based on *Midland* and *MacDonald*. Subsequently, the *Bird* opinion was withdrawn (357 F.2d 1082) and superseded by a procedural ruling disallowing an interlocutory appeal of the question. (359 F.3d 1185).

Under common law, an indictment lacking a necessary element was "no accusation at all" as reported in 1 J. Bishop, Criminal Procedure § 87, p.55 (2d ed. 1872):

> any accusation which lacks any particular fact which the law makes essential to the punishment is ... *no accusation within the requirements of the common law, and it is no accusation in reason*.
>
> (Emphasis supplied).

A fair summary of the prior decisions of this Court is contained in *United States* v. *Calandra*, 414 U.S. 338, 345 (1974): "an indictment valid on its face is not subject to challenge on the ground that the Grand Jury acted on the basis of inadequate or incompetent evidence". Similarly, in *United States* v. *Costello*, 350 U.S. 359, 364 (1956)

the court concluded that: “An indictment ... if valid on its face, is enough to call for trial of the charge on the merits”.

In this case, however, the indictment is not valid on its face as the Solicitor concedes. In such situations, this Court’s precedents have uniformly dismissed the invalid indictment at the appellate level and have automatically vacated the judgment. Once an appellate court dismisses the indictment, the judgment and sentence cannot stand. Although the basis of many decisions is not explicitly stated, respondent submits that when an indictment has been ruled on appeal to be constitutionally deficient, the indictment at that point ceases to be an indictment and the Court has retroactively employed the remedy “No person shall be held to answer”.

This Court’s precedents have been uniformly in support of the remedy of automatic reversal and have supported respondent’s position for more than a century. In early days, the procedure was labeled “arrest of judgment”. Although not frequently employed in modern times, the procedural rule is still preserved in Rule 34(a)(1), F.R.Crim.P. It mandates that “the court must arrest judgment if ... the indictment ... does not charge an offense”. Early cases include *United States* v. *Cook*, 17 Wall. 174, 175 (1872)(if each and every element is not set out “the indictment will be bad” and judgment may be arrested even after verdict); *United States* v. *Cruikshank*, 92 U.S. 542, 559 (1875)(if element missing indictment is “so defective that no judgment of conviction should be pronounced and any judgment should be arrested”); and, *United States* v. *Carll*, 105 U.S. 611, 613

(1881)(element-omission is matter of substance, not form, and indictment is insufficient even after verdict).

In *Ex Parte Bain*, 121 U.S. 1 (1886), overruled in part on other grounds by *Mechanic*, supra, the Court granted a writ of habeas corpus because a trial judge had deleted certain wording from the indictment. Apart from expansive concepts of jurisdiction, the applied remedy was automatic reversal of the verdict. To do otherwise "would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney" thus forcing the citizen to undergo "the trouble, expense, and anxiety of a public trial before a probable cause is established". (121 U.S. at 12).

In *Batchelor* v. *United States*, 156 U.S. 426 (1895), a district judge had denied a timely pretrial motion to dismiss an indictment for failure to include an element. That indictment contained a general allegation but did not "fully and clearly set forth every element necessary to constitute the offence". (Id.429). This Court concluded that the omission did not "enable him to defend himself against it, or plead an acquittal or conviction in bar of a future prosecution for the same cause". (Id.429). The remedy was dismissal of the indictment and vacation of the verdict apart from any consideration of the strength of the government's case.

In *Stirone* v. *United States*, 361 U.S. 212 (1960), the indictment charged interstate movement of sand but the proof also showed interstate movement of steel. The Court ruled squarely:

> While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed defendant's substantial right to be charged tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. Citation. The very purpose of the requirement that a man be indicted by a 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.
>
> (361 U.S. at 274). (Emphasis supplied).

The next decision was *United States* v. *Russell*, 369 U.S. 749 (1962). The indictment provided the generic description of the element but did not provide "essential facts" as to how the generally stated element had been violated. In dismissing the indictment after jury verdict, this Court said that the vice was: "A cryptic form of indictment ... requires the defendant to go to trial with the chief issue undefined ... the indictment left the prosecution free to roam at large – to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal". (369 U.S. at 766,768). The *Russell* decision is particularly apropos in this matter because the government's identification of the required overt act has constantly shifted as more fully explained in Arguments II and III.

Also in 1962, in the case of *Silber* v. *United States*, 370 U.S. 717 (1962) there was a "timely motion to dismiss the indictment, made in accord with F.R.Crim.Pro. 12(b)(2)" which was erroneously denied by the District Court. Although neither presented on appeal nor briefed nor argued, this Court sua sponte recognized the error as plain under Rule 52(b) without discussion. The test applied was whether the obvious error "affects(s)

the fairness, integrity, or public reputation of judicial proceedings". It was not based on whether the outcome of the jury trial would have been the same. (370 U.S. at 317).

Adoption of the Solicitor's argument would necessarily require overruling this long line of precedent which goes back more than a century. In contrast, the government can produce no authority to support its novel, and self-serving, test based upon a judge's view of what a hypothetically "properly instructed grand jury" would have done had they listened to all evidence at the merits trial. (U.S. Br at 35-36).

In each of the foregoing precedents, this Court's chosen remedy was to do what the district judge should have ordered in the first instance, namely, to dismiss the indictment. In each of the foregoing decisions, the accused had insisted upon his constitutional rights in a proper way at the proper time. The government at that point had ample opportunity to return to the grand jury to cure the error or, possibly, to remedy the error by providing notice by other means, or, possibly, by obtaining a waiver from the defendant. But, it did not. By necessary implication, the Court's conclusion was that the accused should not "be held to answer" based on an "indictment that was not an indictment" using the terminology from *Midland*, supra, and *MacDonald*, supra.

There is even more precedent. In 1932, the Court decided *United States* v. *Hagner*, 285 U.S. 427, 433 (1932) which ruled that a post-verdict challenge to the sufficiency of the indictment by way of motion in arrest of judgment came too late. But, the Court opined "without deciding that the indictment would have been open to some form of challenge at an earlier stage of the case".

In *Illinois* v. *Somerville*, 410 U.S. 458, 475 (1973) there was a mid-trial realization that the indictment did not contain an essential element. The trial judge aborted the trial. This Court ruled that mistrial is necessitated when "an error on the part of the State in the framing of the indictment is committed. Only when the indictment is defective - ... when the State has failed to properly execute its responsibilities to frame a proper indictment – does the State's procedural framework necessitate mistrial".

Prosecutors have argued that indictments were void in *Benton* v. *Maryland*, 395 U.S. 784 (1969) and in *Ball* v. *United States*, 163 U.S. 662 (1896). In these cases, a jury trial resulted in acquittal. In an attempt to avoid a Double Jeopardy argument, the prosecutor argued post-trial that the indictment had been defective due to a missing element so as to deprive the district court of jurisdiction. In a situation of role reversal, the accused was in opposition. The Court did not rule the missing-element indictment to be void but voidable at the option of the accused. The constitutional rule established in *Benton* and *Ball* should govern:

> ...the indictment would seem only voidable at the defendant's option, not absolutely void... the indictment was fatally defective ... (but) its judgment is not void, but only voidable.
> (*Benton*, 395 U.S. at 797).

In addition to the Ninth Circuit, other circuits have likewise routinely ruled that the proper remedy for a fatal indictment was dismissal of that indictment even after guilty verdict by a petit jury. Examples include: *United States v. King*, 587 F.2d 956 (9th Cir. 1978); *United States v. Huff*, 512 F.2d 66 (5th Cir. 1975); *Nelson v. United States*, 406

F.2d 1136 (10th Cir. 1969). Neither party has been able to locate any authority to support the government argument that the strength of the government case at jury trial can validate an invalid indictment which was ruled to be "fatally defective" on appeal, or otherwise, after timely and proper pretrial application for dismissal.

A decision heavily relied upon by the Solicitor is *United States* v. *Mechanik*, 475 U.S. 66 (1986). However, the Court did not rule that defendant Mechanik had proceeded to trial based on a constitutionally deficient indictment. The Court's reasoning, in part, was that despite the diligence of the defense, the attack on the validity of the indictment was not timely. The Court commented that had "the matter been called to its attention before the commencement of the trial" dismissal would have been justified. (Id.69). Contrary to the present case, this Court noted that the first indictment "was concededly free from any claim of error". A subsequent indictment "was materially unchanged from the valid initial indictment". (Id.66,69). Had defendant Mechanik obtained a ruling that his indictments were fatally flawed, and therefore that the indictment had ceased to be an indictment, then the Court's decision as to the appropriate remedy in that case would also serve as precedent in this case.

Mechanik is also unavailing because that decision concerns the same question of fact before the petit jury as presented before the grand jury, namely, the issue of factual guilt. The only distinction between successive considerations of the same factual issue was the standard of proof – "probable cause" versus "reasonable doubt". The determination of whether an indictment is fatally defective is made by a district judge who reviews nothing

more than the four corners of the indictment in the light of relevant legal opinions. That determination is a matter of law and not a matter of fact. So, the nature of the issue here is completely different from *Mechanik.* See, for instance, *United States* v. *Sampson*, 371 U.S. 75, 78-79 (1962)(at the pretrial stage the indictment must be tested by its legal sufficiency to charge an offense without consideration of the evidence). Also, in *United States* v. *Cook*, 17 Wall. 174 (1872) this Court ruled that the question whether every ingredient is accurately alleged is a question of law to be decided by the court, not the prosecutor. Rule 12 likewise lists determination of the validity of an indictment as an issue "the court can determine without a trial of the general issue".

Categorization of questions regarding the sufficiency of the indictment as matters of law is established in the Federal Rules Of Criminal Procedure. F.R.Crim.Pro. 12(b)(3)(B) specifically authorizes a pretrial motion to the court "alleging a defect in the indictment ... that the indictment ... fails to ... state an offense". If not raised by the deadline for pretrial motions, an allegation that an indictment is defective is waived under Rule 12(e). But, an exception is a claim that an indictment "fails to invoke the court's jurisdiction or to state an offense". It can be made "at any time while the case is pending". Here, the Solicitor concedes compliance with Rule 12.

Rule 34 (a) similarly places the decision regarding the sufficiency of the indictment in the hands of the district judge who must determine "if the indictment does not charge an offense". *Mechanic* concerned only factual guilt – not a question of law.

In *Neder* v. *United States*, 527 U.S. 1 (1999), as well as its predecessor *Johnson* v. *United States*, 520 U.S. 461 (1997), the subject matter concerned jury instructions. There was no issue concerning the indictment. The indictment was unchallenged. At no point did the charging document cease to be an indictment. Unlike the present case, neither the Bill Of Rights, nor any other provision in the Constitution, addresses the subject of jury instructions. The Constitution provides no explicit remedy for incorrect jury instructions. In contrast, the Grand Jury Clause provides the exclusive means of initiating a federal prosecution coupled with appropriate remedy that "he shall not be held to answer" if the indictment is constitutionally deficient. The Grand Jury Clause is interlinked with the "Notice and Cause" Clause in the Sixth Amendment. And, also with the Double Jeopardy Clause in that it provides a means for distinguishing successive prosecutions. *United States* v. *Debrow*, 346 U.S. 374 (1953). In view of its three constitutional functions, the Founders established the grand jury as the sole means of initiating a prosecution by the government. Fed.Rule Crim.Pro. 7(c)(1) embodies the constitutional requirement that the charge provide "essential facts". Rule 30 governs jury instructions and just states in a general way "that the court instruct the jury on the law". Hence, the constitutional status of a grand jury indictment, including the remedy provided, is far more significant than mundane jury instructions. The question whether a defective indictment is a "structural" error is addressed in Argument II.

Similarly, in *United States* v. *Cotton*, 535 U.S. 625 (2002) the merits trial was based on a "valid on its face" indictment. The accused "did not object in the district court" but

instead “argued in the Court Of Appeals”. (Id.627, 628). The Court noted that the result might have been different had “proper objection been made in the district court”. (Id.631). But, the claim was forfeited and so was reviewed under the plain error provisions of Rule 52(b). The Court ruled: “ a constitutional right may be forfeited ... by the failure to make timely assertion of the right”. (Id.631).

Cotton is also distinguished in that it concerned the sentencing element of drug quantity. Absent that element, the indictment nonetheless stated an offense and did not give rise to the right not to be tried.

The *Cotton* court distinguished *Stirone* and *Russell by*, noting that “in each of these cases proper objection had been made in the district court to the sufficiency of the indictment ... (which is) a settled proposition of law“. (Id.631). That ruling in *Cotton* is compatible with this Court’s precedents that a defective indictment is “not void, but only voidable”. *Benton*, *Ball*, supra. Defendant Cotton’s objection involved the quantity of illegal drugs being transacted which is a matter of fact. Defendant Cotton, moreover, had no constitutional right to be indicted on any particular quantity of drugs. Respondent here does have a constitutional right not to be held to answer based on an indictment that is no longer an indictment. Amdt. V.

The discussion in *Cotton* regarding subject matter jurisdiction (“the court’s statutory or constitutional *power* to adjudicate the case”) in no way implies that if a person asserts his constitutional rights in a proper way at the proper time that those rights should be denied to him.

The rule of constitutional law to be assembled from the foregoing precedents is that a defective indictment is voidable nunc pro tunc at the timely option of the accused but is not void, as articulated in *Benton* and *Ball*. In each precedent, post-verdict dismissal of the indictment had the effect of vacating the jury verdict of guilt. When a court at any level rules that an indictment should be dismissed, or that it should have been dismissed previously, at that point the indictment "is no longer an indictment" within the meaning of *Midland Asphalt*, supra. When an indictment is no longer an indictment, the constitution requires that the accused should not be "held to answer".

In a sense, the damage is not remediable since a court cannot turn back the clock. But, neither does imposition of a sentence in a federal prison sentence accomplish that objective. The only possible remedy on review after verdict is to do what the district judge should have done in pretrial proceedings. Namely, dismiss the indictment which requires that the judgment be vacated. The alternative would be to uphold the judgment, and corresponding prison sentence, based on an indictment that no longer is an indictment.

Respondent now briefly addresses the underlying question of under what circumstances a defect is "so fundamental that it causes ... the indictment no longer to be an indictment". (*Midland Asphalt*, supra, at 802). Admittedly, not every defect causes an indictment to be constitutionally deficient. In *United States* v. *Debrow*, 346 U.S. 374 (1953) the Court ruled:

> The true test of the sufficiency of an indictment is ... whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, ... whether the record shows with accuracy to what extent he may plead a former conviction or acquittal.
>
> (346 U.S. at 376).

This Court has never wavered from the requirement that "elements must be charged in the indictment". *Jones* v. *United States*, 526 U.S. 227, 232 (1999); *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). This Court has stated in *United States* v. *Hamling*, 418 U.S. 87, 117 (1974) that: "the language of the statute must be accompanied by such statement of facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged". The same in *United States* v. *Russell*, 369 U.S. 749 (1962) and *United States* v. *Miller*, 471 U.S. 130, 136 (1985): the Fifth Amendment is satisfied "as long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment". As far back as *Cochran* v. *United States*, 157 U.S. 286, 290 (1906) this Court declared: "the true test is ... whether it contains every element of the offense to be charged". These parameters are so well established as to be incorporated in 1948 in F.R.Crim.P. 7(c)(1) requiring the indictment to contain: "a plain, concise and definite written statement of the essential facts constituting the offense charged".

This Court has determined that certain values and remedies have per se importance independent of any possible "prejudice" to the accused. Recently, in *United States* v. *Gonzales-Lopez*, 548 U.S. __ , 126 S.Ct. 2557, 2562 (2006), the Court ruled that the

constitutional right to counsel of choice is an important value which is not part of "the vehicle for determination of guilt or innocence". The Court ruled: "the right at stake here is the right to counsel of choice, not the right to a fair trial". The right at stake in the present case is the Fifth Amendment right not to be tried on a fatally defective indictment regardless of the strength of the government's case.

Another recent example is *United States* v. *Zedner*, 548 U.S. __ , 126 S.Ct. 1976 (2006) where the Court held that harmless error analysis was inappropriate due to the "absolute language" and the "categorical terms" of the Speedy Trial Act. After observing that the harmless error doctrine presumptively applies to "*all* errors where a proper objection is made", citing *Neder* v. *United States*, supra, the Court ruled that harmless error review "would undermine the detailed requirements of the provision" of the Act and would be inconsistent with the strategy of Congress. Here, as in *Zedner*, "such an approach would almost always lead to a finding of harmless error because the simple failure to make a record of the sort is unlikely to affect the defendant's rights". (Id.1990). That is so because if acquittal results, the case terminates. If conviction results, the standard at trial is always reasonable doubt while the standard at grand jury is always probable cause. The harmless error doctrine must be capable of being "square with the Act's categorical terms" and must not "undermine the detailed requirements of the (regulating) provisions". (126 S.Ct. at 1990). Here, the subject matter is not an Act of Congress but is the Constitution itself.

Since the Fifth Amendment itself provides the particular remedy that "no person shall be held to answer", a "fatally flawed" indictment is no indictment at all. The only possible remedy is dismissal of the faulty indictment. After the indictment is dismissed, the judgment and sentence cannot stand. Automatic reversal is the only viable option. The foregoing precedents span 124 years and squarely support respondent's interpretation.

THEREFORE, when an indictment is declared to be fatally defective it is no longer an indictment and the Fifth Amendment right-not-to be-tried is activated independent of the merits.

II. THE ERROR IN THE PRESENT CASE CANNOT BE CLASSIFIED AS "TRIAL ERROR" BECAUSE IT IS NOT REVIEWABLE AND IS A MATTER OF LAW THAT DID NOT OCCUR DURING THE TRIAL.

This Court ruled in *Arizona v. Fulminante*, 499 U.S. 279 (1991) that admission in evidence of a coerced confession was "trial error" because it occurred as a single part of a reviewable record. The significance of the error could be compared against other evidence and other events at trial. This Court summarized the types of errors that would fall in that classification:

> The common thread connecting these cases is that each involved "trial error" – error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether the admission was harmless beyond a reasonable doubt. (499 U.S. at 307).

Recently, in *United States v. Gonzales-Lopez*, 548 U.S. __ , 126 S.Ct. 2557 (2006), four dissenting justices added that *Fulminante* "did not suggest that trial errors are the *only* sorts of errors amenable to harmless-error review, or that *all* errors affecting the framework within which the trial proceeds are structural". (Internal quotes omitted). The *Gonzales* majority agreed and indicated that the basis of its conclusion that wrongful denial of counsel of choice is "structural" was "the difficulty of assessing the effect of the error". (126 S.Ct. at 2564, Ftne 4).

The first reason the error in the present case is unreviewable is that the government has never identified what discrete act it has selected as the "overt act". The indictment itself does not present the "essential facts" required by Rule 7(c)(1). The indictment does not even mention the element in its generic form. The Solicitor responds that notice can in certain circumstances be given by means other than the indictment. But, the unchallenged decision of the Court of Appeals is that: "Resendiz was never given notice of what specific overt act would be proved at trial". *United States v. Resendiz-Ponce*, 425 F.3d 729, 733 (9th Cir. 2005). At best, the record shows only a list of possibilities. An action which is never identified in any form cannot be reviewed against the backdrop of the entire case.

Apart from the indictment, the designation of the overt act was both varied and misleading. When challenged in pretrial proceedings, the government's written response claimed: "the overt act of an attempted entry crime is the entry itself". (JA 15). At oral

argument before the trial judge the government modulated: “Miss Logan: ... the actual attempt to enter is the overt act itself in these cases”. (JA 20). At oral argument in the Court of Appeals, the government’s identification of the overt act could be construed in two different ways. Both interpretations were rejected on legal grounds. (425 F.3d at 732). A partial list of possible overt acts might include: the physical crossing of the border, the tendering of the bogus identification card, his claim to legal residence, presentation of his cousin’s immigration documents to border agents, as well as innumerable other acts. The record created at the jury trial contains no indication of what a grand jury might have selected as the “specific act” which might constitute an overt act. No court can evaluate the significance of an act which has never been identified.

A second reason that the error is unreviewable is that the transcript of grand jury proceedings was never presented to the district judge as in *Mechanik*. There, the district judge had ordered Jencks Act disclosure of the transcript and thus had a basis to determine that the effect of the Rule 6 error was “negligible” as compared to the strength of the evidence at trial. The rules allow disclosure of grand jury proceedings at government option “preliminarily to or in connection with a judicial proceeding”. F.R.Crim.P. 6(d)(3)(E)(i). In *United States v. James*, 980 F.2d 1314, 1319 (9th Cir.1992) the government did just that. It supplied a copy of the grand jury proceedings so that the district judge could determine it was “inconceivable that James would have presented a different defense if the indictment had been corrected”. Here, the government has provided no explanation as to why its grand jury proceedings were “irrational” or “not

properly instructed", or how or why a material element was omitted. An evaluation of "harmlessness" must be based on the entire case and not simple on the evidence at the merits trial. *United States* v. *Zedner*, 548 U.S. __ , 126 S.Ct. 1976 (2006); *United States* v. *Vonn*, 535 U.S. 55, 76 (2002)(remanded because harmless error could not be reviewed without transcripts).

The third reason the error cannot be compared to the evidence at trial is that the error is a question of law and not a question of fact. The error in this case occurred when the district judge ruled as a matter of law denying the motion to dismiss "with respect to identifying something as an overt act per se". (JA 26). The trial judge misread the En Banc decision in *United States v. Gracidias-Ulibarry*, 231 F.3d 1188 (9th Cir. 2000). That decision had plainly ruled that Congress intended to incorporate the common law meaning of "attempt" into the attempt prong of 8 U.S.C. § 1326 even though the statute does not so state in explicit terms. Moreover, the case of *United States v. Pernillo-Fuentes*, 252 F.3d 1030 (9th Cir. 2001) had ordered automatic reversal and applied *Gracidias* when it ruled "the indictment failed to allege the specific intent required in an 'attempt' crime" and ordered automatic reversal based on circuit case law. (252 F.3d at 1032). It was a reasonably obvious conclusion that the government would suffer the same fate in this case.

The error of the district judge is the type of error that is not correctable by a petit jury. A petit jury does not determine whether the common law elements of attempt were incorporated in the attempt prong of § 1326. It does not review the question whether the

indictment adequately reflects prior circuit court decisions. Juries do not visit the law library. The question whether this indictment contains the required "essential facts" of the offense is radically different from questions whether a defendant was involved in a drug conspiracy (*Mechanic*), whether $5,000,000 of undeclared income is material to tax evasion (*Neder*), and whether a quantity of drugs is more or less than 50 grams (*Cotton*). Those were all matters of fact. This distinction was observed in *United States v. Fabrizio*, 385 U.S. 263, 270 (1966)("insufficiency of indictment does not concern factual proof to be raised at a trial on the merits"). See also Rule 12(b)(2) which characterizes a defect in an indictment as a matter that can be determined "without a trial of the general issue". And which "must be raised before trial". Rule 12(b)(3).

The Solicitor argues that the appropriate test for harmlessness should be whether a "rational" grand jury would have found probable cause based on the evidence produced at trial on the merits. Since the district judge is most familiar with the evidence at trial, such determination would be made in the first instance by the same district judge who erroneously ordered the trial to proceed based on an indictment that he should have dismissed. Under the Solicitor's proposal, the evidence presented at trial would determine the charge rather than the charge determine the evidence to be presented. Such an inversion of the constitutional plan would simply conform the charge to whatever evidence happened to have been presented. As Justice Stewart said in *United States v. Fabrizio*, 385 U.S. 263, 275 (1966)("we long ago rejected the notion that it lies within the province of a court to change the charging part of an indictment to suit its own notions of

what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes").

This court's precedents have uniformly prohibited the government from attacking its own indictment. As stated in *Ball v. United States*, supra, the Court will not allow the prosecutor "to tell the court that his own indictment was good for nothing" and thus seek to profit from his own error. (163 U.S. at. 1194). As the *Ball* Court phrased it: "Although the indictment was fatally defective, yet, if the court had jurisdiction of the case and of the party, its judgment is not void, but only voidable". Also, *Benton*, supra. In short, the court should not allow the government to attack its own indictment as being the result of an irrational grand jury and then ask the court for a bailout.

Regarding the government argument that the focus should be on a hypothetical "properly instructed" grand jury, respondent points out that both *Sullivan v. Louisiana*, 508 U.S. 275 (1993) as well as *Neder* v. *United States*, supra, involved instructions not given. In *Sullivan* the Court refused to engage in speculation outside of the record as to whether "a jury *would surely have found* petitioner guilty beyond a reasonable doubt" if properly instructed. In *Neder* there was no need to go outside the record and there was no uncertainty or guesswork. Here, the facts established at jury trial provide no indication as to what discrete act a grand jury might have selected had it been properly instructed. And, the facts at trial do not lead to any clear indication as to the alien's response as to whether such act was "in furtherance" of the attempt. The trial judge's refusal to give a requested instruction requiring jury unanimity in determining which act was the overt act means

that individual jurors may well have had different acts in their minds. (T.6/2/03, p.178). The same principal was articulated in *United States v. Gonzales-Lopez,* 548 U.S. __ , 126 S.Ct.2557 (2006) where the actions that would have been taken by wrongfully rejected counsel of choice "would be a speculative inquiry into what might have occurred in an alternate universe". (Id.2565). Parenthetically, one must surely wonder why it would be that the government would instruct its grand jury better the second time around than it did the first time.

The Court should now consider the "societal interest" in holding a person to answer where a grand jury was unable, or perhaps unwilling, to identify a particular element of a crime. The "societal interest" in balancing the rights of the accused against the interests of society was a key factor in *Mechanik,* in *Neder,* and in *Cotton*. If probable cause cannot be established as to an essential element, the most probable result will be acquittal at trial. The converse of *Mechanik* is that if the prosecutor cannot establish guilt under the probable cause standard, the odds are small that guilt could be established under the reasonable doubt standard.

Few citizens would feel secure in their liberty if the government were free to arrest and detain them solely on the possibility that future investigation would uncover incriminating evidence for use at a merits trial many months later. The Grand Jury Clause assures both citizen and aliens alike that there will be no arrest at least until the government investigation has progressed to the point of being able to establish probable cause. As stated in *Ex Parte Bain*, 121 U.S. 1 (1886), the intent of the Founders was to

protect citizens from “the trouble, expense, and anxiety of a public trial before a probable cause is established”. (121 U.S. at 12).

The timing of a defense objection is most important because prior to placing the accused in jeopardy the government has numerous options. After jeopardy attaches the options are more limited. Prior to jeopardy, the government may simply dismiss the indictment pursuant to Fed.R.Crim.Pro. 48 and return to the grand jury to seek a new indictment. *Ex Parte United States*, 287 U.S. 241 (1932). Another option is to supersede the charge without dismissal. Although procedures for a Superseding Indictment are not explicit in the procedural rules, such is a common practice.

If dismissal is granted at the pretrial stage based on a defect in the indictment, the defendant does not necessarily go free. There is no windfall because the court may set conditions of release or may continue to detain a defendant for a specified time until a new indictment is filed. Rule 12(g). The government is also favored with specific relief from the bar imposed by a statute of limitations if a defective indictment is dismissed either prior to or after expiration. 18 U.S.C. § 3288, §3289. Similarly, the government has the benefit of an extended Speed Trial Act clock under 18 U.S.C. § 3161(d) if dismissal occurs as a result of a defense motion.

If the objected-to error is merely of a clerical nature, it may be corrected on motion pursuant to F.R.Crim.P. 36 “at any time” assuming it is “arising from oversight or omission”. In *United States v. Rojas-Contreras*, 474 U.S. 231, 231, Note 2 (1985) the Court footnoted that a minor change in the indictment could have been accomplished by

motion for amendment in the District Court. That error was nothing more than changing the date of the alleged prior deportation from “December 17” to “December 7”. In other words, when an error is called to the prosecutor’s attention in the early pretrial stages, it is easily corrected. The question that must be asked is “why not get it right the first time”?

In 1872 Congress departed from English common law to avoid “rules of technical and formalized pleadings”. (17 Stat. 198, 18 U.S.C. § 556 (1940 Version)). The 1872 statute stated that no indictment should be found to be insufficient “by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant”. The legislation was repealed in 1948 and its substance transferred to the modern version of Rule 52(a). (History found in *Russell* at 761). The absence of a material element is if far from “a matter of form only”.

Finally, designation of an error as “structural” refers to the framework under which the entire trial proceeds. The charge as stated in the indictment pervades the entire trial. It never changes throughout the trial. Any addition to the indictment would be a constructive amendment which itself is “reversible per se”. 24 *James Wm. Moore, Moore’s Federal Practice*, § 607 06(1)(3d ed. 2006). It is the indictment that determines the elements that must be proven at trial beyond a reasonable doubt and which determines what the jury instructions must contain. Here, it is pure speculation to guess which act the grand jury might have selected as the overt act. Different grand juries might select different specific acts.

If the district judge had correctly ruled that this indictment contained a "fatal flaw" (*Resendiz-Ponce* at 732), in all probability the government would have returned to the grand jury to correct the indictment by identifying which of the various possible discrete acts constituted its selection as the necessary overt act for the offense of attempted reentry. Double Jeopardy does not bar the government from returning to a successive grand jury. *United States* v. *Williams*, 504 U.S. 1735 (1992). If the overt act were thusly identified, the respondent alien could then have presented possible defenses that the act was not in furtherance of his desire to reenter or, possibly, that he had abandoned his attempt upon immediate discovery by the primary inspector at the border.

THEREFORE, the effect of the error in this matter cannot be ascertained and so cannot be classified as reviewable "trial error".

III. MISINFORMATION PROVIDED BY THE GOVERNMENT AS TO THE OVERT ACT BEING ALLEGED RESULTED IN AN UNFAIR TRIAL AND "PREJUDICE".

As previously stated, the government has not clearly identified any discrete act that would be the alleged necessary overt act. As the Court Of Appeals ruled: "A grand jury never passed on a specific act, and Resendiz was never given notice of what specific act would be proved at trial". *United States v. Resendiz*, 425 F.3d 729, 733 (9th Cir. 2005). Where an accused is not provided with the "notice and cause" of the accusation, prejudice is inherent. If not inherent, prejudice is most probable.

In the recent case of *Washington* v. *Recuenco*, 548 U.S. __ , 126 S.Ct. 2546 (2006), the information charging Recuenco did not allege a firearm enhancement. Recuenco objected to the lack of notice. Two members of the Court, in dissent, ruled that being convicted of a crime not charged is incompatible with the Fifth and Sixth Amendment. Justice Stevens specifically ruled, in dissent, that: "*Blakely* errors are structural because they deprive criminal defendants of sufficient notice regarding the charges they must defend against". (126 S.Ct. at 2554). But, under *Recuenco*, "elements and sentencing factors must be treated the same for Sixth Amendment purposes". (Id.2552). The majority did not address the charging error issue. (Id.2552, Ftne 3). Even if not structural in all situations, the absence of the notice required in an indictment should be strong indication of "prejudice".

Assuming that notice can be provided by means other than the indictment, there was no "other means" in this case. As previously stated in Argument II, the government's responses to the pretrial dismissal motion were ambiguous. In its opening statement the government summarized what each of its witnesses would state regarding numerous acts by the defendant. But, it did not designate any specific act so as to provide notice. (T.6/1/03, pp87-89). If one of these various acts had been identified, Resendiz would have had the opportunity to testify as to whether or not the chosen act was in furtherance of his plan to illegally renter. He might have testified that he physically crossed the line for the purpose of asking whether he could use his cousin's documents for his own entry. He might have testified that having been immediately detected as a phony, he lied to

agent for the purpose of extricating himself from a bad situation. Resendiz' response to a specific government allegation "would be a speculative inquiry unto what might have occurred in an alternate universe". *United States* v. *Gonzales-Lopez*, 548 U.S. __ , 126 S.Ct. 2557 (2006).

At the close of the government's evidence, respondent moved for Rule 29 acquittal. It was only then, when the trial was over, that the prosecutor (Ms. Logan) revealed: "he crossed the boundary and walked to the port of entry in San Luis, which is property of the United States. That is the overt act which is a substantial step toward entering the United States". (T.6/2/03, p.170). The unchallenged ruling of the Court of Appeals was that as a matter of law the government position "is a non-starter" since "The overt act with which the defendant is charged obviously cannot be identified with the ultimate legal question of guilt or innocence". (425 F.3d at 732). If the reentry had clearly been charged as the overt act in the indictment, the defendant's acquittal motion should have been granted. And, on retrial, he will not be able to reference the first indictment as a Double Jeopardy bar to a second indictment. That is "prejudice".

Another form of prejudice resulted in a verdict that quite possibly was not unanimous. After close of the evidence respondent requested a unanimity instruction. His lawyer argued: "one of them could decide one thing is an overt act, another could decide another thing is an overt act. They'd all vote to convict even though they don't agree on which it is". (T.6/2/03, p.178). Thus, the indictment's failure to focus on a specific act denied respondent the right to a unanimous jury verdict.

Even at this late date, the government still has not provided information as to what discrete act this Court should consider as having been the overt act that resulted in conviction. Granted that respondent did “something”. There is no assurance that the “something” was in furtherance of the intended attempt to illegally reenter. If the overt act was, for instance, “lying to an inspection officer” respondent may have been attempting to extricate himself because he instantly aroused suspicion and was being referred to secondary inspection. If the overt act was “”tendering of the bogus identification card” respondent may have explained that the documents were valid and he wished to inquire if they could be used for his entry. On the other hand, there are “a number of other acts that the government might have alleged as a substantial step toward entry into the United States”. (*Resendiz* at 733).

THEREFORE, respondent suffered actual prejudice as a result of the constitutionally deficient indictment.

CONCLUSION

In conclusion, the Court Of Appeals should be affirmed and this court should rule that:

1. Procedural rule 52(a) cannot validate a constitutionally deficient indictment over the Fifth Amendment personal guarantee that “no person shall be held to answer”.

2. The error in the present case cannot be classified as “trial error” because it is not reviewable and is a matter of law that did not occur during the trial.

3. Misinformation provided by the government as to the overt act being alleged resulted in an unfair trial and “prejudice”.

Respectfully submitted,

Atmore Baggot, Esq.
CJA Counsel Of Record For Respondent

AUGUST 2006

APPENDIX

8 U.S.C.A. § 1326

Effective: [See Notes]

UNITED STATES CODE ANNOTATED
TITLE 8. ALIENS AND NATIONALITY
CHAPTER 12--IMMIGRA TION AND NATIONALITY
SUBCHAPTER II--IMMIGRA TION
PART VIII--GENERAL PENALTY PROVISIONS
..§ 1326. Reentry of removed aliens

(a) In general

Subject to subsection (b) of this section, any alien who-

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection-

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence. [FNl] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.