

No. 25-7259

IN THE
SUPREME COURT OF THE UNITED STATES

ISAAC AMBE NFORMANGUM,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

The courts of appeals are split on whether the failure of an indictment to allege an essential element of a criminal offense constitutes structural error, or is instead subject to harmless error review. The government contends that the circuit conflict does not “warrant this Court’s review” (BIO 12-16), that this case is a poor vehicle (*id.* 16-19), and that the decision below was correct (*id.* at 7-12). All three of these assertions are wrong.

I. The circuits are split.

The government does not deny that there is a conflict in the court of appeals—it simply maintains that no conflict “would warrant this Court’s review.” BIO 12-16. That is mistaken. As we showed in our certiorari petition, Pet. 6-8, there is an entrenched split on the question presented: The Ninth and Fourth Circuits are on one side, while most of the remaining circuits are on the other side.

As the government acknowledges, BIO 14, the Ninth Circuit holds that “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.” *United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999). The Ninth Circuit knows that other circuits disagree, but it has determined to stick with its view nevertheless. “Although *Du Bo*’s automatic-dismissal rule conflicts with the harmless-error standard adopted by several other

circuits, it remains the law in this circuit.” *United States v. Qazi*, 975 F.3d 989, 992 (9th Cir. 2020). The government speculates (BIO 15) that the Ninth Circuit might reconsider its view in light of *Greer v. United States*, 593 U.S. 503 (2021), but *Greer* did not address this issue. As explained below, *Greer* concerned plain error, a very different question. *See infra* at 8.

The Fourth Circuit, like the Ninth, holds that “[t]he absence of prejudice to the defendant in a traditional sense does not cure a substantive, jurisdictional defect in an indictment.” *United States v. Hooker*, 841 F.2d 1225, 1232 (4th Cir. 1988) (en banc). *See also United States v. Spruill*, 118 F.3d 221, 227 (4th Cir. 1997) (“It is well established, however, that failure to recite an essential element of the offense in the indictment is not amenable to harmless error review.”). The government erroneously argues (BIO 14) that the Fourth Circuit held otherwise in *United States v. Higgs*, 353 F.3d 281, 306 (4th Cir. 2003), and *United States v. Brown*, 136 F.4th 87, 95-96 (4th Cir. 2025). But *Higgs* and *Brown* do not even mention *Hooker* or *Spruill*, and they could hardly have overruled *Hooker*, which was an en banc decision. The passage in *Higgs* on which the government relies, moreover, is *dicta*, because the indictment in *Higgs* was not defective, so there was not any error in the first place. 353 F.3d at 301-04.

The circuits are thus still split, as they were when the Court granted certiorari on this issue in *United States v. Resendiz-Ponce*, 549 U.S. 102, 103 (2007). As

Justice Scalia observed then, “the full Court will undoubtedly have to speak to the point.” *Id.* at 117 (2007) (Scalia, J., dissenting). That remains true today.

II. This case is a good vehicle.

This case is a clean vehicle to address the question presented, and none of the government’s contrary arguments raise obstacles to the Court’s review.

1. The government errs in suggesting that Isaac Nformangum waived his claim in the District Court. *Id.* at 16-17. The District Court certainly did not think so. When Nformangum moved to dismiss the indictment for failing to allege the required *mens rea*, C.A. ROA 184, the District Court read the motion, *id.* at 529, heard argument from counsel on both sides, *id.* at 530-33, and denied the motion on the merits, *id.* at 533. The government mistakenly interprets a single sentence spoken by defense counsel—“both parties agree the case is not to be dismissed prior to trial; that there would be certain jury instructions which are necessary, specifically a subjective intent requirement,” *id.* at 529—as a waiver. But the record shows that neither the District Court, the prosecutor, nor defense counsel understood it that way. Immediately after defense counsel uttered this sentence, the two lawyers argued the merits of the motion to dismiss, and the District Court decided it rather than deeming it waived. *Id.* at 529-33. This was hardly “the intentional relinquishment or abandonment of a known right” that is required for a waiver. *United States v. Olano*,

507 U.S. 725, 733 (1993) (internal quotation marks omitted). The claim was not waived.

In any event, the government’s preservation argument is beside the point. Whatever its merits, the Court of Appeals squarely reached and resolved the question presented, as the government acknowledges (BIO 17). This Court’s review is available for questions “passed upon below,” *United States v. Williams*, 504 U.S. 36, 41 (1992) (citation omitted), and the Court of Appeals here plainly passed upon the question. There is accordingly no obstacle to this Court’s review. The District Court decided the question presented on the merits. The Court of Appeals did too. Pet. App.8a-12a. This Court may do so as well.

2. The government also errs in arguing that the indictment was not defective. BIO 17-19. It *was* defective, for the reason stated by the Court of Appeals below. Pet. App. 8a-10a. A violation of 18 U.S.C. § 875(c) requires at least the subjective mental state of recklessness, “that [the] speaker is aware that others could regard his statements at threatening violence and delivers them anyway.” *Counterman v. Colorado*, 600 U.S. 66, 79 (2023) (internal quotations omitted); Pet. App.9a-10a (citing *Elonis v. United States*, 575 U.S. 723, 740 (2015), and *Counterman*, 600 U.S. at 74). But the indictment in this case alleged no subjective mental state concerning how the message would be regarded. Pet. App.10a. It merely alleged that Nformangum “knowingly and willfully transmitted” the message. Pet. App.9a-10a.

The Court of Appeals correctly found that “[b]ecause the indictment does not allege Nformangum’s subjective state of mind, it fails to state an offense.” Pet. App.10a.

The government mistakenly claims that recklessness is implicit in the bare allegation of a threat to “injure and kill.” BIO 18-19. The government posits that “[i]t 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.’” BIO 19. In fact, it is not difficult at all. *Elonis* explains that it is not a crime to send “an anonymous letter that says ‘I’m going to kill you,’” if the “author believes (wrongly) that his message will be taken as a joke.” 575 U.S. at 733. *Counterman* offers a simpler example: One person says to another, “I am going to kill you for showing up late.” 600 U.S. at 74. Or consider the non-criminal and constitutionally protected speech from *Watts v. United States*, 394 U.S. 705 (1969), where an 18-year-old man protesting the Vietnam War exclaimed “if they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” *Id.* at 706, 708. From intended jokes gone wrong to political hyperbole, there are many ways a person might express that they will “injure and kill” without possessing criminal *mens rea*. The complete absence of a subjective mental state concerning how the message would be received rendered the indictment defective.

3. This case is therefore a good vehicle for addressing the question presented. It is a much better vehicle than previous cases in which petitioners have tried to raise

the issue. (The government lists these cases at BIO 6-7 n.1). In *Leonard v. United States*, 142 S. Ct. 2709 (2022) (No. 21-1082), the defect in the original indictment was corrected by a superseding indictment. In *In re Allen*, 590 U.S. 941 (2020) (No. 18-9554), the petitioner sought an original writ of habeas corpus in this Court, while *Robinson v. United States*, 589 U.S. 1209 (2020) (No. 19-5535), was a successive motion under 28 U.S.C. § 2255, so both cases involved procedural obstacles to review of the merits. (The remaining cases listed by the government are so old that the certiorari petitions are unavailable online.) Petitioner's case, by contrast, is a clean vehicle for addressing the question presented.

III. The decision below is wrong.

The government errs in defending the decision below. BIO 7-12.

The government's first mistake is its assumption that because the omission of an offense element from jury instructions is subject to harmless error review, *Neder v. United States*, 527 U.S. 1, 8-9 (1999), the same must be true when an offense element is omitted from an indictment. BIO 8. But this is a terrible analogy. When a trial jury is given faulty instructions, the effect of the error can be evaluated simply by assessing the evidence presented at trial and considering whether a properly instructed jury would have reached the same verdict. *Id.* at 16-19. This review is possible because the trial record is a public document equally accessible to the defense and the government. Grand jury proceedings, by contrast, are secret. FED.

R. CRIM. P. 6(e)(2). “[T]he proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.” *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 218 (1979). The defense has no way to participate in any assessment of prejudice. Moreover, this Court has repeatedly held that judicial inquiry into the “evidence supporting a grand jury’s finding of probable cause will not be heard.” *Kaley v. United States*, 571 U.S. 320, 328 (2014) (internal quotation marks omitted). An appellate court thus cannot assess prejudice either.¹

The government also errs in relying on *United States v. Mechanik*, 475 U.S. 66 (1986), for the proposition that a guilty verdict at trial retroactively demonstrates that the grand jury would have found probable cause. BIO 11-12. *Mechanik* concerned a procedural error, an irregularity in *how* the grand jury deliberated. (Two witnesses testified simultaneously, in violation of FED. R. CRIM. P. 6(d). 475 U.S. at 68.) Our case, by contrast, involves the wholesale omission of an element the grand jury never considered at all. The error was a defect in *what* the grand jury was asked

¹ The government quotes (BIO 12) a passage in the opinion below that appears to be erroneous: “Nformangum concedes that the grand jury had access to ‘his statement under custodial interrogation.’ In that statement, he specifically told agents that his message to Senator Cruz ‘was reckless’ and that ‘[he] . . . expected some action to be taken by the government.’ Nformangum admitted to acting with the *mens rea* *Counterman* permits—recklessness.” Pet. App.11a-12a. We have thoroughly searched the record and briefing in the Fifth Circuit for such a concession. It does not appear to exist. The Fifth Circuit may have been referring to Nformangum’s stipulation at trial that he made the statement at custodial interrogation. C.A. ROA 395. But a stipulation at trial is irrelevant to what the grand jury considered. To this day, like most individuals charged with felonies, Nformangum does not know what evidence, if any, the grand jury considered when it indicted him.

to find, not in how it went about finding it. In *Mechanik*, one could be confident that the grand jury would have reached the same result without the error. In our case, there is no way to know.

The government is equally unjustified in relying (BIO 9-11) on *United States v. Cotton*, 535 U.S. 625 (2002), and *Greer v. United States*, 593 U.S. 503 (2021). Neither case involved our issue. *Cotton* held only that it was not plain error under FED. R. CRIM. P. 52(b) for an indictment to omit the quantity of drugs the defendant possessed, a fact that was not even an element of the offense but merely a sentencing enhancement. 535 U.S. at 632-33. *Greer* is also afield. It addressed whether it was plain error for jury instructions to omit a requirement that the defendant knew he was a felon, in the absence of any evidence that he did not know. 593 U.S. at 512-13. And if it was structural error to omit the same requirement from a plea colloquy. *Id.* at 513-14. It said nothing about failure to allege an essential element in an indictment. Neither of these cases bears on whether—applying *de novo* review rather than plain error review—a conviction must be reversed where an indictment omits an element of the offense.

Nor does this Court’s finding that the unpreserved error in *Cotton* failed under the fourth prong of plain error review “cut[] against” Nformangum’s position that the error here was structural. *Cf.* BIO 10 (citation omitted). The government suggests that if the error was structural, the Court would have found that it affected the

fairness, integrity, or public reputation of judicial proceedings under prong four of plain error review. *Id.* But the government has taken the position, including in this Court, that structural errors can fail plain error review, including the fourth prong of the test. *See, e.g.,* Br. in Opp. at 10-17, *Salaam v. United States*, No. 24-5947 (Feb. 7, 2025). Indeed, the government has cited *Cotton* as an example of a case where the Court “applied the fourth plain-error requirement to deny appellate relief irrespective of the potentially structural character of the claimed error.” *Id.* at 15. Thus, the fact that the Court found no plain error in *Cotton* does nothing to resolve the question presented in this case.

The traditional rule is that where an indictment is defective for omitting an element of the offense, a conviction must be reversed. “To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.” *Russell v. United States*, 369 U.S. 749, 770 (1962). *See also Stirone v. United States*, 361 U.S. 212, 217 (1960) (observing that the omission from the indictment of an element of the offense “is far too serious to be . . . dismissed as harmless error”).

The government urges the Court to disregard these older cases (BIO 12 n.2) on the theory that they were decided before application of harmless error review to constitutional issues was supposedly “ma[de] clear” in *Chapman v. California*, 386 U.S. 18 (1967). But harmless error review—even for constitutional errors—existed long before *Chapman*. See, e.g., *Motes v. United States*, 178 U.S. 458, 476 (1900) (“[T]he evidence furnished by Taylor’s statement was not so materially to the prejudice of Columbus W. Motes as to justify a reversal of the judgment.”); *Snyder v. Massachusetts*, 291 U.S. 97, 118 (1934) (“The verdict is not upset for such a cause, if there was no substantial harm.”). In fact, *Russell* quoted and considered the harmless error standard directly: “Any error . . . which does not affect substantial rights shall be disregarded.” 369 U.S. at 762 (quoting FED. R. CRIM. P. 52(a)). It still vacated the convictions without analysis of harm because any other rule would displace the grand jury’s constitutional role with a court’s “guess” of what “could” have happened. *Id.* at 770. *Stirone* did the same. 361 U.S. at 217 (“neither this nor any other court can know”). See also *Vazquez v. Hillery*, 474 U.S. 254, 264 (1986) (applying structural error to discrimination in the grand jury selection process: “[W]e simply cannot know that the need to indict would have been assessed in the same way by a grand jury properly constituted.”).

The government also misunderstands *Russell*’s rationale when it characterizes *Russell* as a case merely about notice. BIO 12 n.2. *Russell* does mention the

importance of giving the defense adequate notice, 369 U.S. at 763-74, but it also emphasizes—entirely apart from the issue of notice—the importance of having the grand jury itself, rather than a reviewing court, find probable cause as to every element of the offense charged. *Id.* at 770-71. *Stirone* confirms this point. In *Stirone*, the defendant had complete notice of the charge, yet the Court still reversed his conviction (without inquiring into harm) because the indictment failed to include an element of the offense. 361 U.S. at 215-19.

In short, Justice Scalia got it right in *Resendiz-Ponce*. 549 U.S. at 117 (Scalia, J., dissenting) (explaining that if the Court had decided the issue on the merits, “I would find the error to be structural”).

CONCLUSION

The petition for writ of certiorari should be granted.

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