No. _____

In the Supreme Court of the United States

JOHN O. GREEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

LOWELL H. BECRAFT, JR.
Counsel of Record for Petitioner
403-C Andrew Jackson Way
Huntsville, Alabama 35801
(256) 533-2535
becraft@hiwaay.net

QUESTION PRESENTED

In a series of decisions from this Court, the reach and scope of conspiracies to defraud the United States in violation of 18 U.S.C. § 371 were defined as including acts that abridged the functions of a federal agency. Petitioner Green's case involves his prosecution for a conspiracy to defraud in violation of § 371, and jury instructions that sought to define the functions of the Internal Revenue Service, the federal agency in question in this case, were submitted to the trial court by the defense, but were not given. The absence of these instructions in the jury charge in Green's case was the subject of Green's appeal to the Fifth Circuit, but his conviction was affirmed by that court.

The **Question Presented** is whether a trial court in a conspiracy to defraud prosecution premised on 18 U.S.C. § 371 must instruct the trial jury about the functions of the agency alleged to have been impeded.

PARTIES

The United States of America was the plaintiff in the court below in this criminal case. Defendants in the district court in this criminal case were Petitioner John O. Green and his co-defendant, Thomas D. Selgas.

CORPORATE DISCLOSURE

No corporation was party to these proceedings.

DIRECTLY RELATED CASES

This case stems from a criminal prosecution in the United States District Court for the Northern District of Texas, Dallas Division, Case No. 3:18-cr-00356-S-3. From convictions, both Green and Selgas appealed their convictions to the U.S. Court of Appeals for the Fifth Circuit, Case Nos. 21-10651, 21-10972, respectively.

Green's counsel has been informed that Thomas Selgas also plans to file a petition for writ of certiorari.

There are no other proceedings in state or federal court, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John O. Green ("Green") respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at *United States v. Green*, 47 F.4th 279 (5th Cir. 2022). That opinion appears in the Appendix, 1a.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2022. Appx., *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

18 U.S.C. §371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

INTRODUCTION

This petition presents a crucial question regarding jury instructions in criminal prosecutions for violations of 18 U.S.C. § 371 (conspiracy to defraud). This Court in *Hammerschmidt v. United States*, 265 U.S. 182, 188-189 (1924), held that a conspiracy to defraud in violation of § 371 "means to interfere with or obstruct one of its lawful governmental functions by deceit, craft, trickery, or at least by means that are dishonest." Prosecutions for violating this section that involve the Internal Revenue Service ("IRS") typically allege that the IRS functions that were hindered or abridged by the conspiracy are the functions of "ascertainment, computation, assessment and collection" of federal taxes.

In some circuits, identifying the functions of a federal agency that are alleged to have been impeded by a conspiracy to defraud has been extremely important in resolving the issue of a defendant's guilt or innocence. In *United States v. Murphy*, 809 F.2d 1427, 1431 (9th Cir. 1987), a money laundering case alleging that functions of the IRS had been impeded by those defendants, the Ninth Circuit concluded that "in the absence of [] a duty there could be no conspiracy to defraud the United States." The *Murphy* court relied on a similar decision of that court, *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986), as dictating this conclusion. In a conspiracy to defraud prosecution in the Ninth Circuit, the Government has an obligation to identify the statutory foundation for the performance of the agency functions it contends have been impeded, and

it must show how the defendants abridged those functions, or at least intended to do so.

Here, Green and his co-defendant, Thomas Selgas, were indicted and tried for a conspiracy to defraud in violation of § 371. The day before trial, Selgas' lawyer filed a series of requested jury instructions, several of which described the IRS' statutory foundation for its functions of "ascertainment, computation, assessment and collection" of taxes. However, during the charge conference with the district court, these requested instructions were not argued. Nonetheless, in Green's appeal to the Fifth Circuit, he asserted that the trial court committed plain error by not giving these submitted instructions. See *United States v. Aitken*, 755 F.2d 188, 194 (1st Cir. 1985) (holding that an appellate court can find plain error in these circumstances).

The heart of Green's defense at trial was that he had little to no contact with the IRS during the period of the alleged conspiracy, and he certainly did nothing to abridge the functions of the IRS and had no plans or intent to do so. It was thus critically important for the jury in this case to be informed of the "essential ingredients" for a case of this nature: the functions of the agency that was the object of the conspiracy. As this Court has stated:

> [W]here the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime

> are entitled to be tried by the standards of guilt which Congress has prescribed."

Screws v. United States, 325 U.S. 91, 107 (1945).

Here, the "essential ingredients" of the conspiracy charge against Green were the functions of the IRS related to the "ascertainment, computation, assessment and collection" of taxes. Only by knowing the statutory foundation for these functions can a jury determine from the facts of the case whether those functions have been abridged, or whether there had been any agreement or plan by the defendants to abridge those functions.

The source of the jury instructions given by the district court in this case were the pattern jury instructions drafted and published by the Fifth Circuit. A simple review of those pattern instructions reveals that they fail to address this critically important matter for conspiracy to defraud prosecutions, and it is suggested that similar pattern instructions of other circuits are similarly deficient.[1]

Without jury instructions explaining in plain terms the functions of the federal agency which is the object of a conspiracy to defraud, a jury is left guessing whether any act of a defendant shown at trial amounted to an actual abridgement of agency functions or an attempt to do so. When this happens, innocent defendants can be wrongfully convicted.

This Court's acceptance of the instant petition will clarify the importance of jury instructions explaining the functions of a federal agency which is the object of a conspiracy to defraud. This issue certainly needs resolution if the promise of due

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[1] The experience of the author of this petition is that other pattern instructions are similarly deficient.

process is to be kept in the courts.

STATEMENT OF THE CASE

1. Factual Background and Proceedings in District Court.

Green was indicted, along with his codefendant, Thomas Selgas, on July 18, 2018, by a federal grand jury sitting in the Northern District of Texas, Dallas Division, for conspiracy to defraud the United States in violation of 18 U.S.C. § 371.[2] The case was tried during January of 2020. At trial, the prosecution showed that Thomas Selgas had apparently been assessed income taxes for the years 1998 through 2002, and that these taxes had not been paid. The prosecution also showed that Selgas filed a tax "statement" for 2005, and had also failed to pay his income taxes for 2005, leaving a substantial amount owed.

In 2005, Selgas' company, MyMail, Ltd., was paid several millions in settlement of patent litigation in which it was involved, and Selgas received as a MyMail partner more than a million dollars of this settlement. When these funds were to be paid to Selgas, he had the funds wired to a gold and silver dealer in Dallas and Selgas' part of the litigation settlement was paid to him in gold coins. Selgas then filed a 2005 "tax statement" reporting his income in the face value of the gold coins he had been paid.[3] Green, a Texas lawyer, assisted Selgas in

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[2] Jurisdiction of the district court for this criminal action was obtained via 18 U.S.C. § 3231.

[3] *See Crummy v. Klein Ind. School District*, 2008 WL 4441957 (5th Cir. 2008), that held that there is no legal difference

the preparation of this tax "statement" as well as a similar one for the MyMail partnership.

At trial, the prosecution contended that Selgas and Green had engaged in various acts in an effort to impede the IRS in its collection efforts to secure payment of taxes Selgas owed.

In early 2008, Selgas purchased a farm in rural Texas with gold coins. Selgas then transferred the property to a trust controlled by a family member. In years prior to the indictment, funds paid to Selgas were deposited into Green's lawyer trust account, and Green paid Selgas' living expenses from such deposits.

In May 2014, an IRS agent assigned to collect taxes assessed against Selgas contacted Green seeking information. Green and the agent exchanged several letters about the taxes allegedly assessed against Selgas, but nothing transpired. This was the only contact Green had with anyone from the IRS related to its efforts to collect taxes claimed to have been assessed against Selgas.

On the eve of trial, Selgas' lawyer filed a series of requested jury instructions that were essential to the defense. The indictment in this case alleged that this conspiracy's objective sought to abridge the functions of the IRS in the "ascertainment, computation, assessment and collection" of the income taxes allegedly assessed against Selgas. In four submitted jury instructions, the statutory authority of the IRS to perform these functions were described.

The statutory authority of the IRS to ascertain taxes was the subject of requested instruction No. 10:

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between dollar denominated "cash" and dollar denominated gold coins.

Functions of IRS: *Ascertainment*

> In reference to "ascertaining" income taxes, there are only two lawful methods available to the IRS to perform this particular function: its agents can either investigate and look for signs of income (canvassing of districts), or they can issue summonses for the production of records.[1]

The statutory authority of the IRS to compute taxes was the subject of requested instruction No. 11:

Functions of IRS: *Computation*

> The function of "computing" taxes within the IRS merely means the mathematical calculations of adding, subtracting, multiplying, and dividing. These math calculations enable taxes to be calculated.

The statutory authority of the IRS to assess taxes was the subject of requested instruction No. 12:

Functions of IRS: *Assessment*

> The "assessment" of income taxes is a very mechanical process. The law holds that the "assessment shall be made by recording the liability of the taxpayer in the office of the Secretary" or his delegate "in accordance with rules or regulations prescribed by the Secretary."

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[1] Authority for this requested instruction: 26 U.S.C. §§ 7601-7610.

> The Secretary's regulations provide that an assessment officer "engages in the act of assessment by the signing of a summary record of assessment." Until the assessment as above mentioned has been made, the function of "collecting" income taxes cannot be pursued.[4]

The statutory authority of the IRS to collect taxes was the subject of requested instruction No. 13:

> Functions of IRS: *Collection*
>
> Once income taxes have been assessed, the IRS must give a person a notice and demand for the payment of the assessed taxes. If the person does not pay the taxes after a specified period, a lien arises as a matter of law. Thereafter, the IRS may give a person a notice of intent to levy. If the taxes are still not paid within the time period, then the IRS can levy and seize all property and rights to property owned by the tax debtor.[5]

But while these requested instructions were actually filed with the district court clerk, they were not argued by defense counsel during the jury charge conference with the district court and thus they were not given to the jury.

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[4] The authorities cited for this requested instruction were the following: 26 U.S.C. § 6203; 26 C.F.R. § 301.6203-1; *Bull v. United States,* 295 U.S. 247 (1935); *Brafman v. United States,* 384 F.2d 863 (5th Cir. 1967); *Ewing v. United States,* 711 F.Supp. 265 (W.D.N.C. 1989); *In re Western Trading Co.,* 340 F.Supp. 1130 (D.Nev. 1972); *Estate of Goetz v. United States,* 286 F.Supp. 128, 131 (D.Mo. 1968).

[5] The authorities cited for this requested instruction were the following: 26 U.S.C. §§ 6303, 6321 and 6331.

The district court's instructions given to the jury did not include these "essential ingredients" and were simply a reading of the relevant Fifth Circuit pattern jury instructions. The trial court's jury charge regarding the conspiracy to defraud count of the indictment was fairly short and simple:

> Title 18, United States Code, Section 371, makes it a crime for anyone to conspire with someone else to defraud the United States or any agency thereof in any manner or for any purpose.
>
> The Defendants are charged with conspiring to defraud the United States by impeding, impairing, obstructing, or defeating the lawful function of the Internal Revenue Service in the ascertainment, compilation [sic], assessment, or collection of income taxes.
>
> The word "defraud" here is not limited to its ordinary meaning of cheating the Government out of money or property; it also includes impairing, obstructing, defeating, or interfering with the lawful function of the Government or one of its agencies by dishonest means.
>
> A "conspiracy" is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of "partnership in crime," in which each member becomes the agent of every other member.
>
> For you to find the Defendants guilty of this crime, you must be convinced that the Government has proved each of the following beyond a reasonable doubt:

First: That a defendant and at least one other person made an agreement to defraud the Government or one of its agencies, as charged in the Indictment;

Second: That a defendant knew that the purpose of the agreement was to defraud the Government and joined in it willfully, that is, with the intent to defraud; and

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the Indictment, in order to accomplish some object or purpose of the conspiracy.

One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. In determining whether a particular defendant was a member of the conspiracy, you should consider only his acts and statements. If a defendant understands the unlawful nature of a plan or scheme on one occasion, that is sufficient to convict him for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

The Government need not prove that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme.

Similarly, the Government need not prove that all of the details of the scheme alleged in the Indictment were actually agreed upon or carried out. Nor must it prove that all the persons alleged to have been members of the

conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

Mere presence at the scene of an event, even with knowledge that a crime is being committed, or the mere fact that certain persons may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

Also, a person who has no knowledge of a conspiracy, but who happens to act in a way that advances some purpose of a conspiracy, does not thereby become a conspirator.

In order to sustain its burden of proof under Count One of the Indictment, the Government must prove beyond a reasonable doubt that one of the members of the alleged conspiracy or agreement knowingly performed at least one overt act in the Northern District of Texas and that this overt act was performed during the existence or life of the conspiracy and was done to somehow further the goals of the conspiracy or agreement.

The term "overt act" means some type of outward, objective action performed by one of the parties to or one of the members of the agreement or conspiracy which evidences that agreement.

Although you must unanimously agree that the same overt act was committed, the Government is not required to prove more than one of the overt acts charged. The overt act may, but for the alleged illegal agreement, appear totally innocent and legal.

> For you to find a defendant guilty of the conspiracy under Count One, you must find that a member of the conspiracy of which the defendant was a member, performed at least one overt act on or after July 18, 2012. If you find that all of the overt acts were made before July 18, 2012, you must find that defendant not guilty of Count One.

Based on these jury instructions, which did not include the "essential ingredients" for a conspiracy to defraud, Green was convicted. For his conviction, Green was sentenced to serve six months (he has already served this sentence). He timely appealed his conviction to the Fifth Circuit.

2. The Fifth Circuit's Decision.

In Green's appeal to the Fifth Circuit, he sought reversal of his conviction by asserting that the trial court plainly erred in failing to give the above submitted instructions as well as others. Two very favorable Fifth Circuit cases mentioned and discussed in Green's opening brief to the court of appeals were *United States v. Haga*, 821 F.2d 1036 (5th Cir. 1987), and *United States v. Porter*, 591 F.2d 1048 (5th Cir. 1979).

In *Porter*, the court of appeals was confronted with the convictions of some doctors for a conspiracy to defraud related to their receipt of Medicare payments. Prior to trial, the defense in that case sought through discovery identification of the various laws and regulations that the prosecution contended had been violated by the doctors, but this request was refused. The doctors were convicted and appealed to the Fifth Circuit, arguing that it was incumbent on the prosecution to identify the laws or

regulations that governed their conduct subject to that prosecution. The Fifth Circuit in that case held that identification of the laws and regulations were very relevant to a determination of the culpability of the doctors and because the prosecution could not identify those laws or regulations (even to the court of appeals), that court reversed the convictions. *Porter* stand for the proposition that the prosecution in a conspiracy to defraud case must identify the laws and regulations forming the foundation for the case.

Haga also involved a conspiracy prosecution where the defendant was charged with violating the offense clause of § 371, and convicted in a bench trial for a conspiracy to defraud. In vacating that conviction, the Fifth Circuit held:

> Post-*Hammerschmidt* cases based on section 371 "conspiracy to defraud" indictments involving intangible governmental rights ordinarily have described clear interference and active contact with governmental agency functions.
>
> While it is not altogether clear whether a "conspiracy to defraud" indictment must specifically allege that the conspiracy had as its object interfering with a particular, specific governmental function, it nevertheless seems plain that, for a section 371 "conspiracy to defraud" conviction to stand, the essence of the conspiracy must at least involve a showing of more than *inadvertent contact with a governmental agency or incidental infringement of government regulations.* [emphasis added]

Haga, 821 F.2d at 1040-41.

These two Fifth Circuit cases clearly support the submitted jury instructions that were the subject of Green's appeal to the Fifth Circuit. Green noted to the court of appeals that these issues regarding these jury instructions could be considered by it as plain error:

> "An appellate court may not correct an error that the defendant failed to raise in the district court unless there is '(1) error, (2) that is plain, and (3) that affects substantial rights.' 'If all three conditions are met an appellate court may then exercise its discretion to notice a forfeited error but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *United States v. Ogba*, 526 F.3d 214, 236-37 (5th Cir. 2008). But, "there is no meaningful difference between the 'affects substantial rights' and the 'fairness, integrity or public reputation of judicial proceedings' parts of the plain error standard, on the one hand, and manifest injustice on the other ... the latter is simply a shorthand version for these two parts of the plain error standard." *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428 (5th Cir. 1996).

Green's Reply Brief at 10.

Green argued that the failure of the trial court to give these instructions was "(1) error, (2) that is plain" based on these cases of *Porter* and *Haga*, and that this error "affect[ed] [Green's] substantial rights" because he had been convicted and could no longer practice law. Green presented to the Fifth

Circuit a clear case that the failure to give these instructions was plain error.

However, the Fifth Circuit panel in this appeal adroitly *avoided* addressing this issue, thus disposing of Green's arguments without any discussion.

REASONS FOR GRANTING THE WRIT

In the Fifth Circuit, *Porter* and *Haga* are precedence requiring, in conspiracy to defraud prosecutions, a consideration of the laws and/or regulations that form the foundation for that type of criminal prosecution. These two cases demonstrate the need for jury instructions like those at issue here. This same rule regarding conspiracy to defraud prosecutions exists in other circuits, *e.g.,* the Ninth Circuit. *See United States v. Murphy*, 809 F.2d 1427, 1431 (9th Cir. 1987), and *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986). However, the Fifth Circuit's decision in Green's appeal not only conflicts with Ninth Circuit authority, but also its own circuit authority.

In determining whether certiorari should be granted, one of the most important factors is the existence of a split among the federal courts of appeals. Such a split exists here regarding the issue that Green asks this Court to review. Furthermore, this Court should grant review because this case presents this very important issue and provides the perfect opportunity to resolve this circuit conflict.

A. Scope of a "Conspiracy to Defraud."

Prosecutions under the "defraud clause" of 18 U.S.C. §371 have been justifiably criticized. In his seminal work entitled *Conspiracy to Defraud the*

United States, 68 Yale Law J. 405, 407-409 (1959), Prof. Goldstein commented:

> The federal conspiracy statute brings the problem into sharp relief. Though it purports to specify the purposes which transform mere agreements into crime – prohibiting conspiracy either "to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose" – it introduces through the phrase "defraud the United States" a concept every bit as shadowy as common law conspiracy. In combination, "conspiracy" and "defraud" have assumed such broad and imprecise proportions as to trench not only on the act requirement but also on the standards of fair trial and on constitutional prohibitions against vagueness and double jeopardy. Yet the difficulties of "conspiracy to defraud the United States" have gone virtually unrecognized by commentators and courts. The federal cases leave the impression that the large problems of defining the crime have long been resolved, with only procedural and tactical minutiae remaining for discussion. Nothing could be further from the truth. An examination first of "conspiracy" and then of "defraud the United States" will demonstrate their peculiar susceptibility to a kind of tactical manipulation which shields from view very real infringements of basic values of our criminal law.

See also *Krulewitch v. United States*, 336 U.S. 440, 445-449 (1949); and *Kotteakos v. United States*, 328 U.S. 750, 760-774 (1949).

Section 371 makes penal two classes of conspiracies: (a) those which have as their object the commission of specific offenses, and (b) those having as an objective the "defrauding of the United States." Under the first class, one may readily discern what conduct is proscribed by reference to the statute making penal a specific offense. Virtually all federal criminal statutes are well drafted and the elements comprising them are known. But the latter class of defraud clause conspiracies does not depend upon statutory language establishing its elements, and for this reason, it is difficult to determine on casual reading what the specific elements of this offense are.

There are two types of conspiracies to defraud: one involves charges of conspiring to defraud the United States of money or property, and the other involves charges that assert the obstruction of the performance of functions by a federal agency. Here, the conspiracy count of the Green indictment alleged that the conspiracy sought to impede, impair, obstruct and defeat the IRS in the performance of four specifically identified functions: the ascertainment, computation, assessment and collection of income taxes.

One of the early cases defining the scope of a conspiracy to defraud was *Haas v. Henkel*, 216 U.S. 462 (1910), which concerned an indictment for "conspiracy to defraud" involving the bribery of an employee of the United States Department of Agriculture to falsify certain cotton reports of that Department and to disclose the unaltered true reports to the other conspirators before they were made public — the purpose of such secret disclosure obviously being to aid the profitable trading in

speculative cotton futures. In *Haas*, which involved a direct abridgment of an agency's functions, a "conspiracy to defraud" was defined to include the following:

> But it is not essential that such a conspiracy shall contemplate a financial loss or that one shall result. The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government.

Haas, at 479.

This extremely broad scope of a "defraud clause" conspiracy as defined by *Haas* was fortunately refined to some extent in *Hammerschmidt v. United States*, 265 U.S. 182, 188-189 (1924). There, the defendants had been charged with impeding the functions of the draft board by distributing handbills and flyers advocating non-compliance with the draft laws. In dismissing the indictment charging such a conspiracy, this Court held:

> To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft, trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention. It

> is true that the words "to defraud" as used in some statutes have been given a wide meaning, wider than their ordinary scope ... Its construction in the *Horman* case cannot be used as authority to include within the legal definition of a conspiracy to defraud the United States *a mere open defiance of the governmental purpose to enforce a law by urging persons subject to it to disobey it.* [emphasis added]

Hammerschmidt was engaged in an obvious exercise of rights protected by the First Amendment, and this Court held that such conduct was not subject to criminal prosecution under a theory that it defrauded the government. This Court also plainly noted that strenuously advising others to violate the law simply is not defrauding the government or obstructing its functions. *See also United States v. Spock*, 416 F.2d 165 (1st Cir. 1969).

The *Hammerschmidt* reconstruction of the term "conspiracy to defraud" was ultimately found to be applicable to acts of impeding the functions of the IRS in *United States v. Klein*, 247 F.2d 908, 916 (2nd Cir. 1957)(hence "*Klein*-type conspiracies"). The *Klein* conspiracy, by very clear and definite acts, involved direct interference with the performance of the functions of the IRS, including the submission of false statements and affidavits to Treasury agents. But *Klein* further defined another limit to such conspiracies:

> Mere failure to disclose income would not be sufficient to show the crime charged of defrauding the United States under 18 U.S.C. § 371.

Following *Klein*, other courts have agreed that the mere failure to disclose income never rises to the level of a conspiracy to defraud or tax evasion. *See United States v. Romano*, 938 F.2d 1569 (2nd Cir. 1991); *United States v. Tarnopol*, 561 F.2d 466, 474-75 (3rd Cir. 1977); *United States v. Doyle*, 956 F.2d 73, 75 (5th Cir. 1992); *Griffin v. United States*, 173 F.2d 909, 910 (6th Cir. 1949); *Bridgeforth v. United States*, 233 F.2d 451, 453 (6th Cir. 1956); and *United States v. Mesheski*, 286 F.2d 345, 346 (7th Cir. 1961).

In summary, *Haas* permits conspiracy charges based upon allegations and proof that agency functions were obstructed, which envisions acts of commission instead of merely passive "acts," and *Hammerschmidt* requires the abridgement of functions by dishonest means, involving active contact with the agency's functions and something more than advocating violations of the law.

B. The Circuit Split.

Notwithstanding the allegations in the Green indictment's conspiracy count that the illegal agreement between him and Selgas sought to impair four specific functions of the IRS, it is still of critical importance that those functions of the IRS be specified and the statutory foundation for their performance identified.

In United *States v. Varbel*, 780 F.2d 758, 762 (9th Cir. 1986), the defendants were charged with conspiracy to violate the currency transaction reporting laws which mandate the reporting of cash transactions exceeding $10,000. These defendants structured their cash transactions below the threshold amount, and were indicted for conspiracy to defraud by evading those reports. In reversing those convictions, the Ninth Circuit held:

> Since appellants were under no duty to report their currency transactions to or through the bank, there can be no concealment ... Since the appellants have not illegally concealed matter within the jurisdiction of the IRS, the wire transfer of funds ... could not have furthered a scheme to defraud the IRS.

On the strength of the decision in *Varbel*, other similar conspiracies were dismissed. See *United States v. Dela Espriella*, 781 F.2d 1432 (9th Cir. 1986); *United States v. Murphy*, 809 F.2d 1427 (9th Cir. 1987); and *United States v. Cogswell*, 637 F.Supp. 295 (N.D.Cal. 1985).

Moreover, the Ninth Circuit has given greater definition to the scope and parameters of such conspiracies in *United States v. Caldwell*, 989 F.2d 1056, 1060 (9th Cir. 1993). In *Caldwell*, the issue was whether the defendant had engaged in defrauding conduct by operating a "warehouse bank," the claimed essence of which was concealment of assets of parties who allegedly owed money to the IRS. In vacating Caldwell's conviction, the court stated:

> But we're unwilling to conclude Congress meant to make it a federal crime to do anything, even that which is otherwise permitted, with the goal of making the government's job more difficult.
>
> But what the government actually did prove – that Caldwell conspired to make the IRS's job harder – isn't illegal.
>
> But we won't lightly infer that in enacting 18 U.S.C. §371, Congress meant to forbid all things that obstruct the government, or

> require citizens to do all those things that could make the government's job easier. So long as they don't act dishonestly or deceitfully, and so long as they don't violate some specific law, people living in our society are still free to conduct their affairs any way which they please.

The above decisions clearly demonstrate the importance of both defining the agency's statutory functions as well as the lawfulness of the conduct at issue.

As both *Hammerschmidt* and *Haga* point out, the purpose of a defraud clause conspiracy must be the commission of acts which actively interfere with an agency's functions, and they must be something more than "mere external interference with the agency." The *Haas* Court required that "defraud" conspiratorial agreements encompass the obstruction of the agency's functions, thus the phrase "impeding, impairing, obstructing and defeating" in the Green indictment must be synonymous with the term, "obstructing." Using the parallels of other cases concerning this term, it is also known that "obstruction" requires active contact with the agency.

Against this background of decisional authorities, Green argued to his Fifth Circuit panel that the jury instructions subject to his appeal should have been given, and it was plain error not to give them. If this case had been tried in Sacramento or Los Angeles and Green had been convicted there, he would have prevailed in his appeal to the Ninth Circuit. In fact, precedence at the Fifth Circuit requires as much. However, the published decision of the Fifth Circuit in Green's appeal transgressed its own decisional authority.

This Court in *Screws* held that when a jury in a criminal prosecution is not informed via jury instructions of the "essential ingredients" of the crime, the conviction must be vacated because of plain error. Here, the jury instructions describing the functions of the IRS in the "ascertainment, computation, assessment and collection" of taxes should have been given, and it was error not to do so, requiring reversal of Green's conviction.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Lowell H. Becraft, Jr.
Counsel of Record for Petitioner
403-C Andrew Jackson Way
Huntsville, Alabama 35801
(256) 533-2535
becraft@hiwaay.net