No. 20-1129

In The

Supreme Court of the United States

SCOTT PHILLIP FLYNN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

IAN M. COMISKY
Counsel of Record
PATRICK J. EGAN
FOX ROTHSCHILD LLP
2000 Market Street, 20th Fl.
Philadelphia, PA 19103
(215) 299-2000
icomisky@foxrothschild.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

The government's opposition only serves to demonstrate why this Court's review is necessary.

Its attempted defense of the existing standards for advising a defendant of the nature of the charges during a guilty plea underscores the conflicting circuit court applications.

The government urges this Court to apply *stare decisis* to foreclose any review of the court-created *Klein* Conspiracy. However, *stare decisis* cannot apply where this Court has never addressed the constitutionality of an interpretation of a statute that creates a common law offense. Moreover, the government contends that this Court should ignore its own holding in *Marinello v. United States*, 138 S. Ct. 1101 (2018), imposing constitutional limits on a similar provision, 26 U.S.C. § 7212(a), despite court holdings and government guidance acknowledging that the *Klein* Conspiracy and § 7212(a) employ similar language and are closely related. Since a defendant cannot plead guilty to an unconstitutional offense, this case is an ideal vehicle to review this issue.

Finally, as to restitution, the government mischaracterizes the plea agreement's advisory guideline treatment to argue that there was no dispute as to restitution. With no agreement as to the amount of restitution, this case represents an excellent vehicle for the Court to determine the extent of the constitutional guarantee of a right to a jury trial.

ARGUMENT

1. The government's defense of the Circuit Courts' varied rulings on advising a defendant of the nature of the offense only reinforces the Circuit Court conflicts. The government's argument spotlights the need for a uniform, objective standard for accepting guilty pleas to ensure defendants due process.[1] It is not too much to ask a district court before sentencing an individual to 87 months in prison to review the elements of the criminal offense to which he is pleading guilty.

a. The government purports to rely upon *Bradshaw v. Stumpf,* 545 U.S. 173, 183 (2005). But there, counsel represented that they had advised the defendant of the elements, and the defendant concurred. Indeed, the Court explicitly stated that a plea would be invalid if the elements of the offense had not been reviewed.

b. The government next argues that the reading of a portion of the charging document was sufficient to reprise the elements of the offense. Even a cursory review demonstrates that this is inaccurate. The Eighth Circuit did not rely on this argument but instead held that that under its jurisprudence, there

---

[1] The government erroneously contends that Petitioner failed to make any due process argument but only argued Rule 11 requirements. This Court "ha[s] long held that a plea does not qualify as intelligent unless a criminal defendant first receives 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Bousley v. United States*, 523 U.S. 614, 618 (1998) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)).

was no requirement to review of the elements at all. App. 6a.

c. The government's opposition cites the same cases as the Petitioner but argues that the recital of general standards should prevail over their specific holdings. The government argues that all the circuits apply some form of a totality-of-the-circumstances test. While most of the cited decisions nominally refer to such a standard, they apply it in markedly different ways, creating both inter- and intra-circuit conflicts.

The Ninth Circuit's decision in *United States v. Kamer*, 781 F.2d 1380, 1384 (9th Cir. 1986), does state that the sufficiency of a particular colloquy "will vary from case to case, depending on the particular facts of each situation." But while the government stops there, the Ninth Circuit did not, holding, "[i]t is incumbent upon a district judge accepting a plea to make the minor investment of time and effort necessary to set forth the meaning of the charges and to demonstrate on the record that the defendant understands." *Id.* at 1385.

The same holds true in the Second, Seventh, and Tenth Circuits. *See United States v. Lloyd*, 901 F.3d 111, 121 (2d Cir. 2018) (holding that "[r]eading the elements of a crime to a defendant is not a difficult task, but it is essential"); *United States v. Fernandez,* 205 F.3d 1020, 1025 (7th Cir. 2000) (requiring that a colloquy "identify the elements of the charged offense followed with an inquiry by the court confirming the defendant's understanding of the crime");[2] *United*

[2] The *Fernandez* court also noted, "We have repeatedly held that simply asking a defendant if he has read and discussed the indictment with his attorney is insufficient to determine if he

States v. Carillo, 860 F.3d 1293, 1302 (10th Cir. 2017) (generalizing that, "[a]t a minimum, Rule 11(b)(1)(G) requires that a district court ensure the defendant understands the 'essential' elements of the offense," but then holding "a district court must identify the elements of the charged crime on the record"). None of these circuits would have approved Petitioner's plea in a complex *Klein* Conspiracy where the circuits disagree as to the elements.[3]

Other circuits have cited the same totality-of-the-circumstances analysis yet held that no recitation of the elements ever need take place. *See United States v. Presendieu*, 880 F.3d 1228, 1238 (11th Cir. 2018); *In re Sealed Case*, 283 F.3d 349, 352 (D.C. Cir. 2002); *United States v. Cefaratti*, 221 F.3d 502, 508 (3d Cir. 2000). The government attempts to limit these holdings, arguing these circuits might require

---

truly understands the nature of the charge against him." *Id.*; *see also United States v. Pena,* 314 F.3d 1152, 1156 (9th Cir. 2003) (same). Those holdings directly conflict with other circuits. *See United States v. Liboro,* 10 F.3d 861, 864 (D.C. Cir. 1993) (finding defendant adequately informed of nature of charges based on advice of counsel); *United States v. Johnson*, 715 F.3d 1094, 1103 (8th Cir. 2013) (same); *United States v. Ghanjanasak*, 789 F. App'x 368, 370 (4th Cir. 2019) (same).

[3] The government's attempt to minimize the circuit differences as to the *mens rea* element should be rejected. The object of the conspiracy here was the evasion of tax. Citing *United States v. Coplan,* 603 F.3d 46 (2d Cir. 2012), *cert. denied,* 571 U.S. 819 (2013), Petitioner correctly contends that, by alleging evasion was the sole object of the *Klein Conspiracy,* the government was required to establish the elements of this offense. *See also United States v. Foote,* 542 F.3d 1088, 1098 (5th Cir. 2008) (collecting authorities).

elements review. But the government's assertion is only conjecture; it cites no authority in which any of those circuits that would require an explanation of the elements of the offense as part of the colloquy.

The government takes issue with Petitioner's assertion that the First and Eighth Circuits have created a bright-line rule that reading the indictment suffices to advise the defendant of the nature of the offense. But it was the Eighth Circuit—not Petitioner—that recited a bright-line rule, holding that it is "the well-settled law in this circuit" that reading the indictment[4] suffices to inform the defendant of the nature of the offense. App. 6a.

d. The government's opposition concludes that each circuit knows a valid plea when it sees one. Opp. 11-14. But a variant approach between and within the circuits should not suffice in a criminal justice system where over 90% of the defendants plead guilty. This case presents an excellent opportunity to review this area for the first time in over fifty years.

e. The government is thus left to contend that this case would be a poor vehicle for the Court to take up the circuit split, because the district court found that "the motion was brought for purposes of delay and that granting it would 'substantially prejudice' the government." Opp. 15. But the Eighth Circuit

---

[4] The government twice cites *Bousley* for the proposition that a mere receipt of the indictment gives rise to a presumption that the defendant was properly informed of the nature of the offense. *Bousley* does not stand for the principle—in fact, *Bousley* rejects that principle and instead cites authority for this proposition only where it was clear that the elements of the offense had been reviewed. 523 U.S. at 619-20.

explicitly declined to reach this issue. App. 10a. For this reason and because there is no evidence in the record regarding prejudice,[5] the government cannot employ this alleged issue to avoid review by this Court. *See Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 481 (1976) (where court of appeals "did not reach the issue nor express any opinion on [it]," it is "appropriate to remand the case [on that issue] rather than deal with the merits of that question in this Court").

2. The government provides no convincing basis to preclude this Court's review of the *Klein* Conspiracy, especially considering the limitations imposed by *Marinello*. The government relies on the purported application of *stare decisis* but ignores plain language to perpetuate the court-created crime.

a. The government contends that the doctrine of *stare decisis* should lead this Court to deny the petition asserting that, in 1948, Congress manifested its intent to incorporate this Court's interpretations of § 371 from *Haas v. Henkel,* 216 U.S. 462 (1910), and *Hammerschmidt v. United States*, 265 U.S. 182 (1924), by passing an act recodifying its predecessor statute. The government's reliance on the legislative re-enactment doctrine is without merit.

---

[5] There was no evidence in the record demonstrating prejudice, just conjecture. App. 34a. Petitioner cited substantial authority that merely preparing for trial anew does not establish prejudice. *United States v. Collyard*, 2013 WL 2318141, *12 (D. Minn. May 28, 2013) (having to prepare for trial upon the withdrawal of a plea is not prejudicial); *see also United States v. Hall*, 2016 WL 1175207, *7 (N.D. Iowa Mar. 24, 2016) (similar).

When Congress passed the Act of June 24, 1948, ch. 645, 62 Stat. 701, it was a broad recodification of federal criminal statutes into Title 18. *See, e.g.*, 94 Cong. Rec. A4543 (1948) (purpose of the act is simply to codify federal criminal law in one place); *see also Morissette v. United States*, 342 U.S. 246, 266-67 (1952) ("We find no other purpose in the 1948 re-enactment than to collect from scattered sources crimes so kindred as to belong in one category."). The Congressional Record contains no discussion of *Haas* or *Hammerschmidt*, or any other interpretation of § 371 prior to the Act's passage. Thus, the legislative re-enactment doctrine cannot apply. *See Brown v. Gardner*, 513 U.S. 115, 120-21 (1994) (where Congressional Record makes no reference to, "and there is no other evidence to suggest that Congress was even aware of the [prior] interpretive position," re-enactment has no significance) (citing *United States v. Calamaro*, 354 U.S. 351, 359 (1957)).

The government's reliance on the doctrine of *stare decisis* is misplaced. This Court has never ruled upon the validity of the *Klein* Conspiracy. The government's argument that the century-old holdings in *Haas* and *Hammerschmidt* are dispositive misses the point. While the *Klein* Conspiracy doctrine may be the progeny of those decisions, *Coplan*, 703 F.3d at 60, it was a judicially created expansion that has never been sanctioned by this Court.[6] Both the Eighth Circuit below and the Second Circuit in *Coplan* have

[6] As discussed in the amicus brief, the *Klein* Conspiracy is based on an extension of dicta from *Haas* and *Hammerschmidt* rather than their holdings. Amicus Br. 6-7.

explicitly stated that the *Klein* Conspiracy's viability should be directed to this Court's "higher authority." App. 9a; *Coplan*, 703 F.3d at 62. "[*S*]*tare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020); *see also Franchise Tax Bd. of Calif. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019) ("*[S]tare decisis* is not an inexorable command, and we have held that it is at its weakest when we interpret the Constitution."); *Gamble v. United States,* 139 S. Ct. 1960, 1986 (2010) (Thomas, J., concurring).

Nowhere does the government dispute that the *Klein* Conspiracy is a court-created crime. *See also Coplan*, 703 F.3d at 61 ("The Government thus appears implicitly to concede that the *Klein* conspiracy is a common law crime, created by the courts rather than by Congress."). Regardless of which circuit's differing statements of the elements of the crime[7] are applied, those elements are not apparent from the face of § 371.

The varying elements of the offense defined by different circuits further exemplify the unworkability of the doctrine, which is a "relevant consideration in the *stare decisis* calculus." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2481 (2018). *Stare decisis* should not compel this Court to

---

[7] The government echoes the Eighth Circuit's questionable conclusion that the differing elements of a *Klein* Conspiracy among the circuits are merely a variance in how to subdivide the elements. That argument underscores the critical problem with the common law crime, since it is Congress that is charged with defining the elements, not the courts. *See, e.g.*, *United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997).

"methodically ignor[e]" the *Klein* Conspiracy's underlying flaws. *Ramos*, 140 S. Ct. at 1405.

b. Whatever the prior import of the *Klein* Conspiracy, this Court's decision in *Marinello* requires review of the prior law. The government, however, contends that *Marinello* has no application in the context of a *Klein* Conspiracy because the words of the respective offenses differ. The government, like the Eighth Circuit below, draws a distinction between the "lawful government function" used by courts under *Klein* and the "due administration" at issue in *Marinello*. The government's argument ignores that the language of the statutes is definitionally identical. There is no fundamental difference between impeding, impairing, obstructing, and defeating the Internal Revenue Service's "lawful government function," as charged here, and doing the same with regard to the Service's "due administration of the Code." The government further ignores the fact that at least one circuit has held that *Marinello*'s nexus requirement applies beyond the "due administration" language of § 7212(a). *United States v. Sutherland*, 921 F.3d 421 (4th Cir. 2019) (applying the *Marinello* nexus requirement to 18 U.S.C. § 1512(c)(2)).

The government contends, citing the Fifth Circuit, that *Marinello* "lives in a separate vein of law" than § 371. Opp. 22. However, both the government itself and courts have emphasized that § 371 and § 7212(a) are closely related. Pet. 27-28. The government's contention here should be rejected for numerous reasons, including its own manual for prosecutors treating them as identical but for the number of participants. *See* DEPARTMENT OF JUSTICE CRIMINAL TAX MANUAL, Tax Directive No. 77.

c. The government is again left to argue that this case is not suitable for review. Petitioner raised the deficiencies with the *Klein* Conspiracy below and claimed that a limitation was needed to avoid vagueness concerns. App. 32a-33a. Moreover, the government ignores that such claims may be raised at any time. *See Class v. United States*, 138 S. Ct. 798, 807 (2018) (defendant does not waive constitutional claims that statute is invalid after guilty plea).

d. The government does not dispute that the plea record fails to support any nexus between Petitioner's conduct and an existing proceeding. Absent a valid basis for a conviction on the *Klein* Conspiracy charge, Petitioner would face a maximum sentence of three years in prison, which would have precluded the 87-month sentence imposed. *See* 26 U.S.C. § 7206. The government's contention that the ruling on *Klein* is not "outcome-determinative" must be rejected.

3. Finally, the government contends that this Court should refuse to consider whether a jury trial is warranted for restitution because Petitioner admitted to the amount of intended tax loss for purposes of setting an advisory guideline range in the plea agreement.

The plea agreement does not authorize, or even contemplate, an agreement as to the amount of restitution. While the government relies on the section of the plea agreement focused on intended loss for purposes of sentencing, the plea agreement specifically states that the loss to the IRS still must be determined by the Court. App. 69a, 71a.

The government's contention that an admittedly incorrect amount of restitution is justified by the sentencing provisions (or any other part) of the plea

agreement is contrary to law. While sentencing focuses on the criminal defendant, "[r]estitution, on the other hand, focuses on the victim and the harm *proximately caused* by the defendant's conduct." *United States v. Gossi*, 608 F.3d 574, 580 (9th Cir. 2010) (emphasis in original). Because restitution must be based on identifiable loss to the victim, "it does not require restitution to match the loss figure used for sentencing. Indeed, the amounts of loss and restitution can and do differ." *United States v. Patterson*, 595 F.3d 1324, 1327 (11th Cir. 2010).

Petitioner explicitly requested a jury trial on restitution before the district court. After the district court denied the motion, it went on to ignore multiple complex tax issues as to whose income it was, when the income was realized, the rate of taxation and, more fundamentally, whether the income was realized in the United States by a person required to file a U.S. return. When imposing restitution, the district court conducted a full hearing (that otherwise would have been unnecessary if an agreement had been reached) admitting that the restitution award did not "in any way reflect the amount that should actually be paid back." App. 78a-79a. Where the sentencing court itself admits that restitution does not reflect actual loss, the legitimacy of the award without a jury trial cannot be justified.

This case is the appropriate vehicle to consider this issue where. The factfinder had an obligation to determine the actual loss, and the district court made no attempt to do so. Thus, this case provides an excellent vehicle for this Court's review of the Sixth and Seventh Amendment issues involved.

CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

IAN M. COMISKY
Counsel of Record
PATRICK J. EGAN
FOX ROTHSCHILD LLP
2000 Market St., 20th Floor
Philadelphia, PA 19103
(215) 299-2000
icomisky@foxrothschild.com

June 7, 2021