

IN THE SUPREME COURT OF THE UNITED STATES

ISAAC NFORMANGUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, notwithstanding the court of appeals' finding of harmlessness, petitioner is entitled to automatic relief from his conviction for transmitting a threat in interstate commerce, 18 U.S.C. 875(c), based on his claim that the indictment -- which alleged that he "did knowingly and willfully transmit in interstate and foreign commerce, a communication containing a threat to injure the person of another" -- omitted the offense element of a subjective mens rea with respect to the threatening nature of his communication.

PARTIES TO THE PROCEEDING

Petitioner (defendant-appellant below) is Isaac Nformangum.

Respondent (plaintiff-appellee below) is the United States of America.

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No. 25-7259

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is unpublished but available at 2026 WL 18900.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 2026. The petition for a writ of certiorari was filed on April 1, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of Texas, petitioner was convicted of

transmitting in interstate commerce a communication with a threat to injure, in violation of 18 U.S.C. 875(c). Judgment 1; Pet. App. 1a-3a. He was sentenced to one year of probation. Judgment 2. The court of appeals affirmed. Pet. App. 1a-12a.

1. On June 26, 2022, petitioner left a voicemail message at the office of U.S. Senator Rafael Edward ("Ted") Cruz, in which he stated:

Hello and good afternoon Senator Rafael. This is one of the many Afro-American constituents of whom you are representative of here in Texas, as you currently serve from the Senate. [Sigh] I have just read the, uh, Texas Republican parties platform for this current 2022 year, uh, wherein it is apparent that your many colleagues intend, intend to have the voting rights act appealed and not reauthorized?

Every last one of your Republican colleagues to have signed off on that platform is to be found and, is to be found and killed, be it by a bullet to the face or by the smashing of a brick in your skull. It is a civic duty of every American citizen or resident to see to it that every last one of your colleagues is to be killed. Killed. Be it by finding you in a public space or by trailing you to your very, by your very public homes. The addresses of which are public knowledge. You and every one of your colleagues is to be shot dead. Found and killed. You sick pieces of human scum will not have the fucking audacity to aggress this any further and to strip us of our rights like you did our grandparents so many years ago. You will be found and killed. As a civic duty of every American to do so. Fuck you. Fuck you Rafael. You peace of human scum.

C.A. ROA 395 (brackets in original); see Pet. App. 2a-3a.

Petitioner was arrested. C.A. ROA 217. In his interview with law enforcement, he admitted to leaving the voicemail, which

he described as a "very detailed threat to the senator," id. at 256, and acknowledged that his actions were "reckless," ibid.; see id. at 395. He also told the agents that he had "expected" the voicemail to result in "some action * * * by the government," although he had not expected to be "arrested." Id. at 256; see Pet. App. 3a.

2. A federal grand jury in the Southern District of Texas returned a two-count indictment charging petitioner with threatening to murder a United States official, in violation of 18 U.S.C. 115(a)(1)(B) and (b)(4) (Count 1), and transmitting in interstate commerce a communication containing a threat to injure, in violation of 18 U.S.C. 875(c) (Count 2). Indictment 1-2; see C.A. ROA 45-46. With respect to the latter count, the indictment alleged that petitioner "did knowingly and willfully transmit in interstate and foreign commerce, a communication containing a threat to injure the person of another, to wit, a telephone call to the Office of United States Senator Ted Cruz in Houston, Texas, threatening to injure and kill Senator Ted Cruz, in violation of Title 18 United States Code, Section 875(c)." Indictment 1-2.

Petitioner moved to dismiss the indictment, arguing (inter alia) that, as alleged in the indictment, "both counts fail[ed] to include the essential element of a subjective understanding of the threatening nature of the [voicemail] and should be dismissed." C.A. ROA 184. But at a hearing, petitioner's counsel told the district court that "both the parties agree the case is not to be

dismissed prior to trial” and “that there would be certain jury instructions which are necessary, specifically a subjective intent requirement for both Counts 1 and 2.” Id. at 529; see 22-cr-367 Docket entry No. 51 (Oct. 23, 2023). The prosecutor similarly informed the court that “any issues * * * can be resolved through jury instructions.” C.A. ROA 532. The court, in turn, noted that the jury “instructions will be carefully crafted” and denied petitioner’s motion to dismiss. Id. at 533.

“Shortly before jury selection was set to begin, the parties advised the district court that [petitioner] had agreed to waive a jury trial and proceed before the court on Count 2 [i.e., the interstate-threat count], and the government had agreed to dismiss Count 1 [i.e., the murder-threat count].” Pet. App. 2a; see C.A. ROA 393, 605-607. The parties subsequently submitted a joint stipulation of evidence, in which petitioner stipulated, inter alia, “that the voicemail message traveled in interstate commerce” and that he had “admitted to law enforcement agents that he left the voicemail and ‘was reckless with his actions.’” Pet. App. 3a. The government also introduced petitioner’s interview with law enforcement. See pp. 2-3, supra; C.A. ROA 623-625.

After the bench trial, the district court found petitioner guilty of violating 18 U.S.C. 875(c). Pet. App. 1a. The court found “beyond a reasonable doubt” that petitioner “knowingly sent the communication containing the threat” and did so with “the purpose of issuing the threat” and “with knowledge that the

communication would be viewed as a threat.” C.A. ROA 628; see Pet. App. 3a. The court then sentenced petitioner to a year of probation. Judgment 2.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-12a. Petitioner argued, among other things, that “the district court erred in declining to dismiss the indictment for failure to allege the requisite mens rea.” Id. at 8a. The court of appeals found that it “need not decide” whether petitioner waived that issue due to his agreement in the district court “that proper jury instructions could cure” the purported defect in the indictment because, “even under the de novo standard * * * the omission was harmless.” Ibid.

The court of appeals agreed with petitioner that the indictment was deficient. Pet. App. 9a-10a. The court explained that a conviction under 18 U.S.C. 875(c) requires the government to prove that the “defendant transmit[ted] a communication for the purpose of issuing a threat” or “with the knowledge that the communication [would] be viewed as a threat,” Pet. App. 9a (quoting Elonis v. United States, 575 U.S. 723, 740 (2015)), or else acted with “a mental state of recklessness,” ibid. (quoting Counterman v. Colorado, 600 U.S. 66, 69 (2023)). And it concluded that the indictment “fail[ed] to state an offense” because it “does not allege [petitioner’s] subjective state of mind.” Id. at 10a.

But the court of appeals found that the error was harmless. Pet. App. 10a-12a; see id. at 10a n.5. The court reasoned that

the indictment “served its core purpose of ‘provid[ing] notice * * * [and] the opportunity to prepare a defense’”; that it did not harm grand jury proceedings because a “‘rational grand jury presented with a proper indictment’” -- who would have had access to petitioner’s admissions to law enforcement about his state of mind -- “‘would have charged’” petitioner; and “‘it appears beyond a reasonable doubt that the error * * * did not contribute to the verdict obtained’” because “the district court, acting as the fact finder, concluded that [petitioner] did act with the requisite degree of subjective knowledge.” Id. at 11a-12a (citations omitted; first set of brackets in original).

ARGUMENT

Petitioner contends (Pet. 9-10) that the court of appeals erred by applying harmless-error review because the omission of an offense element from an indictment constitutes structural error. The court correctly declined to grant automatic relief on petitioner’s omission claim, and the disagreement that he alleges (Pet. 6-8) in the circuits is overstated and stale. Furthermore, this case would be a poor vehicle for addressing the question presented because petitioner waived his objection to the indictment, and the indictment was not deficient in the first place. This Court has repeatedly denied review of similar contentions,¹ and it should follow the same course here.

¹ See, e.g., Leonard v. United States, 142 S. Ct. 2709 (2022) (No. 21-1082); In re Allen, 590 U.S. 941 (2020) (No. 18-9554); Robinson v. United States, 589 U.S. 1209 (2020) (No. 19-

1. The court of appeals correctly declined to treat petitioner's claim that an element was omitted from his indictment as a claim of structural error that would warrant automatic relief, irrespective of whether he was prejudiced. Pet. App. 10a-12a.

a. Under Rule 52(a) of the Federal Rules of Criminal Procedure, "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a); see 28 U.S.C. 2111. That requirement of prejudice ensures that the "substantial social costs" that result from reversal of criminal verdicts will not be imposed without justification. United States v. Mechanik, 475 U.S. 66, 72 (1986).

This Court has recognized a "very limited" set of errors that are so intrinsically harmful to the framework of a prosecution that they require automatic vacatur of the defendant's conviction without regard to any case-specific showing of prejudice. Neder v. United States, 527 U.S. 1, 8 (1999) (citation omitted) (listing examples); see United States v. Gonzalez-Lopez, 548 U.S. 140, 148-149 (2006). That limited "category of structural errors," however, is "'highly exceptional.'" Greer v. United States, 593 U.S. 503, 513 (2021) (citation omitted). "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred' are not

5535); Lee v. United States, 581 U.S. 1019 (2017) (No. 16-7317); Barton v. United States, 574 U.S. 1049 (2014) (No. 14-5354); Gomez v. United States, 571 U.S. 1096 (2013) (No. 13-5625); Hardy v. United States, 571 U.S. 831 (2013) (No. 12-9527); Davis v. United States, 562 U.S. 1290 (2011) (No. 10-7564).

'structural errors.'" United States v. Marcus, 560 U.S. 258, 265 (2010) (citation omitted).

The omission of an element from an indictment is not the type of highly exceptional error that warrants classification as structural. This Court held in Neder that the omission of an offense element from jury instructions at trial, which prevents the petit jury from making a determination on that element necessary to a finding of guilt, does not constitute structural error and is subject to harmless-error review. 527 U.S. at 8-15. It logically follows that the omission of an offense element from the indictment also does not constitute structural error. Indeed, the type of omission alleged here constitutes an even weaker candidate for structural error than the type of omission in Neder.

Unlike the Sixth Amendment right to a trial by a petit jury, the Fifth Amendment right to an indictment by a grand jury has not been incorporated against the States through the Fourteenth Amendment as an essential requirement of fundamental fairness. See Hurtado v. California, 110 U.S. 516, 538 (1884). In addition, this Court has held that errors at the charging stage may be rendered harmless by subsequent developments in the prosecution. See Mechanik, 475 U.S. at 70-72 & n.1; see also Bank of Nova Scotia v. United States, 487 U.S. 250, 254-256 (1988). Specifically, a "petit jury's verdict of guilty beyond a reasonable doubt demonstrates a fortiori that there was probable cause to charge the defendants with the offenses for which they were convicted,"

despite a violation of a federal rule governing grand-jury proceedings. Mechanik, 475 U.S. at 67.

And although the grand jury serves an important protective function, that “is surely no less true” of the petit jury, which provides the accused even greater protection. United States v. Cotton, 535 U.S. 625, 634 (2002). Before the grand jury, the prosecutor has no obligation to present exculpatory evidence (and the accused has no right to present evidence at all), see United States v. Williams, 504 U.S. 36, 51 (1992); a finding of probable cause by a simple majority can suffice, see Fed. R. Crim. P. 6(a)(1) and (f); see also Kaley v. United States, 571 U.S. 320, 338-339 (2014); and a vote not to indict raises no bar to further proceedings akin to the effect of a jury acquittal under the Double Jeopardy Clause, see Crist v. Bretz, 437 U.S. 28, 38 (1978). Those considerations strongly support the conclusion that the failure to submit an element to the grand jury does not stand on a higher plane than the failure to submit an element to a petit jury, which under Neder is subject to harmless-error review.

This Court’s decisions in United States v. Cotton and Greer v. United States likewise indicate that omission of an offense element from an indictment is not structural error. In Cotton, the Court determined that even though the Fifth Amendment requires sentence-enhancing facts to be charged in a federal indictment, the failure to allege drug quantity in the indictment (or to obtain a finding on drug quantity by the petit jury) did not constitute

reversible plain error. 535 U.S. at 627, 631-634. Although the Court did not specifically decide the applicability of the third, explicitly prejudice-focused, component of the plain-error inquiry (which is analogous to the harmless-error inquiry for preserved errors), the Court found plain-error relief unwarranted because the error in the case before it did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. Id. at 632-633. The Court noted that the evidence concerning the sentence-enhancing fact there was “‘overwhelming’” and “‘essentially uncontroverted,’” and the Court reasoned that that the grand jury “[s]urely” would have found that fact had the indictment included it. Id. at 633. The Court’s conclusion in Cotton that the omission of a sentence-enhancing fact from an indictment will not seriously affect the fairness, integrity, or public reputation of judicial proceedings “cuts against the argument that [an indictment omission] will always render a trial unfair,” Neder, 527 U.S. at 9 (emphasis omitted), and should constitute structural error.

More recently, in Greer, this Court addressed felon-in-possession prosecutions under 18 U.S.C. 922(g)(1) that resulted in either a guilty plea or jury verdict prior to the Court’s decision in Rehaif v. United States, 588 U.S. 225 (2019), which held that knowledge of felon status is an element of that offense, see Greer, 593 U.S. at 505-507. In the two prosecutions at issue, neither the plea colloquy (for one defendant) nor the jury instructions

(for the other) had mentioned the knowledge-of-status element. See id. at 506. This Court held that those omissions did not warrant plain-error relief where the defendant had made no showing that he was unaware of his own felon status at the time of the offense. See id. at 514. In so holding, the Court explained that “Rehaif error[s]” are “not structural” because “the omission of that mens rea element” from the plea colloquy or jury instructions “does not affect the entire framework within which the proceeding occurs.” Id. at 513-514 (citing Neder, 527 U.S. at 8). Similarly here, the alleged omission of a mens rea element from the indictment was at most a “discrete defect[] in the criminal process.” Id. at 513. A court may accordingly analyze such an error for harmlessness.

b. Petitioner asserts (Pet. 9) that an indictment omission must be structural because the lack of procedural safeguards in grand jury proceedings means “there is no basis to meaningfully assess harmlessness.” A critical premise of that argument seems to be that courts reviewing the effect of an indictment omission cannot look at events that followed the grand jury proceedings but must instead “speculate[]” about what would have happened in the proceedings. Ibid. But Mechanik rejected that premise.

Mechanik makes clear that a defendant’s conviction “after a trial free from reversible error” provides ample basis to determine that “any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt.” 475

U.S. at 70-71. The same is true here, where the district court, acting as factfinder at trial, explicitly rested its guilty verdict on a finding that petitioner satisfied the element that was allegedly missing from the indictment. See Pet. App. 12a.

Moreover, petitioner is incorrect as a practical matter that it is necessarily difficult to assess the effect of indictment omissions. Below, petitioner "concede[d] that the grand jury had access to 'his statement under custodial interrogation,'" in which he admitted "that his message to Senator Cruz 'was reckless'" (the mens rea that 18 U.S.C. 875(c) permits) and that he "'expected some action to be taken by the government.'" Pet. App. 11a. So in fact, the court of appeals had no need to "speculate[] about what 'would have been available' to the grand jury." Pet. 9 (citation omitted).²

2. Petitioner identifies no conflict in the courts of appeals that would warrant this Court's review.

² Contrary to petitioner's suggestion, see Pet. 6, 8-9, 10, Russell v. United States, 369 U.S. 749 (1962), does not support his position. Russell was decided before Chapman v. California, 386 U.S. 18 (1967), which makes clear that constitutional errors can be subject to harmless-error analysis. And the specific omission at issue in Russell -- the failure to identify the subject of the inquiry in which defendants were alleged to have refused to answer the questions of a congressional subcommittee, see 369 U.S. at 752 -- was a failure of notice, *i.e.*, that the indictments "failed to sufficiently apprise the defendant 'of what he must be prepared to meet,'" *id.* at 764. Here, petitioner did not dispute that the indictment provided him with sufficient notice. See Pet. App. 11a.

a. Nearly every court of appeals has recognized that the omission of an element or sentence-enhancing fact from an indictment is subject to harmless-error analysis. See, e.g., United States v. Corporan-Cuevas, 244 F.3d 199, 202 (1st Cir.), cert. denied, 534 U.S. 880 (2001); United States v. Lee, 833 F.3d 56, 69 (2d Cir. 2016), cert. denied, 581 U.S. 1019 (2017); United States v. Stevenson, 832 F.3d 412, 426-427 (3d Cir. 2016), cert. denied, 580 U.S. 1072 (2017); United States v. Higgs, 353 F.3d 281, 304-306 (4th Cir. 2003), cert. denied, 543 U.S. 999 (2004); United States v. Dentler, 492 F.3d 306, 310 (5th Cir. 2007); United States v. Cor-Bon Custom Bullet Co., 287 F.3d 576, 580-581 (6th Cir.), cert. denied, 537 U.S. 880 (2002); United States v. Maez, 960 F.3d 949, 958 (7th Cir. 2020), cert. denied, 141 S. Ct. 2813, 141 S. Ct. 2814, and 141 S. Ct. 2838 (2021); United States v. Allen, 406 F.3d 940, 945 (8th Cir. 2005), cert. denied, 549 U.S. 1095 (2006); United States v. Prentiss, 256 F.3d 971, 981-985 (10th Cir. 2001) (en banc) (per curiam), abrogated in part on other grounds by Cotton, supra; United States v. Leonard, 4 F.4th 1134, 1144 (11th Cir. 2021), cert. denied, 142 S. Ct. 2709 (2022).

Petitioner posits (Pet. 6-7) that the Fourth and Ninth Circuits have taken the opposite approach. But while the Fourth Circuit stated in United States v. Spruill, 118 F.3d 221, cert. denied, 522 U.S. 1006 (1997), that “failure to recite an essential element of the offense in the indictment is not amenable to harmless error review,” id. at 227, it has subsequently recognized --

citing Mechanik, and this Court's post-Spruill decisions in Neder and Cotton -- that it has been "persuaded by the reasoning of [its] sister circuits, which have held that indictment error, and in particular the failure of an indictment to allege an element of a charged offense, may be reviewed for harmlessness," Higgs, 353 F.3d at 306; see United States v. Brown, 136 F.4th 87, 95-96 (4th Cir. 2025) (reiterating that "'the failure of an indictment to allege an element of a charged offense'" is "subject to harmless-error review") (citation and emphasis omitted).

Only the Ninth Circuit has taken the view that omission of an element from an indictment invariably requires reversal, even when it had no effect on the outcome. See United States v. Du Bo, 186 F.3d 1177, 1179 (1999) ("[I]f properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of the indictment."); see also United States v. Qazi, 975 F.3d 989, 992 (9th Cir. 2020) ("Du Bo requires automatic dismissal regardless of whether the omission prejudiced the defendant."). But even the Ninth Circuit has "limited Du Bo's reach after Cotton" by, for example, "apply[ing] harmless-error review when an indictment omits [a sentence-enhancing fact] even when it was timely challenged." Qazi, 975 F.3d at 992 & n.1 (referencing United States v. Salazar-Lopez, 506 F.3d 748 (9th Cir. 2007), cert. denied, 553 U.S. 1074 (2008)).

More relevantly here, it has applied Du Bo only to indictment omissions that are “properly challenged before trial.” Qazi, 975 F.3d at 991. As explained below, petitioner here waived his challenge to the indictment after telling the district court that, notwithstanding his filed objection, the indictment should not be dismissed because jury instructions could cure the alleged omission. See pp. 16-17, infra. That suggests that even in the Ninth Circuit, the purported omission in petitioner’s case would be reviewed for harmlessness. And at all events, the Ninth Circuit itself may choose to reconsider its outlier position following this Court’s recent clarification of the structural-error category in Greer, which postdates the Ninth Circuit decisions on which petitioner relies. Cf. Qazi, 975 F.3d at 992 & n.1 (recognizing that “other circuits * * * disagree with [the Ninth Circuit’s] view”). No need exists for intervention by this Court to address the question presented at this time.

b. As petitioner notes (Pet. i, 3, 6), this Court granted a writ of certiorari in United States v. Resendiz-Ponce, 549 U.S. 102 (2007), to decide “whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error,” id. at 103, but ultimately did not find it necessary to reach that issue, id. at 104. But when the Court granted certiorari in Resendiz-Ponce, the Third Circuit, in addition to the Ninth Circuit, believed that indictment omissions constituted structural error. See United States v. Spinner, 180 F.3d 514, 515-516 (3d

Cir. 1999). The Third Circuit has since repudiated that view. See Stevenson, 832 F.3d at 427 n.11. And in the 20 years since granting review in Resendiz-Ponce, this Court has denied petitions for writs of certiorari in numerous cases raising similar issues. See p. 6 n.1, supra.

3. At all events, petitioner's case would be an unsuitable vehicle for considering the question presented.

a. First, petitioner waived the claim that his indictment was defective for omitting an element of the offense. In the district court, petitioner moved to dismiss his indictment on the ground that it "fail[ed] to include the essential element of a subjective understanding of the threatening nature of the alleged statements." C.A. ROA 184. But at the motions hearing a month later, petitioner's counsel told the district court that "both the parties agree the case is not to be dismissed prior to trial" because "there would be certain jury instructions * * * , specifically a subjective intent requirement." Id. at 529. Accepting that position, the district court stated that "the instructions will be carefully crafted" and declined to dismiss the indictment. Id. at 533.

On appeal, however, petitioner argued that "the district court erred in declining to dismiss the indictment for failure to allege the requisite mens rea." Pet. App. 8a. But in the district court, petitioner "intentional[ly] relinquish[ed] or abandon[ed]" the "known right" to have his allegedly defective indictment

dismissed. United States v. Olano, 507 U.S. 725, 733 (1993) (citation omitted). Though petitioner initially sought dismissal, petitioner then agreed that the indictment should not be dismissed and that jury instructions would cure the error or at least presumably remedy any prejudice resulting from it.

The court of appeals did not reach the government's waiver arguments because it alternatively found that the claimed indictment omission was harmless. See Pet. App. 8a. But petitioner's waiver remains an alternative ground on which this Court could affirm the judgment below, see Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970) (prevailing party may rely on any ground to support the judgment, even if not considered below), thus obviating any need for this Court to reach the harmless-error question presented by the petition.

b. Second, this case may suffer from the same vehicle impediment that forestalled the Court's review in Resendiz-Ponce. There, even though the government had "expressly declined" to seek review of the court of appeals' threshold determination that the indictment failed to allege an offense element, the Court sua sponte ordered briefing on that issue. Resendiz-Ponce, 549 U.S. at 103-104. And because "it is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case," id. at 104 (brackets and citation omitted), it decided the case solely on the ground that the indictment was not, in fact, deficient, see ibid.

Something similar could happen here. Petitioner's indictment is sufficient. See Gov't C.A. Br. 53-55. A person violates 18 U.S.C. 875(c) by "transmit[ting] in interstate or foreign commerce any communication containing * * * any threat to injure the person of another." Although the statute omits any mention of criminal intent, it still "include[s] broadly applicable scienter requirements." Elonis v. United States, 575 U.S. 723, 734 (2015) (citation omitted). Those requirements are satisfied if the defendant transmits the communication "for the purpose of issuing a threat," "with knowledge that the communication will be viewed as a threat," id. at 740, or by "consciously disregard[ing] a substantial risk that his communications would be viewed as threatening violence," Counterman v. Colorado, 600 U.S. 66, 69 (2023). But while petitioner's indictment did not in haec verba accuse him of having those mental states, that does not mean that the indictment was deficient.

This Court has indicated that an "implicit" allegation of an element of a crime can be sufficient. Resendiz-Ponce, 549 U.S. at 108 n.4. And here, the indictment alleged that petitioner "did knowingly and willfully transmit * * * a communication containing a threat to injure the person of another, to wit, a telephone call to the Office of United States Senator Ted Cruz * * * threatening to injure and kill Senator Ted Cruz." Indictment 2; see C.A. ROA 45-46. The allegation that petitioner placed "a telephone call

to” Senator Cruz, “threatening to injure and kill” him, Indictment 1-2, implies that petitioner acted with the requisite mens rea.

It is difficult to imagine how someone who calls another person and threatens to kill him does so with a “purpose” other than “issuing a threat,” Elonis, 575 U.S. at 740, much less acts with a mens rea less than recklessness. And several lower court decisions have upheld the sufficiency of an indictment charging a Section 875(c) violation even where the indictment “did not explicitly accuse [the defendant] of intending to send a threat, or allege that [the defendant] knew the [statements] would be viewed as threats,” where the indictment contained “[a]n implicit allegation” of the intent requirement by alleging facts that “denote purpose, knowledge, and intent.” United States v. Khan, 937 F.3d 1042, 1049-1050 (7th Cir. 2019); accord, e.g., United States v. Miah, 120 F.4th 99, 107 (3d Cir. 2024); United States v. Howard, 947 F.3d 936, 944 (6th Cir. 2020) (applying plain-error review); United States v. Killingsworth, No. 21-3028, 2022 WL 294083, at *2-4 (6th Cir. Feb. 1, 2022) (citing Howard, supra, in the context of de novo review). The same logic would apply here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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