NO. 20-7062

IN THE

SUPREME COURT OF THE UNITD STATES

ALFRED CROSS-Petitioner,

vs.

UNITED STATES OF AMERICA-Respondent.

ORIGINAL

ON PETITION FOR A WRIT OF CERTIORARI TO
SEVENTH CIRCUIT COURT OF APPEALS
CASE NO: 3:17-CR-30047-HJR-1

PETITION FOR WRIT OF CERTIORARI

Alfred Cross
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In Propria persona.

QUESTION(S) PRESENTED

I. Whether the Decision below squarely conflicts with *McCarthy v. United States* and *Neder v. United States*, where Mr. Cross Held a Constitutional Right to know Both the Nature and Cause of the Charges Against him, which Included Both the Materiality of the charge and Intent for any Plea to be valid under a Rule 11 Plea?

II. Whether the Decision Below squarely conflicts with *Neder v. United States* where a plea of guilt relating to a defect in the Indictment, affects jurisdiction of the Court, and Where the Indictment Fails to Charge an Offense, does the Guilty Plea Waive the defects?

III. Whether The Decision of the District Court that it holds jurisdiction over a Claim of Bank Fraud, where the Bank nor victims are covered by FDIC Insurance for any loss from Bank Fraud, conflicts with *United States v. Perez-Ceballos, intel alia,* where the charge should be a State claim, not Federal?

LIST OF PARTIES

All Parties appear in the caption of the case on the cover.

There are no related cases to Petitioner's knowledge.

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IN THE
SUPREME COURT OF
THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the Judgment below.

OPINIONS BELOW

The opinions of the United States District Court appear in **Appendix A** to the petition and is unpublished.

The first opinion of the United States court of appeals appears at **Appendix B** to the petition and is unpublished.

A timely petition for rehearing was filed and that order is at **Appendix C** to the petition and is unpublished.

The amended opinion of the United States court of appeals appears at **Appendix D** to the petition and is unpublished.

The final mandate of the United States court of appeals appears at **Appendix E** to the petition and is unpublished. That date was June 26, 2020.
Petitioner wrote the Supreme Court for an extension and court extended the certiorari filing "150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. See Rules 13.1 and 13.3." A copy of this court's order of March 19, 2020 appears at **Appendix F** to the petition and is unpublished. Notably, 150 days from the mandate of June 26, 2020 would be November 23, 2020.

On September 1, 2020 Petitioner filed a pro se document explaining his case and requesting an additional extension of time of "90 days" to file his certiorari. Although the letter did not address the Covid-19 issue, he explains his issue here. Because of Covid-19 the prison is on continuous lock down. This lockdown denies all access to any law library and no books can be requested making drafting any certiorari futile. A Sixty-day extension would from the 150 day of November 23, 2020 would be January 22, 2021, a Friday. A copy of his pro se document appears at **Appendix G** to the petition.

On October 19, 2020, the Supreme Court Clerk returned a stamped copy of petitioner's pro se document and a letter addressing the extension of time document he filed September 11, 2020. The Clerk reiterated the 150-day extension but failed to acknowledge that an extension could be extended under Covid-19, taking the document as a petition for certiorari instead of solely an extension of time. The Clerk did not say if an extension was granted or not. A copy of that letter appears in **Appendix H** of the petition and is unpublished.

Because petitioner is on continuous lockdown, his hardships to obtain this Petition to be made, he prays this Court will accept the second extension requested and this certiorari, reinstating it even though a few days late.

JURISDICTION

This case arises from a federal court. The date on which the United States Court of Appeals decided my case the first time was May 22, 2020. A timely petition for rehearing was denied by the United States Court of Appeals on June 18, 2020 and the Court issued an Amended decision of the May 22, 2020 decision. The mandate issued June 26, 2020.

An extension of time was requested for filing the writ of certiorari and was granted on March 19, 2020, granting "150-day extension from the date of the lower

court judgment" attached in Appendix F. A second extension request was made and filed on September 11, 2020. No decision on this extension was made.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provisions in pertinent part involved states:

U.S. Const., Article III:

> Section 1.
>
> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.
>
> Section 2.
>
> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.
>
> In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.
>
> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes

shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

U.S. Const., Art. III.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, *** nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; ***.

U.S. Const., Amend. 5.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the *nature and cause of the accusation*; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const., Amend. 6 (Emph. Added).

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Const., Amend. 9.

The statutory provisions in pertinent part involved states:

(B) Bad checks.

> A person commits a deceptive practice when:
>
> (1) With intent to obtain control over property or to pay for property, labor or services of another, or in satisfaction of an obligation for payment of tax under the Retailers' Occupation Tax Act or any other tax due to the State of Illinois, he or she issues or delivers a check or other order upon a real or fictitious depository for the payment of money, knowing that it will not be paid by the

depository. The trier of fact may infer that the defendant knows that the check or other order will not be paid by the depository and that the defendant has acted with intent to defraud when the defendant fails to have sufficient funds or credit with the depository when the check or other order is issued or delivered, or when such check or other order is presented for payment and dishonored on each of 2 occasions at least 7 days apart. In this paragraph (B)(1), "property" includes rental property (real or personal).

(2) He or she issues or delivers a check or other order upon a real or fictitious depository in an amount exceeding $150 in payment of an amount owed on any credit transaction for property, labor or services, or in payment of the entire amount owed on any credit transaction for property, labor or services, knowing that it will not be paid by the depository, and thereafter fails to provide funds or credit with the depository in the face amount of the check or order within 7 days of receiving actual notice from the depository or payee of the dishonor of the check or order.

720 ILCS 5/17-1(B) (1) (2), P.A. 96-1432, eff. 1-1-11; 96-1551, eff. 7-1-11.

Whoever knowingly executes, or attempts to execute, a scheme or artifice-

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1344 (1) (Pub. L. 101–647, title XXV, §2504(j), Nov. 29, 1990, 104 Stat. 4861).

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1346, (Pub. L. 100–690, title VII, §7603(a), Nov. 18, 1988, 102 Stat. 4508).

STATEMENT OF THE CASE

Alfred Cross reports that he has been self-employed in the real estate industry for the better part of the past three decades. PSR ¶ 108. He focused on unattractive parts of the sector—distressed hotels, bank foreclosures, and other commercial properties—and his methods were sometimes unsavory as well. Id. Between April 2011 and March 2015, he unlawfully obtained funds from seven southern Illinois banks by knowingly depositing Non-Sufficient-Fund checks drawing on Mr. Cross's California bank account. PSR ¶¶ 11–31. In total the banks gave Mr. Cross about $516,000 before realizing the checks were NSF. PSR ¶ 32. Civil lawsuits and state criminal prosecutions followed. PSR ¶¶ 12, 15–16, 18, 20, 22, 25–26, 28, 30–31. Much of the money was returned in one form or another. By December 2018, Mr. Cross had made full or almost full restitution to three of the seven banks; one bank waived its right to collect after foreclosing on properties; and the remaining banks either held civil judgments or a criminal restitution order against Mr. Cross. PSR ¶ 34.

Knowingly depositing a bad check is a state crime in Illinois. 720 ILCS 5/17-1(B). It is not necessarily a federal crime, because presenting an NSF check does not involve making a "false statement." *Williams v. United States*, 458 U.S. 279, 284 (1982). Knowingly executing a scheme to defraud a bank, on the other hand, is a federal crime, 18 U.S.C. § 1344(1), and federal prosecutors concluded that Mr. Cross had committed that offense through a scheme to deposit bad checks. After unsuccessfully trying to work out a plea to a criminal information, the U.S. Attorney obtained an indictment charging Mr. Cross with five counts of bank

fraud. R.36. Each count alleged that Mr. Cross had executed his scheme to defraud by knowingly depositing an NSF check. *Id.*

Before *Neder v. United States*, 527 U.S. 1 (1999), this Court had held that a scheme to kite checks could constitute bank fraud even though that conduct does not involve false representations. See *United States v. Doherty*, 969 F.2d 425, 429 (7th Cir. 1992). But in *Neder*, the Supreme Court held that materiality of falsehood is an element of bank fraud. When Mr. Cross was charged, bank fraud thus had five elements:

1. There was a scheme to defraud a bank; and

2. The defendant knowingly carried out the scheme; and

3. The defendant acted with the intent to defraud the bank; and

4. The scheme involved a materially false or fraudulent pretense, representation, or promise; and

5. The bank's deposits were insured by the FDIC[1] (**Appendix I**).

Pattern Criminal Jury Instructions of the Seventh Circuit at 452 (2012 ed.) (plus 2015–2017 and 2018 changes).

In delineating those elements, the Committee on Federal Criminal Jury Instructions of the Seventh Circuit recognized the tension between pre- and post-

[1] The District Court contends it obtained jurisdiction over the case, which should be a State action, because FDIC insured the funds of the bank. In Document 124, filed 05/29/2018, "Defendant's Summary of Plea Hearing, Request for Status," Mr. Cross explained how an insufficient check, even though no funds cover it, can constitute an "unsecured loan" the bankers verify and gives the Greenville Bank example the bank gave authority to write checks above what was in the account by overdraft protection. In Document 124-1, at pg. 43, Mr. Cross obtained a letter from FDIC through a friend. There, the FDIC states "As previously stated, financial institutions typically purchase private insurance to cover losses from a variety of incidents, such as robbery, theft, fraud, or embezzlement, but the FDIC is not involved with the purchase or coverage of such private insurance." The FDIC makes plain that "The FDIC does not reimburse banks or individuals for loss due to robbery, theft, fraud, or embezzlement. That the FDIC only steps in if the bank fails or is closed by regulatory mandates to insure deposits made at that point. FDIC does not cover bank fraud, so how did the Court obtain jurisdiction over a State bank action?

Neder cases. *Id.* at 454–55. Relieving that tension, though was beyond the Committee's authority. *Id.* at 455.

No tension hung in the air when Mr. Cross entered an open plea of guilty to all counts, though, because both the district court and the United States proposed that bank fraud comprised only four elements:

1. There was a scheme to defraud a bank; and
2. The defendant knowingly executed the scheme; and
3. The defendant acted with the intent to defraud; and
4. The bank's deposits were insured by the FDIC.

Plea Tr. at 13. The prosecutor provided a factual basis to support each of those four elements. *Id.* at 18–23. He did not mention a material misrepresentation or omission, however. Mr. Cross was asked if he agreed with the factual basis. He did—so far as the checks were concerned. "I knew at the time that I deposited those checks some of them didn't have sufficient funds to cover them." *Id.* at 24. The court accepted the guilty plea and set the case for sentencing. *Id.* at 25.

That's when the trouble really started. Mr. Cross started having problems with his attorney, and at a hearing two months after the guilty pleas were entered he told the court he wasn't sure he was actually guilty of bank fraud. Though he did not at that time move to withdraw his plea, the court warned him: "I have never let anyone withdraw a plea. I don't know of any reason why I would here. All that's left to do is the sentencing hearing." *Id.* at 19. Nevertheless, the court appointed a new attorney to represent Mr. Cross at that hearing. Mr. Cross immediately filed a pro se motion to withdraw his plea. R. 124.

The court struck the pleading because Mr. Cross was represented by counsel. R.125. But the new lawyer was not sympathetic to Mr. Cross's reservations about

his guilt either and refused to file a counseled motion. R.153 at 6. So before sentencing Mr. Cross filed another pro se motion to withdraw his guilty plea alongside a motion to terminate counsel. R.152, 153. He explained that his deposits of NSF checks involved no misrepresentations. R.152 at 6–7. He still did not know "whether [he] violated the offense charged, Bank Fraud—1344" under *United States v. Bean*, 18 F.3d 1367, 1370 (7th Cir. 1994), which notes that the bank fraud statute "does not attach criminal penalties to the unadorned writing of rubber checks." R.152 at 7. He asked the court to allow him to withdraw his plea. *Id.* at 8.

This time, the court addressed the pleading on the merits. Its perspective had not changed, though. "[Y]ou acknowledged that you knew that there wasn't enough to cover the checks when you deposited them." Sent. Tr. at 5. So the motion was denied on the merits: "[T]here is just simply no reason at all, let alone a fair and just reason, at this point to warrant withdrawal of the guilty plea." *Id.* at 17. The court also denied the motion because it was filed pro se. *Id.*

The district court then sentenced Mr. Cross to 78 months in prison, at the high end of his Guidelines range, to be followed by a 5-year term of supervised release. R.160 at 2–3. It also ordered $111,698.98 in total restitution to two banks. *Id.* at 5. Mr. Cross then filed a timely notice of appeal. R.163.

1. The indictment fails to mention "intent to defraud" or materiality.

Let us return to the indictment[2]. R. 36. It alleged five counts of bank fraud under 18 U.S.C. § 1344(1) by describing a scheme to defraud seven banks. *Id.* at 2. The object of the scheme was to fraudulently obtain more than $500,000 from the banks. *Id.* Mr. Cross opened accounts at each of the banks under the names of

[2] The document's title, "Superseding Indictment," is a misnomer. The indictment "superseded" a criminal information, not any previous indictment.

businesses he purportedly owned or operated. *Id.* Once the accounts had been open for a period of time, Mr. Cross knowingly deposited NSF checks that drew on other bank accounts Mr. Cross owned or controlled. *Id.* at 2–3. Before the banks knew what was happening, Mr. Cross would then withdraw the funds from the victim banks. *Id.* at 3. The indictment does not explicitly allege that Mr. Cross acted with intent to defraud or that the scheme involved a material misrepresentation.

Each count then recited a specific instance when Mr. Cross "knowingly executed" the scheme to defraud by making a deposit using a check he knew to be NSF:

> • Count 1 involved a deposit into the "Al L. Cross—Consolidated Billing Account" at Washington Savings Bank using a check drawn on an account entitled "Alfred L. Cross—Cross/Hart/Page—Special Account" at County Bank in Fresno, California.
>
> • Count 2 involved a deposit into the "Premier Business Properties" account at The Farmers and Merchants National Bank using a check drawn on an account entitled "Giant Hospitality Group" at WestAmerica Bank.
>
> • Count 3 involved a deposit into the "Whitehouse Business Group" account at First Southern Bank using a check drawn on the same Giant Hospitality Group account in Count 2.
>
> • Count 4 involved a deposit into a different "Whitehouse Business Group" account, this time at State Bank of Whittington, using a check again drawn on the Giant Hospitality Group account.
>
> • Count 5 involved a separate deposit at State Bank of Whittington, with the same particulars as that in Count 4.
>
> Id. at 3–5.

2. Mr. Cross admits he knowingly deposited bad checks.

Mr. Cross was 75 years old when he entered a guilty plea in March 2018. Plea Tr. at 5. He entered the courtroom that day in full shackles—handcuffs, leg

irons, and connecting chains—and remained so constricted throughout his plea to bank fraud, in accordance with the district court's regular practice. See R.167 at 13–14.[3] No one voiced concern that shackling an elderly man accused of fraud might be an affront to the dignity of the proceedings or undermine his ability to participate in the proceedings. But see *United States v. Henderson*, 915 F.3d 1127, 1137 (7th Cir. 2019) (Hamilton, J., dissenting). Indeed, no one made his shackling a part of the record of the plea hearing at all.

The Government in its Reply Brief set forth in its facts that Mr. Cross:

> But the government fails to note that Mr. Cross does not make a couple other arguments too. Mr. Cross did not argue that the record contains no factual basis to support a conviction, nor did he argue that he is actually innocent of bank fraud. "[T]he question here is not whether Mr. Cross actually committed fraud or merely deposited checks." Def. Br. at 43. Instead, Mr. Cross argued that he did not enter a knowing and voluntary plea of guilty. See *Henderson v. Morgan*, 426 U.S. 637, 644–45 (1976) ("We assume ... that the prosecutor had overwhelming evidence of guilt available. ... Nevertheless, such a plea cannot support a judgment of guilt unless it was voluntary in a constitutional sense.").
>
> To obtain a conviction, the prosecutor must prove each element of a crime beyond a reasonable doubt to a jury. *In re Winship*, 397 U.S. 358, 364 (1970). Alternatively, the accused may agree that he committed each element of the crime and plead guilty. *Najera-Rodriguez v. Barr*, 926 F.3d 343, 349 (7th Cir. 2019). When the prosecutor fails to prove every element, the conviction must be vacated, regardless of whether the defendant is actually innocent. *United States v. Locklear*, 97 F.3d 196, 199–200 (7th Cir. 1996). Likewise, when the accused does not agree to facts establishing every element, his guilty plea must be vacated, regardless of whether he is

[3] Later, Mr. Cross intended to move to remove the shackles at his sentencing hearing in a pro se motion, R.167 at 13, but abandoned the idea after his other pro se motions mentioned here received a poor reception. R.167 at 1. He thus sent a copy of the proposed motion to the Court only after he was sentenced. *Id.*

actually innocent or not. *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005).

Government Reply Brief at pg. 1-2.

The district judge conducted the plea hearing and generally covered the topics mentioned in Rule 11 of the Federal Rules of Criminal Procedure. The judge directed the prosecutor to describe the elements of the offense, and as noted above, he informed Mr. Cross that bank fraud had four elements:

1. There was a scheme to defraud a bank; and
2. The defendant knowingly executed the scheme; and
3. The defendant acted with the intent to defraud; and
4. The bank's deposits were insured by the FDIC.

Plea Tr. at 12–13. Mr. Cross affirmed that he understood the government would need to prove those four elements to establish guilt. *Id.* at 13–14.

To establish a factual basis for the plea, the district court again enlisted the help of the prosecutor. "I know there is a lot of conduct at issue here. So I'm not going to specifically ask Mr. Cross to recite what they did. But, Mr. Cross, I'm going to ask the government to summarize what their evidence would be if we had a trial in this case and get your acknowledgment that the government could prove that." *Id.* at 18.

The government's factual basis tracked the allegations in the indictment. Mr. Cross owned both Global Investment Group and Giant Hospitality Group, and he set up bank accounts for both companies in states other than Illinois. *Id.* He then opened up separate accounts at seven southern Illinois banks, all of which were insured by the FDIC[4]. *Id.* at 18–19. He then deposited large checks into those

[4] Again, FDIC does not cover bank fraud, so how did the Court obtain jurisdiction over a State action? See Footnote 1 above.

accounts drawn on the out-of-state accounts he owned, knowing that the out-of-state accounts did not contain sufficient funds to cover the checks. *Id.* And before the banks could discover the checks were bad, Mr. Cross withdrew most, if not all, of the money from the deposited checks. *Id.* The factual basis added some flesh to the bare allegations on each count:

- After depositing about $19,000 at Washington Savings Bank in April 2011, Mr. Cross withdrew about $13,000 in cashier's checks payable to himself and his creditors before the bank learned that the check bounced. (Count 1)

- Mr. Cross opened an account at The Farmers and Merchants National Bank in the name of "Premier Business Properties" in March 2013. Three months later, he deposited $148,000 into the account using a bad check. Mr. Cross then withdrew nearly $122,000 in the form of nine cashier's checks before the check bounced. (Count 2)

- In September 2013, Mr. Cross opened an account for his "Whitehouse Business Group" at the First Southern Bank. A month later, he deposited a bad check for $38,000 and withdrew about $34,000 of that amount in cashier's checks before the bank discovered the check was bad. (Count 3)

- And in March 2014, Mr. Cross opened another "Whitehouse Business Group" account at the State Bank of Whittington. Two months later he deposited two bad checks: one for $76,600 (Count 4) and one for $33,400 (Count 5). He used that money to buy buildings worth about $35,000 from the bank. He also withdrew $67,500 in cashier's checks and cash withdrawals.

Id. at 20–23. "In addition," the prosecutor concluded, "we would prove that the defendant acted with intent to defraud." *Id.* at 23. The court was satisfied with that factual basis, so it turned to Mr. Cross: "[D]o you agree with the government's summary about what you did?" *Id.* He did, with some reservations.

> "Those checks that he's talking about, yes. And you can ask me where the money went to as far as he's talking about the monies that I

drawed out of there. Like he talked about the buildings and the Whittington bank. We—I think we've got most of this restitution has been paid ... by selling some of these buildings that I bought from different banks and some properties I had. The buildings in Whittington bank we've got working out something on that. ... But a lot of that money has been paid."

"Yes, he's—when he talked about the checks being deposited, the majority of those checks, that he says, I knew at the time that I deposited those checks there wasn't sufficient funds to cover those checks from the payee bank. They gave me instant credit, and some I signed notes for, and such. But yes, he's pretty accurate on the banks and such as that."

Id. at 23–24. The court found Mr. Cross's admission satisfactory, even though the Court thought some of his response related to sentencing issues, not guilt:

THE COURT: [W]e will talk about the restitution, what's owed, what's been paid, what's outstanding, at the sentencing hearing. But I just wanted to make sure that you agree that the government could prove what they say they could prove with respect to the elements of the offense of bank fraud.

MR. CROSS: Yes.

THE COURT: Okay.

MR. CROSS: I knew at the time that I deposited those checks some of them didn't have sufficient funds to cover them. They gave me credit for it; but yes.

Id. at 24. Neither side then requested any further discussion, so the court solicited and accepted Mr. Cross's guilty pleas to Counts 1–5. *Id.* at 25. The court found that Mr. Cross had entered a knowing and voluntary plea supported by "an independent basis in fact containing each of the essential elements of the offense." *Id.* at 25–26.

Mr. Cross was not advised of the elements of the offense.

3. Materiality of falsehood is an element of § 1344(1).

In the Government's Response brief they addressed materially as they believed it applied, which was contrary to Defendant's Opening Brief's contention under *Neder*. They wrote:

> The answer to the first question is easy. "We hold that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes." *Neder v. United States*, 527 U.S. 1, 25 (1999). That is a holding of the Supreme Court. The government thinks the Supreme Court got it wrong, because *Neder* did not involve check kiting, and the Court did not consider the legislative history behind the bank fraud statute. Gov't Br. at 32. Those are not reasons to ignore a holding of the Supreme Court, though. The government's argument that materiality of falsehood is not an element of bank fraud is foreclosed by Supreme Court precedent. The most this Court can do is find that the government has preserved the issue for further review. See *United States v. Taylor*, 777 F.3d 434, 439–40 (7th Cir. 2015).
>
> The government also tries to distinguish *Neder*. It suggests that a "fair reading" of the holding is that "materiality is an element of the bank fraud statute," but it argues that "materiality" does not require a falsehood. Gov't Br. at 33. It is better to just take the Supreme Court at its word: "We hold that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes." *Neder*, 527 U.S. at 25 (emphasis added). "[A] good rule of thumb for reading our decisions is that what they say and what they mean are one and the same." *Mathis v. United States*, 136 S. Ct. 2243, 2254 (2016). In arriving at its holding, the Court adopted the well-settled meaning of "fraud" from the common law:
>
> > [At common law,] the well-settled meaning of "fraud" required a misrepresentation or concealment of material fact. Indeed, as the sources we are aware of demonstrate, the common law could not have conceived of "fraud" without proof of materiality. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 579 (1996) ("[A]ctionable fraud requires a material misrepresentation or omission").

Neder, 527 U.S. at 22 (emphasis in original; internal citation omitted). Fraud requires a misrepresentation or concealment of material fact. A scheme to defraud a financial institution does as well. *Neder* is not ambiguous on that point. *Neder* upset this Court's precedent in check-kiting cases. In our opening brief, we described competing views within the circuit before *Neder* on how fraud should be defined. Def. Br. at 32. On the one hand, the Court had embraced a view of fraud that depends only on whether "the scheme demonstrated a departure from fundamental honesty, moral uprightness or fair play and candid dealings in the general life of the community." *United States v. Norton*, 108 F.3d 133, 135 (7th Cir. 1997); accord *United States v. Omer*, 395 F.3d 1087, 1089 (9th Cir. 2005). On the other hand, the Court had cautioned that that standard "cannot have been intended, and must not be taken, literally," because it is "much too broad and ... would put federal judges in the business of creating what in effect would be common law crimes, i.e., crimes not defined by statute." *United States v. Holzer,* 816 F.2d 304, 309 (7th Cir.), vacated, 484 U.S. 807 (1987), opinion on remand, 840 F.3d 1343 (7th Cir. 1988). The Supreme Court in *Neder* did not endorse the former, amorphous standard; instead, it hewed to the well-settled meaning of fraud, which "requires a misrepresentation or concealment of material fact." 527 U.S. at 22. The Court's previous understanding that the bank fraud statute was broad enough to encompass schemes that do not involve material falsehoods was abrogated by *Neder*.

In a footnote, the government argues that the materiality requirement of *Neder* applies only to § 1344(2), because "schemes to defraud are, by definition, material." Gov't Br. at 38–39 n.9. That has it backwards. The reason "materiality of falsehood" is an element of the federal bank fraud statute is because § 1344(1) uses the term "scheme to defraud." *Neder*, 527 U.S. at 21–25; Def. Br. at 31. "We granted certiorari ... to decide whether materiality is an element of a 'scheme or artifice to defraud' under the federal ... bank fraud (§ 1344) statute[]." *Neder*, 527 U.S. at 20 (emphasis added). The Court's five-page discussion focuses on what the term "scheme or artifice to defraud" means. *Id.* at 21–25. Only § 1344(1) prohibits a scheme or artifice to defraud; section 1344(2) prohibits schemes or artifices to obtain property. *Neder* is meaningless if "schemes to defraud are, by definition, material." Gov't

Br. at 38–39 n.9. The government's belief that it need not prove as an element materiality of falsehood under § 1344(1) is simply foreclosed under *Neder*.

The government also suggests that taking the Supreme Court at its word would render § 1344(1) superfluous, because § 1344(2) already prohibits obtaining property from banks by means of false or fraudulent pretenses, representations, or promises. Gov't Br. at 33–35. It ignores that § 1344(1), by targeting schemes to defraud, also criminalizes schemes to defraud a financial institution of intangible rights, not just property. 18 U.S.C. § 1346. "The two subsections overlap substantially but not completely." *Shaw v. United States*, 137 S. Ct. 462, 469 (2016). And to the extent that § 1344(1) regulates little conduct not already addressed by § 1344(2), that is a consequence of the Supreme Court's decisions in both *Neder* and *Skilling v. United States*, 561 U.S. 358, 408–09 (2010), which narrowly construed § 1346. The definition of fraud under § 1344(1) reflects the common law, *Shaw*, 137 S. Ct. at 467, and the common law requires a misrepresentation or concealment of material fact. *Neder*, 527 U.S. at 22.
The elements of bank fraud are straightforward after *Neder*:

> A bank fraud conviction requires the government prove (1) there was a scheme to defraud a financial institution; (2) the defendant knowingly executed or attempted to execute the scheme; (3) the defendant acted with the intent to defraud; (4) the scheme involved a materially false or fraudulent pretense, representation, or promise; and (5) at the time of the charged offense the entity was a 'financial institution' within the meaning of 18 U.S.C. § 20.

United States v. Freed, 921 F.3d 716, 722 (7th Cir. 2019) (citing *Shaw*, 137 S. Ct. at 465). It is axiomatic that the elements of an offense do not change depending on how the offense is committed. The Court's prior understanding of the bank fraud statute was overruled in *Neder*.

4. Mr. Cross tries to withdraw his guilty plea to bank fraud.

In May 2018, two months after counseling his client to plead guilty, Mr. Cross's appointed attorney, William Margulis, moved to withdraw based on a

deterioration of the attorney-client relationship. R.113 at 2. At a hearing on the motion, Mr. Cross expressed his frustration with the many errors he perceived in the presentence investigation report. 5/23/18 Tr. at 7–9. In particular he felt that the Sentencing Guidelines calculation was inaccurate. *Id.* at 12. And he was not convinced that he was even guilty of the offense:

> I have some reservation that I'm guilty of some of this. And it's went from the day I walked in the door November 10th 2016 in [Assistant Federal Public Defender] Tom Gabel's office. [Assistant U.S. Attorney] Mr. Verseman, I met him, and the FBI agent. I told them the truth. I told them that I knew when I deposited them checks that some of them wasn't good at the time. But there's some cases, one right here in the Seventh Circuit, that just making that deposit .... Now, if I kited them, that's a different story. And I brought that issue up with Mr. Gabel and I brought it up with [Mr. Margulis]. ... I've not said anything and I've not filed anything about him, as I did with Mr. Gabel. And I just — I have some reservation on it.

Id. at 13. Mr. Cross did not wish to withdraw his plea at that time—"I don't have a problem with the guilty plea"—but he was not willing to serve 63 months in prison when so many issues were outstanding. *Id.* at 14.

Mr. Margulis agreed that Mr. Cross was uncomfortable with the guilty plea in light of the prospective sentence. The attorney-client relationship had soured not only because of PSR objections but also due to Mr. Cross's reservations about his guilt. Id. at 17. The court reminded Mr. Cross that it had ensured his plea was knowing and voluntary during the plea hearing. Id. at 17– 18. Mr. Cross had known then what the sentencing process would look like. Id. at 18–19. The court continued:

> At this point, you have pled guilty. I have never let anyone withdraw a plea. I don't know of any reason why I would here. All that's left to do is the sentencing hearing, which means that if you have objections to the presentence report, which is what I told you over and over before, then your lawyer needs to file those and I'll take

them up. And all this other stuff you want to tell me, you can tell me at the time of sentencing.

Id. at 19. The court then gave Mr. Cross the option to keep Mr. Margulis and proceed to sentencing promptly or to have the court appoint a new lawyer, which would delay sentencing. *Id.* at 19. Mr. Cross was equivocal—"I just have some reservations. Like he says, we've never had any personality—" so the court cut him off and gave him a new attorney. *Id.* at 19–20. Mr. Cross again tried to explain his position:

> There's some issues. And I'm not trying to—I told him the other day, I don't have a problem with the plea. ... But I have some concerns about this case. I've pled guilty. I realize that. And I've got to deal with it. But I have some concerns.

Id. at 20.

Those concerns manifested themselves into a pro se "Request for Status Hearing" Mr. Cross mailed to the court later that day upon returning to jail. R.124. He alleged that the court had not specifically addressed all five charges at the plea hearing and that his lawyer had not told him of substantial defenses he could have raised. *Id.* at 2. "[A]ttorneys today are 'plea attorneys' and lack knowledge of actual defensive abilities." Id.

In part, Mr. Cross defended his conduct by denying the existence of deceit. One bank, for example, "knew, as others did, there was no funds because they called California and still allowed the checks to be cashed. Notably, Defendant has repaid banks by restitution and agreements, thus showing no intent to defraud." *Id.* at 2–3. He admitted using NSF checks "to induce the bank to make a loan, secured or unsecured, which they did," but denied any intent to defraud. *Id.* at 5. "The credit of the Defendant warranted the bank not to place a hold on the deposits." *Id.*

Under the law, Mr. Cross contended, he had not committed bank fraud:

> [Cases] make[] plain that the mere depositing of a check is not a representation nor false/fraudulent statement nor is it a scheme to defraud. Defendant's actions do not fall under the criteria of bank fraud, ... as indicated by [Bean] (presentation of a check does not make a "false statement" that the account contains sufficient funds).

Id. at 5–6. Mr. Cross thus did not know what he pleaded guilty to. He asked the court to set a hearing to either clarify the charges or to allow him to withdraw his guilty plea. *Id.* at 6.

The motion was summarily stricken, because it was filed pro se. R.124. Summer came and went, as did Mr. Cross. The U.S. Marshals had borrowed him from the State of Kentucky, where he was facing other charges, and the State wanted to resolve its case. See R.136. So after spending time in Kentucky, Mr. Cross returned to southern Illinois in November. See R.140.

Mr. Cross maintained he was not guilty upon his return. In his view, "[b]anks approve money to be paid out, sell me deteriorated real estate, and then come to the courts to collect with criminal damages!" R.150 at 3. His lawyer refused to file a motion to withdraw the plea, though, and told him that he would have to ask the court to represent himself if he wanted it filed. R.153 at 6. So before sentencing Mr. Cross filed three pro se motions: to terminate counsel, to withdraw his guilty plea, and to dismiss the case. R.154 at 1.

The motion to withdraw the plea "incorporated" the stricken filing from May mentioned above. R.152 at 1. Mr. Cross alleged that he had pleaded guilty because his lawyer told him he had no defense and the only way out was a guilty plea. *Id.* But Mr. Cross did some research after the guilty plea and realized that he "may not be guilty of such offense" for a number of reasons. Id. at 2. For one, he was concerned that the indictment did not allege that he acted with the "intent to defraud." Id. at 2–3. He continued to express confusion about the indictment's list

of seven banks, when it contained five charges concerning four banks. *Id.* at 4. And he repeated his bottom-line problem with the plea:

> [T]he defendant did not commit the overt acts to establish a bank fraud offense, Bean, 18 F.3d 1367. ...
>
> In the plea hearing ... defendant admits he deposited checks knowing were insufficient at the time of deposit, there was no representation upon deposit, there was no "intent" to defraud, further defendant was given instant credit by the bank ....

R.152 at 5. In Mr. Cross's view, he had not admitted to fraud. "There was no misrepresentations, F.I. numbers, S.S. and other information was all valid[.] [T]he defendant may have unusual business tacits [sic], but, such are not illegal, yet the Defendant's due process is being violated." *Id.* at 6. Mr. Cross could not get a straight answer from his attorney for why his admitted conduct was bank fraud under *Bean*, 18 F.3d at 1370. *Id.* at 7. "Therefore," he summarized, "the Defendant did not enter into a guilty plea knowing and voluntary, McCarthy, as well, a question whether the Defendant did actually commit bank fraud at all." *Id.* at 8.

But as she watched the shackled septuagenarian begin to argue his motion at sentencing, the district judge was not swayed. "I don't think anything has changed at all. I went back and looked at your change of plea transcript. And we went through it very carefully." Sentencing Tr. at 4–5. She continued:

> Mr. Verseman went through a very long explanation of what the government's evidence would be if we had a trial. ... And you acknowledged that you did it. I think, in fact, you maybe wanted to quibble with a few facts, but you acknowledged that you knew that there wasn't enough to cover the checks when you deposited them.

Id. at 5. Mr. Cross decided to plead guilty "on the eve of trial," and the judge conducted the plea colloquy herself to be "100 percent confident" that Mr. Cross knew what he was doing. *Id.* at 5–6. Mr. Cross had been through three lawyers and

several revisions of the PSR, and the court was done delaying the case. "[W]e could quibble all day about maybe little facts, but I don't think anything of the major facts underlying what we talked about at the time of the change of plea that anything whatsoever has changed." *Id.* at 6.

The court denied the motion to withdraw the plea on the merits. It was convinced at the change of plea hearing that Mr. Cross "was knowingly and voluntarily pleading guilty to each of the counts," and it was still "fully satisfied that the plea was knowing and voluntary." Id. at 16. The court could not understand why Mr. Cross "just wants to continue to prolong these proceedings and not proceed to sentencing," but the time had come to proceed, because "there is just no reason here whatsoever that I would allow Mr. Cross to withdraw his guilty plea at this time." *Id.* at 16–17. "[T]here is just simply no reason at all, let alone a fair and just reason, at this point to warrant withdrawal of the guilty plea." *Id.* at 17.

The court arrived at that conclusion after considering both Mr. Cross's motion to terminate counsel and the motion to withdraw guilty plea. The prosecutor characterized Mr. Cross's motion to terminate counsel as a motion to substitute counsel, though the motion makes no request for a new lawyer. Sent. Tr. at 6–12; R.153. Indeed, Mr. Cross filed the motions (along with a motion to dismiss) with the understanding that he would have to represent himself on them: "[C]ounsel refuses to file any motions, and directed the Defendant to request the Court to represent himself; therefore, the Defendant filed a motion

accordingly." R.154 at 1. But when Mr. Cross tried to respond to the prosecutor's characterization of his motion to terminate counsel—"Your Honor, to respond to Mr. Verseman there"—he was cut off, because he was represented by a lawyer.

> Mr. Cross, you have counsel. You are represented by very able counsel. I've been patient by even taking up these motions that you filed. And you will have a right to do what we call an allocution during your sentencing, which is a time that you can say anything that you wish to say. But I don't need to hear anything else from you at this point right now.

Sent. Tr. at 13. The court then adopted the prosecutor's understanding of the "Motion to Terminate Counsel" and found that Mr. Cross was not entitled to another lawyer because "[t]here is no basis here for substitution of counsel." Sent. Tr. at 13–14.

The court never asked Mr. Cross whether he wanted to represent himself, notwithstanding his "Motion to Terminate Counsel" that was premised on his understanding that he would need "to request the Court to represent himself." R.154 at 1. Instead, it found that Mr. Cross had counsel, and thus had no right to file motions by himself. So the motion to withdraw the guilty plea was denied not only because "there is no basis for granting [it]," but also because it was filed pro se. Sent. Tr. at 17.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The district court erred when it accepted Mr. Cross's guilty plea to bank fraud. A guilty plea is invalid if the defendant pleads guilty without having been informed of all the elements of the charged crime. It is similarly void if the defendant does not understand the essential elements of the crime.

Mr. Cross was charged with bank fraud. That offense has "materiality of falsehood" as an element of the offense. *Neder v. United States*, 527 U.S. 1, 25 (1999). It also requires that a person do more than simply write bad checks. When

Mr. Cross pleaded guilty, though, he was not informed that a scheme to defraud under the bank fraud statute required a material misrepresentation. And the district court did not elicit an admission from Mr. Cross that he intended to defraud the banks. Instead, Mr. Cross admitted only that he knowingly deposited bad checks drawing on an account he owned into an account he owned. That admission was insufficient to meet the elements of bank fraud. Yet on that admission alone, the district court refused to allow Mr. Cross to withdraw his guilty plea notwithstanding his claims that he did not intend to defraud the banks or use deceit.

Finally, courts have repeatedly acknowledged that federal jurisdiction over a bank fraud claim exists solely because FDIC covers the victim of any losses. *United States v. Perez-Ceballos*, 907 F.3d 863, 867-868 (5th Cir., 2018) (Jurisdiction by FDIC insurance); *United States v. Wells*, 177 F.3d 603, 607 (7th, 1999) (Restitution only set by statute and FDIC coverage); *United States v. Adepoju*, 756 F.3d 250, 255 (4th Cir. 2014) (Federally insured is element of statute); *United States v. Forchette*, 220 F. Supp. 2d 914, 921-922 (E Wis. DC, 2002) (statute element requires funds insured by FDIC). A letter from FDIC, however, to Mr. Cross's friend indicates plainly FDIC does not cover losses for Bank Fraud and banks have private insurance for this type coverage. Thus, set by Wells and others, only banks insured and where funds are covered by FDIC affords a court jurisdiction in a bank fraud case. FDIC makes plain they do not cover Bank Fraud funds and loses in banks they insure. Thus, restitute and the statutory element is not met.

Mr. Cross did not enter a knowing and voluntary plea to bank fraud and Government failed to prove all elements of the bank fraud. The court thus abused its discretion in denying his motion to withdraw his plea and not dismissing the

case for lack of jurisdiction thereby violating the Fifth Amendment. This Court should vacate the convictions and remand for further proceedings.

REASONS FOR GRANTING THE PETITION

I. **Whether the Decision below squarely conflicts with *McCarthy v. United States* and *Neder v. United States*, where Mr. Cross Held a Constitutional Right to know Both the Nature and Cause of the Charges Against him, which Included Both the Materiality of the charge and Intent for any Plea to be valid under a Rule 11 Plea?**

II. **Whether the Decision Below squarely conflicts with *Neder v. United States* where a plea of guilt relating to a defect in the Indictment, affects jurisdiction of the Court, and Where the Indictment Fails to Charge an Offense, does the Guilty Plea Waive the defects?**

On appeal to the Seventh Circuit, Mr. Cross argued that his plea was invalid because the Court did not inform him about the nature of the charge and did not elicit an adequate factual basis for the plea. Mr. Cross also challenged the Indictment on grounds that it did not contain all the necessary elements and did not track the statutory language. Mr. Cross maintained that the restitution not valid because the statute and charges were not covered by the FDIC transactions to insure the banks and the charges in the Indictment of bank fraud failed to include "intent" and "materiality."

Mr. Cross was charged in Indictment with five charges under 18 U.S.C. § 1344 (1) which states:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice-
>
> (1) to defraud a financial institution; or
>
> ***

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

This Court has long ago held the Bank Fraud Statute included an element of "intent," and it required proof against a Defendant. See, e.g. *Coffin v. United States*, 162 U.S. 664, 667 (1896) (Essential element of intent, bank fraud); *Evans v. United States*, 153 U.S. 584, 587-588 (1894) (Indictment or statute must show every element of the offense, bank fraud). The more recent case is *Neder v. United States*, 527 U.S. 1, 25 (1999) ("We hold that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes").

Rule 11's requirements and its purposes through a conviction voluntariness hearing are particularly as held in *McCarthy v. United States*, 394 U.S. 459, 471-472 (1969). Like *McCarthy*, Petitioner here was 75 years old and in poor health at the time he entered his plea. He plead guilty to a crime that requires a "knowing and willful" attempt to defraud a bank of funds; yet, throughout his sentencing hearing, he and his counsel insisted that his acts were merely "neglectful," "inadvertent," of mere non-sufficient funds and committed without 'any disposition to deprive any bank of its due.' Like in *McCarthy*, these remarks cast considerable doubt on the Government's assertion that petitioner pleaded guilty with full awareness of the nature of the charges against him. But, like in *McCarthy*, out of the same court of Appeals, confronted with petitioner's statements that he entered his plea of his "own volition," his counsel's statement that he explained the nature of the charges, and evidence that petitioner did obtain money from banks, both the District Court and the Court of Appeals concluded that petitioner's guilty plea was voluntary. Such violates the Article III and the Fifth, Sixth and Ninth Amendment's protections.

Despite petitioner's inability to convince the courts below that he did not fully understand the charges against him, it is certainly conceivable that he may

have intended to acknowledge only that he in fact owed the banks the money it claimed without necessarily admitting that he committed the crimes charged; for those crimes requires the very type of specific intent that he repeatedly disavowed. See *Sansone v. United States*, 380 U.S. 343 (1965). Moreover, since the elements of the offenses were not explained to petitioner, specifically "Intent," and since the specific acts of bank fraud do not appear of record, contrary to the Seventh Circuit's amended ruling which conflicts with other Circuits and this Court's holding, see e.g. *United States v. Lyons*, 898 F.2d 210, 214 (1st Cir., 1990) (Rule 11 inquiry is mandated when a defendant by plea does not contest a guilty finding; a court's noncompliance with that mandate can constitute reversible error); *Araromi v. United States*, 2014 U.S. Dist. LEXIS 56891, * 80 (WD, Tex, April 23, 2014) (Because *McCarthy* no longer governs the Fifth Circuit, Appellate Counsel did not render ineffective assistance by failing to cite it))[5], it is also possible that if petitioner had been adequately informed he would have concluded that he was actually innocent of the charges because a mere drafting of a check does not constitute bank fraud. *United States v. Bean*, 18 F.3d 1367, 1370-1371 (7th Cir., 1994) (presentation of a check does not make a "false statement" that the account contains sufficient funds) (Citing, inter alia: *Williams v. United States*, 458 U.S. 279, 73 L. Ed. 2d 767, 102 S. Ct. 3088 (1982)).

On the other hand, had the District Court scrupulously complied with Rule 11, there would be no need for such speculation. At the time the plea was entered, petitioner's own replies to the court's inquiries might well have attested to his

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[5] *Araromi*, 2014 U.S. Dist. LEXIS 56891, * 80 contends that Congress abrogated Rule 11 and *McCarthy* no longer applies to the courts and only by showing that substantive rights are affected does error come into play. A substantive right is like life, liberty, property, or reputation, while procedure may be Rule 11 standards, but if Rule 11 affects a substantive right, like losing one's liberty by a plea of guilt, by defects, Rule 11 comes into play and McCarthy would still be fully applicable.

understanding of the essential elements of the crime charged, including the requirement of specific intent, and to his knowledge of the acts which formed the basis for the charge, however, here, Government and the Court gave only four (4) elements and "intent" was not one of them. Only after the plea Petitioner Cross learned intent was required and sought to withdraw his plea because he claimed he was not guilty of bank fraud.

Like in *McCarthy*, prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives a defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea. A defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew not only will ensure that every accused is afforded those procedural safeguards, but also will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate. It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, that district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking. *McCarthy v. United States*, 394 U.S. 459, 471-472 (1969).

Petitioner Cross prays the Court will acknowledge the Government and Court failed to give any element of "intent" before accepting the plea of guilty and refused to withdraw. That the Seventh Circuit failed to address this matter, then on rehearing, amended their opinion to attempt to show an intent, but failed, like in *McCarthy*, to acknowledge Petitioner Cross was never given the element of "intent" for a knowing, voluntary and intelligent plea which affects Mr. Cross's liberty. This violates the Article III and the Fifth, Sixth and Ninth Amendment's

protections. Petitioner Cross prays this Court will hear this matter due to conflict in the Circuits or, in the alternative, would remand, like in *McCarthy*, to withdraw the plea and plea anew because the court did not comply with Rule 11 or give all elements of intent for a knowing and voluntary plea.

III. Whether The Decision of the District Court that it holds jurisdiction over a Claim of Bank Fraud, where the Bank nor victims are covered by FDIC Insurance for any loss from Bank Fraud, conflicts with *United States v. Perez-Ceballos, intel alia,* where the charge should be a State claim, not Federal?

This is a case of first impression and affects all the States of the Union. Courts have repeatedly acknowledged that federal jurisdiction over a bank fraud claim exists solely because FDIC covers the victim of any losses. *United States v. Perez-Ceballos*, 907 F.3d 863, 867-868 (5th Cir., 2018) (Jurisdiction by FDIC insurance); *United States v. Wells*, 177 F.3d 603, 607 (7th, 1999) (Restitution only set by statute and FDIC coverage); *United States v. Adepoju*, 756 F.3d 250, 255 (4th Cir. 2014) (Federally insured is element of statute); *United States v. Forchette*, 220 F. Supp. 2d 914, 921-922 (E Wis. DC, 2002) (statute element requires funds insured by FDIC). A letter from FDIC, however, to Mr. Cross's friend indicates plainly FDIC does not cover losses for Bank Fraud and banks have private insurance for this type of coverage. See Document 124, filed 05/29/2018, "Defendant's Summary of Plea Hearing, Request for Status." Thus, set by *Wells* and others, only if the banks insured have their funds covered by FDIC does it afford a court jurisdiction in a bank fraud case.

FDIC makes plain, via their letter, they do not cover Bank Fraud funds and loses in banks they insure[6]. Document 124, filed 05/29/2018, "Defendant's

[6] In recent years banks and private equity investors have partnered with the FDIC by purchasing interests in FDIC-owned LLCs holding loan portfolios seized from failed banks. These

Summary of Plea Hearing, Request for Status." Although federal courts have for years convicted people under the bank fraud statutes, which requires FDIC insurance for authority, if the funds are not covered by FDIC, the statute fails and is unconstitutional. In *Ex parte Siebold*, 100 U.S. 371, 25 L. Ed. 717 (1880), this Court addressed why substantive rules must have retroactive effect regardless of when the defendant's conviction became final. At the time of that decision, "[m]ere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitute[d] no ground for the issue of the writ." *Id.*, at 375, 25 L. Ed. 717. Before *Siebold*, the law might have been thought to establish that so long as the conviction and sentence were imposed by a court of competent jurisdiction, no habeas relief could issue. In *Siebold*, however, the petitioners attacked the judgments on the ground that they had been convicted under unconstitutional statutes. The Court explained that if "this position is well taken, it affects the foundation of the whole proceedings." *Id.*, at 376, 25 L. Ed. 717. A conviction under an unconstitutional law

> "is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But . . . if the laws are unconstitutional and void, the

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arrangements allow the FDIC to retain a financial interest in the assets while transferring management responsibilities to its co-venturers, including managing the loan enforcement process and overseeing the ultimate disposition of any collateral. This process frequently involves litigation. Federal court is often the preferred venue for this type of contract-based judicial action for a variety of reasons, including predictability of outcome; clear precedent; avoiding the risk of judicial bias; and a tendency on the part of federal judges to construe contracts and statutes plainly and as written. But co-venturers must recognize that the mere fact of partnering with the FDIC may prevent the venture from using the federal courts. In a decision issued on October 27, 2011, the U.S. District Court for the District of Nevada dismissed a case brought by an FDIC co-venture for lack of jurisdiction. In *RES-NV TVL, LLC v. Towne Vistas, LLC*, 2011 U.S. Dist. LEXIS 124731 * | 2011 WL 5117886 (U.S.D.C. Nev. 2011), the court found that it lacked diversity jurisdiction over a lawsuit brought by that co-venture to recover on an eight-figure deficiency balance. See also see *RES-NC Settlers Edge, LLC v. Settlers Edge Holding Company, LLC*, 2011 U.S. Dist. LEXIS 99728 * | 2011 WL 3897729 (Sept. 3, 2011)

Circuit Court acquired no jurisdiction of the causes." *Id.*, at 376-377, 25 L. Ed. 717.

As discussed, the Court has concluded that the same logic governs a challenge to a punishment that the Constitution deprives States of authority to impose. *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989); see also Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 151 (1970) ("Broadly speaking, the original sphere for collateral attack on a conviction was where the tribunal lacked jurisdiction either in the usual sense or because the statute under which the defendant had been prosecuted was unconstitutional or because the sentence was one the court could not lawfully impose" (footnote omitted)). A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void. See *Siebold*, 100 U.S., at 376, 25 L. Ed. 717

In support of its holding that a conviction obtained under an unconstitutional law warrants habeas relief, the *Siebold* Court explained that "[a]n unconstitutional law is void, and is as no law." *Ibid.* A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids. To conclude otherwise would undercut the Constitution's substantive guarantees. Writing for the Court in *United States v. United States Coin & Currency*, 401 U.S. 715, 91 S. Ct. 1041, 28 L. Ed. 2d 434 (1971), Justice Harlan made this point when he declared that "[n]o circumstances call more for the invocation of a rule of complete retroactivity" than when "the conduct being penalized is constitutionally immune from punishment." *Id.* 401 U.S., at 724, 91 S. Ct. 1041, 28 L. Ed. 2d 434. *United States Coin & Currency* involved a case on direct review; yet, for the reasons

explained by this Court, the same principle should govern the application of substantive rules on collateral review. As Justice Harlan explained, where a State lacked the power to proscribe the habeas petitioner's conduct, "it could not constitutionally insist that he remain in jail." *Desist v. United States*, 394 U.S. 244, 261, n. 2, 89 S. Ct. 1030, 22 L. Ed. 2d 248 (1969) (dissenting opinion).

If the FDIC does not cover the funds charged in a bank fraud case, then the statute is misstated and misread, and the conviction cannot stand. The elements of a § 1344(1) violation is (1) the defendant knowingly executed or attempted a scheme or artifice to defraud a financial institution, (2) he did so with intent to defraud, and (3) the institution was a federally insured or chartered bank. *United States v. Brandon*, 298 F.3d 307, 311 (4th Cir. 2002); see also *United States v. Flanders*, 491 F.3d 1197 (10th Cir. 2007). The statute is broad as to the third element, however, under a reasonable person standard, one would conceive that insured means the funds themselves are covered by the FDIC. This would be a logical reasoning. If so, bank fraud cases in federal courts have been incarcerated wrongfully for years now and such actions in a land of law is egregious to say the least. Such conduct violates the Article III and the Fifth, Sixth and Ninth Amendment's protections. If the funds are not covered by FDIC, as FDIC claims in their letter, then the third element fails, and the conviction must be overturned.

This Court has stated that it is the duty of this Court to say what the law is! It would be difficult to imagine a more question-begging analysis. "The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the *power and duty* of those courts to decide cases and controversies properly before them." *United States v. Raines*, 362 U.S. 17, 20-21, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960) (citing *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803) (emphasis added). This Court's power "to say what

the law is" is circumscribed by the limits of its statutorily and constitutionally conferred jurisdiction. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-578, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). And that is precisely the question in this case: whether the Constitution confers jurisdiction on federal courts to decide petitioners' claims. It is both irrational and arrogant to say that the answer must be yes, because otherwise this Court would not be Supreme.

Government would contend if the bank fraud was held unconstitutional, it would affect a numerous amount of cases and put convicted people back unto the street, but not to correct an illegal statute and keeping those wrongfully incarcerated inside violates due process and the very foundation of what American represents. States, by contrast, have considerable expertise in enforcing their laws and have enforced state laws abusive financial bank practices more than has FDIC or the Federal Government.[7] States are more familiar with local conditions and practices than is the federal government and can more quickly recognize and respond to new predatory practices as they arise. As the Government increasingly permits national banks and their subsidiaries to expand into nonfinancial areas, states' greater expertise and experience in identifying abuses in those areas will become even more essential to protecting consumers' interest. Thus, the issue whether 1344 (1) is constitutional or not is of national importance and affects both state and federal convictions through all fifty States of the Union and D.C. Not to correct such violations of Article III and the Fifth, Sixth and Ninth Amendment's protections indicates no court holds to the Law and allows corruption and people to

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[7] For examples of enforcement efforts against operating subsidiaries under state laws, see *Minnesota ex rel. Hatch v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962 (D. Minn. 2001) (State enforcement action under state consumer fraud and deceptive practices law); Compl., *State v. First Horizon Home Loan Corp.*, No. 272/2004 (N.Y. Sup. Ct. filed Jan. 16, 2004), available at http://www.oag.state.ny.us/press/2004/jan/horizon5.pdf (last visited oct. 2, 2008) (state enforcement action under state unlawful debt collection and deceptive practices law).

be incarcerated unlawfully. Thus, this Court holds a duty to hear such an important issue and if found the FDIC must cover the funds and does not, reverse the action back to have Petitioner's conviction vacated.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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