Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States*

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oral argument we ordered the parties to file supplemental briefs directed to the question whether respondent's indictment was in fact defective. We conclude that it was not and therefore reverse without reaching the harmless-error issue.

I

Respondent was deported twice, once in 1988 and again in 2002, before his attempted reentry on June 1, 2003. On that day, respondent walked up to a port of entry and displayed a photo identification of his cousin to the border agent. Respondent told the agent that he was a legal resident and that he was traveling to Calexico, California. Because he did not resemble his cousin, respondent was questioned, taken into custody, and ultimately charged with a violation of 8 U. S. C. §1326(a).[1] The indictment alleged:

"On or about June 1, 2003, JUAN RESENDIZ

he has a right to have a grand jury consider whether to charge that specific overt act.

Respondent nonetheless maintains that the indictment would have been sufficient only if it had alleged any of three overt acts performed during his attempted reentry: that he walked into an inspection area; that he presented a misleading identification card; or that he lied to the inspector. See Supplemental Brief for Respondent 7. Individually and cumulatively, those acts tend to prove the charged attempt—but none was essential to the finding of guilt in this case. All three acts were rather part of a single course of conduct culminating in the charged "attempt." As Justice Holmes explained in *Swift & Co.* v. *United States*, 196 U. S. 375, 396 (1905), "[t]he unity of the plan embraces all the parts."[5]

Respondent is of course correct that while an indictment parroting the language of a federal criminal statute is often sufficient, there are crimes that must be charged with greater specificity. See *Hamling*, 418 U. S., at 117. A clear example is the statute making it a crime for a witness summoned before a congressional committee to refuse to answer any question "pertinent to the question under inquiry." 2 U. S. C. §192. As we explained at length in our opinion in *Russell* v. *United States*

quently uncertain but invariably "central to every prosecution under the statute." *Id.*, at 764. Both to provide fair notice to defendants and to assure that any conviction would arise out of the theory of guilt presented to the grand jury, we held that indictments under §192 must do more than restate the language of the statute.

Our reasoning in *Russell* suggests that there was no infirmity in the present indictment. First, unlike the statute at issue in *Russell*, guilt under 8 U. S. C. §1326(a) does not "depen[d] so crucially upon such a specific identification of fact." 369 U. S., at 764. Second, before explaining the special need for particularity in charges brought under 2 U. S. C. §192, Justice Stewart noted that, in 1872, Congress had enacted a statute reflecting "the drift of the law away from the rules of technical and formalized pleading which had characterized an earlier era."

cise, and definite written statement of the essential facts constituting the offense charged."[7]

Because we are satisfied that respondent's indictment fully complied with that Rule and did not deprive him of any significant protection that the constitutional guaran-

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

[January 9, 2007]

JUSTICE SCALIA, dissenting.

It is well established that an indictment must allege all the elements of the charged crime. *Almendarez-Torres* v. *United States*, 523 U. S. 224, 228 (1998); *United States* v. *Cook*, 17 Wall. 168, 174 (1872). As the Court acknowledges, it is likewise well established that "attempt" contains two substantive elements: the *intent* to commit the underlying crime, and the undertaking of *some action* toward commission of that crime. See *ante*, at 4 (citing 2 W. LaFave, Substantive Criminal Law §11.2(a), p. 205 (2d ed. 2003), E. Coke, Third Institute 5 (6th ed. 1680), and Keedy, Criminal Attempts at Common Law, 102 U. Pa. L. Rev. 464, 468 (1954)). See also *Braxton* v. *United States*, 500 U. S. 344, 349 (1991). It should follow, then, that when the Government indicts for attempt to commit a crime, it must allege both that the defendant had the intent to commit the crime, *and* that he took some action toward its commission. Any rule to the contrary would be an exception to the standard practice.

The Court gives two reasons for its special "attempt" exception. First, it says that in "common parlance" the word attempt "connote[s]," and therefore "impli[es]," both the intent and overt-act elements. *Ante*, at 5. This strikes me as certainly irrelevant, and probably incorrect to boot. It is irrelevant because, as I have just discussed, we have

always required the elements of a crime to be explicitly set forth in the indictment, *whether or not* they are fairly called to mind by the mere name of the crime. Burglary, for example, connotes in common parlance the entry of a building with felonious intent, yet we require those elements to be set forth. Our precedents make clear that the indictment must "fully, directly, and *expressly*, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." *United States* v. *Carll*, 105 U. S. 611, 612 (1882) (emphasis added). And the Court's argument is probably incorrect because I doubt that the common meaning of the word "attempt" conveys with precision what conviction of that crime requires. A reasonable grand juror, relying on nothing but that term, might well believe that it connotes intent plus any minor action toward the commission of the crime, rather than the "'substantial step'" that the Court acknowledges is required, *ante*, at 5.

Besides appealing to "common parlance," the Court relies on the fact that attempt, "as used in the law for centuries . . . encompasses both the overt act and intent elements." *Ante*, at 6. Once again, this argument seems to me certainly irrelevant and probably incorrect. Many common-law crimes have retained relatively static elements throughout history, burglary among them; that has never been thought to excuse the specification of those elements in the indictment. And the argument is probably incorrect, because the definition of attempt has not been nearly as consistent as the Court suggests. Nearly a century ago, a leading criminal-law treatise pointed out that "'attempt' is a term peculiarly indefinite" with "no prescribed legal meaning." 1 F. Wharton, Criminal Law §229, p. 298 (11th ed. 1912). Ev10.9591 0 0 10.98 215.nTBTEdeT c80 0 10.98 30lrea

§11.4(a), at 218–219. Among the variations are: "'an act toward the commission of' some

> "The definition of obscenity . . . is not a question of fact, but one of law; the word 'obscene,' . . . is not merely a generic or descriptive term, but a legal term of art. The legal definition of obscenity does not change with each indictment; it is a term sufficiently definite in legal meaning to give a defendant notice of the charge against him. Since the various component parts of the constitutional definition of obscenity need not be alleged in the indictment in order to establish its sufficiency, the indictment in this case was sufficient to adequately inform petitioners of the charges against them." *Id.*, at 118–119 (citations omitted).

If these sentences established the broad principle the Court asserts, they would apply not only to the elements of attempt, but to the elements of all crimes, effecting a revolution in our jurisprudence regarding the requirements of an indictment. In fact, however, *Hamling* is easily distinguishable. "Obscenity" is, to be sure, one of the elements of the crime of publishing obscenity. But the "various component parts of the constitutional definition of obscenity" are no more *elements* of the crime of publishing obscenity than the various component parts of the definition of "building" are elements of the crime of bures7s6Se8e m.955 341.4614 Tm

other, has anything to do with the purposes, and hence the substance, of the indictment requirement. Conspiracy is also, in most cases, a parasitic crime, and no one contends

whether a constitutionally deficient indictment is structural error, as the Ninth Circuit held, or rather is amenable to harmless-error analysis. I cannot vote to affirm or to reverse the judgment without resolving that issue. Since the full Court will undoubtedly have to speak to the point on another day (it dodged the bullet today by inviting and deciding a *different* constitutional issue—albeit, to be fair, a narrower one) there is little use in my setting forth my views in detail. It should come as no surprise, given my opinions in *United States* v. *Gonzalez-Lopez*, 548 U. S. ___ (2006), and *Neder* v. *United States*, 527 U. S. 1,