

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_

BRENT DOUGLAS COLE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*.

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

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## QUESTION PRESENTED

The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty. Bowsher v. Symar, 478 U.S. 714, 730, (1986). The “structural principles secured by the separation of powers protect the individual as well.” Stern v. Marshall, 564 U.S. 462, 483, (2011).

The question presented in this case is:

Whether the indictment in this case should have been dismissed because the structural protections of the grand jury designed to safeguard individual rights and liberties were compromised when the prosecution impermissibly interfered with the grand jury’s function guaranteed by the Fifth Amendment to act as an independent investigative body when the prosecution abruptly prevented a grand juror from asking a question the grand juror deemed relevant?

Did this interference impermissibly alter the structure of the grand jury by taking away the freedom given to the grand jury to pursue its investigation unhindered by external influence or supervision and to make its decision based on evidence it deems appropriate and to protect individual’s right of freedom and liberty? Is a constitutionally deficient Indictment structural error?

## **OPINION BELOW**

On May 21, 2018, the United States Court of Appeals for the Ninth Circuit filed an unpublished opinion in United States v. Brent Douglas Cole, No. 15-10459, affirming Mr. Cole's convictions. A copy of the opinion is attached hereto as Appendix "A". On July 10, 2018, the Ninth Circuit denied Mr. Cole's petition for rehearing. A copy of the order is attached hereto as Appendix "B".

## **JURISDICTION**

On May 21, 2018, the United States Court of Appeals for the Ninth Circuit affirmed Mr. Cole's convictions. On July 10, 2018, the Ninth Circuit denied Mr. Cole's petition for rehearing. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

## **STATEMENT OF THE CASE**

On October 2, 2014, Mr. Cole was charged by Indictment with assault on a federal officer with a deadly weapon which inflicts bodily injury in violation of 18 U.S.C. § 111(a)(1) and (b) in count 1. In count 2, Mr. Cole was charged with assault on a person assisting a federal officer with a deadly

weapon which inflicts bodily injury in violation of 18 U.S.C. § 111(a)(1) and (b). In count 3, Mr. Cole was charged with discharging a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A) and 18 U.S.C. § 924(c)(1)(A)(iii). (ER 343-346.)

On February 11, 2015, a jury found Mr. Cole guilty as charged. (CR 64.) On August 28, 2015, the district court sentenced Mr. Cole to a total term of 355 months. On Counts 1 and 2, the court sentenced Mr. Cole to 235 months on each count to be served concurrently. The district court imposed a consecutive 120 month sentence on count 3. (ER 47, RT 8/28/15, p. 22.)

On September 8, 2015, Mr. Cole filed a timely Notice of Appeal. (ER 57.) The Ninth Circuit affirmed his convictions and denied the petition for rehearing. (App. A, App. B.)

## **STATEMENT OF FACTS**

Mr. Cole was camping on federal land in California. Mr. Cole's defense was that he was acting in self-defense during an altercation on his campground with a federal ranger and a California Highway Patrol officer.

During the grand jury proceedings, an agent testified: A federal ranger conducted a traffic stop on Mr. Cole's pickup and he told Mr. Cole that the road was not open to the public. (ER 8.) Mr. Cole left the area and the federal

ranger decided to check out Mr. Cole's campsite without Mr. Cole present. Later, when Mr. Cole returned to his campsite, the ranger was there with a California Highway Patrol "CHP" officer. At the campsite, Mr. Cole identified himself to the federal ranger as the person that the ranger had earlier contact with and explained that this was his campsite and that these were his belongings and that he did not want law enforcement to take his things. The ranger removed a pair of handcuffs and asked if Mr. Cole was armed. Mr. Cole said he was armed. Both law enforcement officers drew their weapons and Mr. Cole drew his weapon. Shots were fired. (ER 8-13.)

A grand juror attempted to ask questions regarding the interaction between Mr. Cole and the ranger because the grand juror believed the answer to this question would be "relevant in the fact that when they pulled the arms [Mr. Cole] felt threatened and that's why [Mr. Cole] pulled his." (ER 20-22.)

The prosecutor interfered with the grand jury's investigation and prevented the grand juror from asking a question the grand juror believed was relevant to the proceedings. (ER 20-22.) Mr. Cole was indicted and eventually convicted.



## **REASONS FOR GRANTING THE WRIT**

Mr. Brent Cole argued in the district court that the Indictment should be dismissed because the grand jury was prevented from performing its independent function of deciding whether there was probable cause a crime was committed when the government instructed and admonished the grand jury not to consider evidence the grand jury deemed relevant.

During Agent Forristel's testimony before the grand jury, a grand juror asked the agent questions relating to whether Mr. Cole felt threatened during the incident to cause him to draw his weapon. The prosecutor abruptly stopped the grand juror from questioning and admonished the grand juror that his role was limited to determine whether or not there is probable cause to believe these crimes have occurred and it is not the grand juror's role to consider defenses. The record shows that this grand juror believed his questions was relevant to answer whether a crime cognizable by the court had been committed. Supreme Court authority provides that the grand jury has wide latitude to inquire into violations of criminal law, no one presides to monitor its proceedings, and the grand jury may determine the course of inquiry. The Indictment in this case is not valid and should be dismissed because the grand jury in this case was unable to perform its independent constitutional function due to the

prosecutor's interference. This interference impermissibly altered the freedom given to the grand jury to pursue its investigation unhindered by external influence or supervision and to make its decision based on evidence it deemed appropriate.

The panel below in this case found: The panel in this case concluded that "any error in the grand jury proceedings here was rendered harmless when the petit jury convicted Cole on all three counts". (App. "A", p. 2.) The panel further stated that:

"Cole has not otherwise established that the grand jury's structural protections in this case were compromised". (App. "A", p. 2.)

However, Mr. Cole can establish the grand jury's structural protections designed to protect individual freedom and liberty in this case were compromised: The grand jury represents a structural protection of individual rights. United States v. Supreme Court, 839 F. 3d 888, 924 (10<sup>th</sup> Cir. 2016.) When the prosecution interfered with the grand juror's independent function to investigate whether there was probable cause that a crime was committed, the grand jury's structural protection designed to protect individual rights, freedom and liberty was compromised. "In this regard, the Supreme Court has recognized that the Framers envisioned that

the federal grand jury would possess a broad range of discretion; more specifically, the Court has held that the grand jury's function 'is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred.' United States v. Supreme Court, supra, 839 F. 3d at 925, citing to United States v. R. Enters, Inc. 498 U.S. 292, 297, 111 S. Ct. 722, 112 L. Ed 2d 795 (1991).

The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty. Bowsher v. Synar, 478 U.S. 714, 730, 106 S. Ct. 3181, 92 L. Ed 2d 583 (1986). The 'structural principles secured by the separation of powers protect the individual as well.' Stern v. Marshall, 564 U.S. 462, 483, 131 S. Ct. 2594, 180 L. Ed 2d 475 (2011).

The Ninth Circuit's decision is in direct contradiction of Supreme Court authority that provides that structural protections to protect individual rights, such as freedom and liberty, against the abuse of power are critical to preserving liberty. Bowsher v. Synar, supra, 478 U.S. at 730. The structure of the grand jury was purposely created to "remain free to pursue its investigation unhindered by external influences or supervision so long as it does not trench upon the legitimate rights of any witness called before it".

United States v. Williams, 504 U.S. 36, 47, 112 S. Ct. 1735, 118 L. Ed 2d 354 (1992).

Even though a petit jury convicted Mr. Cole in this case, “a dismissal of the indictment will be appropriate only where ‘the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair’”. Guam v. Muna, 999 F. 3d. 397, 399 (9<sup>th</sup> Cir. 1993), citing to Bank of Nova Scotia v. United States, 487 U.S. 250, 257, 108 S. Ct. 2369, 101 L. Ed 2d 228 (1988). Because the proceedings are fundamentally unfair, prejudice is presumed without a particular assessment of the prejudicial impact of the errors, and the case will be reversed. Bank of Nova Scotia v. United States, supra, 487 U.S. at 256-257.

Here, the grand jury’s independence was infringed when the prosecution hindered the grand jury’s investigative function when it prevented a grand juror from asking questions of a witness to determine whether a crime was committed and when the prosecutor admonished the grand juror that his questions were not relevant and that “it was not your role to consider” at this point whether Mr. Cole had defenses. (ER 22-24.)

The prosecution’s admonition to the grand juror impermissibly interfered with the grand jury’s structure designed to protect individual

liberty and to function independently from the prosecution to determine whether there was probable cause to believe that a crime has been committed. The design and structure of the grand jury is created so that the grand jury acts independently of the prosecution and the court. Recognizing this independence, the Supreme Court has said that “the *Fifth Amendment*’s constitutional guarantee *presupposes* an investigative body acting independently of either the prosecuting attorney *or judge...*” (Emphasis in original.) United States v. Williams, *supra*, 504 U.S. at 49.

The panel found that that Cole has not otherwise established that the grand jury’s structural protections in this case were compromised. (App. “A”, p. 2.)

Mr. Cole respectfully requests that this Court should consider granting this petition for writ of certiorari because he has established that the grand jury’s structural protections to protect individual rights of liberty and freedom in this case were compromised: The grand jury represents a structural protection of individual rights. United States v. Supreme Court, *supra*, 839 F. 3d at 924. When the prosecution interfered with the grand juror’s independent function to investigate whether there was probable cause that a crime was committed, the grand jury’s structural protection designed

to protect individual rights, freedom and liberty was compromised.

“In this regard, the Supreme Court has recognized that the Framers envisioned that the federal grand jury would possess a broad range of discretion; more specifically, the Court has held that the grand jury’s function ‘is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred.’” United States v. Supreme Court, *supra*, 839 F. 3d 888, 925, citing to United States v. R. Enters, Inc., *supra*, 498 U.S. at 297.

“In carrying out its role in the criminal justice system, a grand jury ‘paints with a broad brush,’ unlike federal courts, it is not bound by Article III’s case or controversy requirement or by ‘the technical procedural and evidentiary rules governing the conduct of criminal trials.’” United States v. Supreme Court, *supra*, 839 F. 3d 888, 925, citing to United States v. Williams, *supra*, 504 U.S. at 66-67. The grand jury carries out their investigative function “free from technical rules” and “it has relatively *broad power to run down available clues and examine all relevant witnesses* to determine if there is probable cause to prosecute a particular defendant”. (Emphasis added.) United States v. Supreme Court, *supra*, 839 F. 3d 888, 925, citing to Branzburg v. Hayes, 408 U.S. 665, 701, 92 S. Ct. 2646, 33 L.

Ed 2d 626 (1972).

Here, a grand juror in this case, desired to “run down available clues” and “examine all relevant witnesses” to determine whether there was probable cause to prosecute Mr. Cole. Agent Forristel testified before the grand jury. He stated that a federal ranger conducted a traffic stop on Mr. Cole’s pickup and he told Mr. Cole that the road was not open to the public. (ER 8.) Later, the ranger arrived at Mr. Cole’s campsite. When Mr. Cole returned to his campsite, the ranger was there with a CHP officer:

While they were at the campsite, they heard rustling in the bushes. The ranger identified himself as the police and directed whoever was down there to identify themselves. Mr. Cole came out from the trees. Mr. Cole identified himself as the person that the ranger had earlier contact with. Mr. Cole indicated that this was his campsite, that these were his belongings, and that he did not want law enforcement taking his things. The ranger removed a pair of handcuffs from his duty belt. Mr. Cole backed up a little bit and took kind of an aggressive stance. The ranger asked Mr. Cole if he was armed. Mr. Cole said he was armed. In response to that, both of the law enforcement officers drew their weapons. (ER 11-12.)

The officers gave Mr. Cole commands for Mr. Cole to surrender his weapon. Instead of surrendering his weapon, in a very quick movement, Mr. Cole drew a silver-colored revolver from his right waist area and fired multiple rounds at the BLM ranger. Both officers fired multiple rounds at Mr. Cole. (ER, 13.)

At the end of Agent Forristel’s testimony, a grand juror questioned Agent Forristel:

GRAND JUROR: Mr. Cole, he met the BLM ranger twice in the one

day, but he never met him before?

THE WITNESS: During the day of this incident, he had met him earlier in the day at the traffic stop. And then a few hours later when the CHP officer and the BLM ranger were in the campsite working on the impound of the two motorcycles is when Mr. Cole returned. And so, that was the second time that ---

GRAND JUROR: Never met him before that day?

THE WITNESS: I'm not positive on that. I don't know the answer to that.

GRAND JUROR: Are there signs on closed roads to say you can't go up there, or it's just common knowledge?

THE WITNESS: I don't know the answer to that.

GRAND JUROR: This morning confrontation between this BLM, was it a normal confrontation? Was it friendly? He said, "Hey, listen, you guys can't be here. Please go somewhere else."

PROSECUTOR: I'm going to have to say I don't know that that's relevant.

GRAND JUROR: Okay.

PROSECUTOR: Only because of, you know, the facts, is if it was



friendly or not.

I know you have heard testimony from two of the other individuals in the vehicle with him that morning who indicated the nature of that conversation, because the agent has no firsthand knowledge of that. I don't think it's a relevant question, and I also don't know that he's the best witness.

So, I would refer you back to the testimony of those two witnesses.

GRAND JUROR: But it would be revellent [sic] -- relevant in the fact that when they pulled the arms he felt threatened and that's why he pulled his.

PROSECUTOR: Yeah. Let me make this clear first of all. Your role is to determine whether or not there's probable cause to believe these crimes have occurred.

GRAND JUROR: I understand.

PROSECUTOR: Not whether or not he has defenses. Right? There are various defenses that Mr. Cole may have to any charges that are brought. That's not your role to consider at this point. It's whether or not elements -- and I'll go over the elements crimes -- are satisfied and you believe there's probable cause to believe that that crime was committed.

I don't want to foreclose the discussion on defenses. And clearly, there will be discussion once – if the case is indicted and it progress. I'm sure that's an appropriate discussion that will be had in court. But at this point it's just not relevant.

Any other questions?

Okay. Thank you very much. (Then, the testimony of Andrew Forristel was concluded.) (ER 20-22.)

Here, the government interfered with the grand juror's investigation when the grand juror attempted to ask Agent Forristel questions to help him determine whether there was probable cause that a crime was committed. The grand juror wanted to inquire if Mr. Cole had felt threatened by the ranger when the ranger pulled his gun and "that's why he pulled his". (ER 20-22.) Obviously, the grand juror was inquiring whether Mr. Cole pulled his gun because he already felt threatened by the ranger.

"Just as the constitutional structure provides each of the branches with the prerogative to check the others, the grand jury, with its robust discretion, checks the judicial, executive, and legislative branches and represents a *structural protection of individual rights.*" (Emphasis added.) United States v. Supreme Court, supra, 839 F. 3d 888, 924.)

“By the Framers’ explicit design, the federal grand jury occupies a uniquely independent space in the constitutional text, part from the three branches of government.” United States v. Supreme Court, *supra*, 839 F. 3d 888, 924, citing to United States v. Williams, *supra*, 504 U.S. at 47. “The grand jury occupies a unique role in our criminal justice system” and “under the constitutional scheme, the grand jury is not and *should not be captive* to any of the three branches. (Emphasis added.) The grand jury is a pre-constitutional institution given constitutional stature by the *Fifth Amendment* but not relegated by the Constitution to a position within any of the three branches of the government.” United States v. Supreme Court, *supra*, 839 F. 3d 888, 924. “Not only is the grand jury independent of the three branches of government, but it serves as a check on them. The separation of powers doctrine mandates judicial respect for the independence of both the prosecutor *and* the grand jury.” United States v. Supreme Court, *supra*, 839 F. 3d 888, 924.

The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty. Bowsher v. Synar, *supra*, 478 U.S. at 730. The ‘structural principles secured by the separation of powers protect the individual as well.’ Stern v. Marshall,

supra, 564 U.S.at 483. As Justice Scalia stated: “The purpose of separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve *individual freedom*.” Morrison v. Olson, 487 U.S. 654, 727, 108 S. Ct. 2597, 101 L. Ed 2d 569 (1988) (Scalia, J., dissenting.) “As such a powerful check on the government, the grand jury is meant to provide additional protection for the individual for the individual threatened by the government with a *serious deprivation of his liberty*.” (Emphasis added.) United States v. Stevenson, 2018 U.S. Dist. LEXIS 61988, \*8 (So. Dist. West Virginia.)

In this case, the Indictment should have been dismissed since the structural protections of the grand jury proceedings protecting individual rights including freedom and liberty from government prosecution have been so compromised as to render Mr. Cole’s proceedings fundamentally unfair. Bank of Nova Scotia v. United States, supra, 487 U.S. at 257. The purpose of the grand jury was to protect individual freedom “against tyranny and arbitrary exercise of government power in the criminal justice system”. “A prosecutor cannot compel an individual to answer accusations of serious, i.e., felony, criminal conduct other than through the grand jury indictment.

This is because, at the founding, liberty was considered to be such a preeminent value that where it is most seriously threatened, the people withheld from the government the power to compel an individual to answer accusations without their consent.” United States v. Stevenson, 2018 U.S. Dist. LEXIS 61988, \*5-\*6 (So. Dist. West Virginia.)

The structure of the grand jury was purposely created to “remain free to pursue its investigation unhindered by external influences or supervision so long as it does not trench upon the legitimate rights of any witness called before it”. United States v. Williams, *supra*, 504 U.S. at 47.

The Supreme Court has found cases relating to grand jury proceedings fundamentally unfair when there was racial discrimination in the selection of the grand jurors and where women had been excluded from the grand jury. Vasquez v. Hillery, 474 U.S. 254, 260-264, 106 S. Ct 617, 88 L. Ed 2d 598 (1986); Ballard v. United States, 329 U.S. 187, 67 S. Ct. 261, 91 L. Ed 181 (1946). In Vasquez, the Court held that “racial discrimination in selection of grand jurors compelled dismissal of the indictment” and that it could be presumed that a discriminatorily selected grand jury would treat defendants unfairly”. Bank of Nova Scotia v. United States, *supra*, 487 U.S. at 257. Also, in Ballard, the Court presumed the defendant was prejudiced, “any

inquiry into harmless error would have required unguided speculation.”

Bank of Nova Scotia v. United States, supra, 487 U.S. at 256-257.

Similarly, the prosecution’s interference with the grand jury’s function to act independently compels dismissal of the indictment because it could be presumed that a grand jury not acting independently would treat defendants unfairly since the grand jury was not free to pursue its investigation unhindered by external influences. United States v. Williams, supra, 504 U.S. at 48-49.

The grand jury was impermissibly influenced by the executive branch and the grand jury was not functioning as an independent body that it is designed to be—separate from the three branches of government and to protect individual liberty and freedom. The grand jury’s independence was impermissibly interfered with by the executive branch when the prosecution hindered the grand jury’s investigation as whether probable cause to believe a crime was committed. This interference impermissibly altered the structure of the grand jury by taking away the freedom given to the grand jury to pursue its investigation unhindered by external influence or supervision and to make its decision based on evidence it deems appropriate and to protect individual’s right of freedom and liberty. The grand jury may

determine alone the course of its inquiry. United States v. Calandra, 414 U.S. 338, 343, 94 S. Ct. 613, 38 L. Ed 2d 561 (1974).

The panel below relied on United States v. Navarro, 608 F. 3d 529, 536 (9<sup>th</sup> Cir. 2010) in rejecting this issue. In Navarro, the district court judge, who charged the grand jury, told the jurors that the prosecutor was duty bound to present exonerating evidence and also praised the integrity of the federal prosecutors. The Ninth Circuit found that the district court's instruction was wrong, that the prosecutor has a duty to present exculpatory evidence and that the error was magnified by the encomium to prosecutorial integrity. Id. at 537. The Ninth Circuit found that the erroneous instruction did not constitute structural error requiring dismissal of the indictment because the Court found that the error did not affect the substantial rights of the defendant. Id. at 538. The instruction did not interfere with the grand jury's independent function to investigate and consider evidence it deems appropriate.

In the present case, Mr. Cole has a substantial right to have the structural protection of the grand jury functioning as an independently body as it investigates and determines whether there is probable cause that a crime has been committed in order to protect his freedom and liberty. The

prosecution's impermissible interference with the grand jury investigation results in structural error requiring reversal.

Structural error is a term of art for error requiring reversal regardless of whether it is prejudicial or harmless. United States v. Navarro, supra, 608 F. 3d at 538. In Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed 2d 35 (1999), the Court held that structural error occurs when there is complete denial of counsel, a biased trial judge, racial discrimination in selection of grand jury, and denial of self-representation at trial. United States v. Navarro, supra, 608 F. 3d at 538, citing to Neder v. United States, supra, 547 U.S. at 8.

Here, denial of a grand jury functioning as an independent body, free from prosecutorial interference during its investigation, is structural error because the prosecution's interference impermissibly compromised the grand jury's structural design to protect individual freedom and liberty from unjust government power. Just like a defendant has the right to have a fair judge, to have an attorney during criminal proceedings, no discrimination in the selection of the grand jury, and the right to represent himself—a criminal defendant has the right to have the grand jury who is investigating him be free from impermissible influence by the prosecution. The structure



of the criminal system is constitutionally protected and designed to give a criminal defendant a fair trial with an unbiased judge and with the assistance of counsel. If any of these structural protections are compromised, then error is presumed and the case is reversed. Similarly, the structure of the grand jury is constitutionally designed to protect a defendant from outside influences and to protect the individual's liberty and to operate independent from interference by the prosecution. Denial of this protection in grand jury proceedings results in structural error requiring reversal.

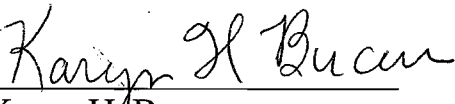
The structural protection of the grand jury to protect individual rights of freedom and liberty and to remain independent has been so compromised as to render the proceedings fundamentally unfair requiring reversal without particular assessment of the prejudicial impact of the errors. Bank of Nova Scotia v. United States, supra, 487 U.S. at 256-257. This petition for a writ of certiorari should be granted.

## **CONCLUSION**

For the foregoing reasons, Mr. Brent Cole respectfully submits that the petition for writ of certiorari should be granted.

Dated: October 2, 2018

Respectfully Submitted,

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Karyn H. Bucur  
Attorney for Petitioner

**NOT FOR PUBLICATION**

**FILED**

UNITED STATES COURT OF APPEALS

MAY 21 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRENT DOUGLAS COLE,

Defendant-Appellant.

No. 15-10459

D.C. No.

2:14-cr-00269-GEB-1

MEMORANDUM\*

Appeal from the United States District Court  
for the Eastern District of California  
Garland E. Burrell, Jr., District Judge, Presiding

Submitted May 15, 2018\*\*  
San Francisco, California

Before: THOMAS, Chief Judge, FRIEDLAND, Circuit Judge, and ZILLY,\*\*\*  
District Judge.

Appellant Brent Douglas Cole appeals his jury conviction for one count of  
assaulting a federal officer in violation of 18 U.S.C. §§ 111(a) and 111(b), one

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\* This disposition is not appropriate for publication and is not precedent  
except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision  
without oral argument. *See* Fed. R. App. P. 34(a)(2).

\*\*\* The Honorable Thomas S. Zilly, United States District Judge for the  
Western District of Washington, sitting by designation.

count of assaulting a person assisting a federal officer in violation of 18 U.S.C. §§ 111(a) and 111(b), and one count of discharging a firearm during and in relation to a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A) and 924(c)(1)(A)(iii). Cole argues on appeal that his indictment is invalid because the government interfered with the independent structure of the grand jury. Cole also asserts that the district court denied his right of allocution and requests that this case be remanded for a new sentencing hearing. Cole further argues that his two assault convictions under 18 U.S.C. §§ 111(a) and 111(b) are not “crimes of violence” for purposes of sustaining his firearm conviction.

We conclude that any error in the grand jury proceedings here was rendered harmless when the petit jury convicted Cole on all three counts. *United States v. Navarro*, 608 F.3d 529, 538–40 (9th Cir. 2010). Cole has not otherwise established that the grand jury’s structural protections in this case were compromised.

We also review for harmless error a district court’s failure to give the right of allocution at sentencing. *United States v. Mack*, 200 F.3d 653, 657 (9th Cir. 2000). The district court afforded Cole his right of allocution on multiple occasions during sentencing and properly limited Cole’s discussion to issues pertaining to mitigation. *Id.* at 658.

This Court has held that a defendant charged with assault by using a deadly or dangerous weapon in violation of 18 U.S.C. § 111(b) must necessarily threaten the use of force. *United States v. Juvenile Female*, 566 F.3d 943, 947–48 (2009). As such, a § 111(b) weapons charge is categorically a “crime of violence.” *Id.* Cole’s convictions on Counts One and Two necessarily threaten the use of force and are therefore categorically “crimes of violence.” The jury’s determination that Cole committed a “crime of violence” was not an error.

**AFFIRMED.**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED

JUL 10 2018

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRENT DOUGLAS COLE,

Defendant-Appellant.

No. 15-10459

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

D.C. No.

2:14-cr-00269-GEB-1

Eastern District of California,  
Sacramento

ORDER

Before: THOMAS, Chief Judge, FRIEDLAND, Circuit Judge, and ZILLY,\*  
District Judge.

The panel has voted to deny the petition for panel rehearing. Chief Judge Thomas and Judge Friedland have voted to deny the petition for rehearing en banc and Judge Zilly has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

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\* The Honorable Thomas S. Zilly, United States District Judge for the Western District of Washington, sitting by designation.

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