No. 21-

In The

Supreme Court of the United States

SCOTT PHILLIP FLYNN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the due process clause of the United States Constitution, as discussed in *McCarthy v. United States,* 394 U.S. 459 (1969) and more recent decisions of this Court, requires discussion in open court of the elements of an 18 U.S.C. § 371 conspiracy to defraud the Internal Revenue Service (*Klein* Conspiracy) offense to advise the defendant of the nature of the charges against him before a guilty plea is accepted.

II. Whether the requirement for a nexus between a particular administrative proceeding and a taxpayer's conduct is necessary to save the constitutionality of a conviction under an 18 U.S.C. § 371 conspiracy to defraud the Internal Revenue Service (*Klein* Conspiracy) after this Court's decision in *Marinello v. United States*, 138 S. Ct. 1101 (2018).

III. Whether a criminal defendant is entitled to a jury trial to determine the amount of restitution under either the Sixth or Seventh Amendments to the United States Constitution.

PARTIES TO THE PROCEEDINGS

Petitioner Scott Phillip Flynn was the defendant in the district court and the appellant in the Eighth Circuit.

The respondent is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Scott Phillip Flynn respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this matter.

OPINIONS BELOW

The decision of the court of appeals, reported at 969 F.3d 873, is reprinted in the Appendix (App.) at 1a-15a. The district court's opinion denying the motion to withdraw the guilty plea is unreported but available at 2019 WL 135701, and is reprinted at App. 16a-35a. The district court's memorandum order denying petitioner's request for a jury trial on restitution is unreported, and is reprinted at App. 36a-38a.

JURISDICTION

The court of appeals entered its judgment on August 13, 2020, and denied a petition for rehearing and rehearing *en banc* on September 17, 2020.[1] App. 39a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] By Order dated March 19, 2020, this Court extended the deadline to file a petition for writ of certiorari to 150 days from the date of the order denying a timely petition for rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Rule 11 of the Federal Rules of Criminal Procedure provides, in relevant part:

> Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following…
>
> (G) the nature of each charge to which the defendant is pleading…

Fed. R. Crim. P. 11(b)(1)(G).

Title 18, United States Code, Section 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.

The Sixth Amendment to the United States Constitution provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the

right to a speedy and public trial, by an impartial jury…."

The Seventh Amendment to the United States Constitution provides, in relevant part, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved…."

INTRODUCTION

Depending on the year, 90% or more of defendants charged with a crime in the federal criminal justice system plead guilty.[2] That figure is even higher for those charged with tax offenses.[3] Given the prevalence of convictions by guilty plea, it is imperative that guilty pleas are knowing and voluntary, and comport with all constitutional protections that should be afforded to criminal defendants.

Despite the importance of this issue, this Court has not considered the core requirements of a guilty plea in a federal criminal proceeding since *McCarthy v. United States,* 394 U.S. 459 (1969), over fifty years

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[2] *See* Statistical Tables for the Federal Judiciary—September 2019, Table D-4, (77,104 of 85,478 pleaded guilty) *https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2019.pdf* (as last visited February 9, 2021).

[3] *See id.* (92% of defendants charged with tax fraud pleaded guilty, and 93% of those charged with conspiracy against the United States pleaded guilty).

ago. There, this Court stated that "[i]t is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking." *Id.* at 472.

Since that time, some Circuit Courts have limited this Court's ruling in *McCarthy* to the detriment of the criminal justice system. This case presents an ideal vehicle to resolve a conflict among the Circuit Courts on the requirements before a plea to a complex offense may be accepted. This Court should resolve the conflict by holding that it should not be "too much to require" before accepting a plea and sentencing an individual like the petitioner to 87 months in prison that the trial court review the elements of the offense.

This Court should also accept review on two additional issues. Petitioner pleaded guilty to a crime that, as evidenced by the record, he never understood and which is defined only by parameters created by courts, not by the statute itself. The charging document for the 18 U.S.C. § 371 (*Klein* Conspiracy) charge used all but identical language to a tax obstruction charge, 26 U.S.C. § 7212(a), that was limited by this Court in *Marinello v. United States*, 138 S. Ct. 1101 (2018). The same nexus limitation should have been applied here or the statute should be declared unconstitutional.

Finally, after accepting the plea, the district court imposed an order of criminal restitution in excess of $5 million after stating, on the record, that the restitution award did not represent the actual loss but only a "proxy" for the loss, without providing petitioner his Sixth or Seventh Amendment guarantee

to a trial by jury. This is also an ideal case to resolve this issue and to find that a jury trial was required.

STATEMENT OF THE CASE

1. The United States indicted petitioner on tax and related conspiracy charges in December 2016. App. 17a. The Second Superseding Indictment ("Indictment") alleged that petitioner controlled shares resulting from a series of reverse merger transactions and that entities controlled by petitioner's now-deceased father received some of the shares. App. 2a-3a. The Indictment further alleged that certain nominees sold the stock and that petitioner and his father received capital gains income not reported to the Internal Revenue Service on these sales. *Id*.

In particular, Count 1 of the Indictment charged petitioner with engaging in a conspiracy to defraud the United States under 18 U.S.C. § 371 "by impeding, impairing, obstructing, and defeating the lawful governmental functions of the Internal Revenue Service...." App. 22a. The sole object of the alleged conspiracy was "to evade the assessment of income taxes." App. 45a. Such a charge under 18 U.S.C. § 371 is commonly referred to as a "*Klein* Conspiracy" named for *United States v. Klein,* 247 F.2d 908 (2d Cir. 1957). Count 3 of the Indictment alleged that petitioner filed a false tax return for 2007 in violation of 26 U.S.C. § 7206(1). App. 23a.

2. On June 4, 2018, petitioner executed a plea agreement with respect Counts 1 and 3 of the Indictment. App. 17a. Petitioner agreed to plead guilty to the *Klein* Conspiracy charge and the false tax

return charge in exchange for dismissal of the remaining counts and a two-point reduction for acceptance of responsibility. App. 17a. The plea agreement further provided the government would recommend an 87-month sentence of imprisonment. App. 70a.

However, the plea agreement failed to list the elements of the offense charged in Count 1. App. 64a. The plea agreement also failed to contain any recommendation regarding the amount of restitution that petitioner should pay. App. 71a. It provided instead that the district court should enter an order of restitution. *Id*.

The change of plea hearing occurred on June 4, 2018. The entire transcript was 26 pages.[4] App. 18a. Despite the factual and legal complexity of the alleged crimes, the only discussion relating to the elements of the *Klein* Conspiracy was the recitation of the introductory paragraph of Count 1 of the Indictment during arraignment. App. 21a-22a. Neither the elements of the *Klein* Conspiracy nor the 33 other paragraphs of the charge were mentioned. The district court did not ask petitioner if he understood the nature of the offense or if his attorneys had explained the elements to him.[5]

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[4] The district court included the cover page and indexes in referring to a "29 page transcript."

[5] The *only* discussion regarding counsel's advice and/or explanation of petitioner's rights and defenses was in relation to certain constitutional rights he was waiving. App. 24a. The district court began to ask petitioner if he had "gone over it with

Shortly after entry of the plea, a number of factual disputes regarding the specific conduct petitioner allegedly had admitted. Those disputes were unresolved at the time of sentencing. App. 10a.

3. Prior to sentencing, petitioner filed a motion seeking to withdraw his guilty plea. App. 19a. In his motion, petitioner argued, *inter alia*, (1) the district court failed to adequately ensure that he understood the nature of the charges against him, and that (2) that there could be no *Klein* Conspiracy without an allegation and proof of a nexus between petitioner's conduct and an administrative proceeding based upon this Court's decision in *Marinello*.

The district court denied petitioner's motion. App. 35a. The district court held that, since it recited the single paragraph from the Indictment while arraigning petitioner, and because petitioner had experienced counsel and had a prior conviction for a federal crime, he must have understood the nature of the charges against him. App. 24a-25a. The district court held that *Marinello* did not apply to the *Klein* Conspiracy charge. App. 33a.

4. The district court promptly scheduled petitioner's sentencing. Petitioner moved for a jury trial on restitution, which was denied. App. 37a.

5. Petitioner was sentenced to 87 months of incarceration. During the restitution portion of the sentencing, the government presented through the testimony of an IRS Special Agent three different calculations of the tax loss. The government witness

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[his] attorneys," but never gave petitioner an opportunity to respond. App. 22a.

stated that she was "ballparking" the loss calculation. App. 74a. The government conceded that the calculation was "a proxy number that [the government] used kind of as a compromise between the largest tax loss that it could be and what Mr. Flynn probably wanted." App. 75a. The government acknowledged that it was "not contending that this [$15 million imputed income] is a completely accurate number." App. 76a.

The district court imposed a restitution award acknowledging, "I won't pretend that I think it is mathematically precise in any way to reflect the amount that should actually be paid back." App. 78a-79a. The district court adopted the government's tax loss calculation as "fair" and entered an order of restitution on both counts of $5,392,442.87, with immediate payment required. App. 79a.

6. The Eighth Circuit affirmed. First, the Eighth Circuit found that the district court adequately informed petitioner of the nature of the charges by reading the Indictment, without acknowledging that only a small portion of the *Klein* Conspiracy charge was actually recited. App. 5a. The Eighth Circuit noted, "[T]he district court properly applied the well-settled law in this circuit and the elements of Flynn's offense were laid out in his indictment and read aloud to him at his change of plea hearing." App. 6a. The panel cited no authority supporting "well-settled law in this circuit."

The Eighth Circuit also ruled that *Marinello* did not impose a nexus requirement for a *Klein* Conspiracy charge. The Court acknowledged, however, that this Court was the proper authority to address the issue, stating: "As the Second Circuit has

explained, the broad scope of *Klein* conspiracies is sanctioned in 'long-lived Supreme Court decisions' and arguments aimed at narrowing it 'are properly directed to a higher authority. [*United States v.*] *Coplan*, 703 F.3d [46] at 62 [(2d Cir. 2012)].'" App. 9a.

The Eighth Circuit further held that there was no right to a jury trial on restitution under the Sixth Amendment, but failed to address whether such a right existed under the Seventh Amendment. App. 12a-13a. The Eighth Circuit found that "[*United States v.*] *Thunderhawk*, [799 F.3d 1203 (8th Cir. 2015)] remains the law in this circuit and we must follow it until the *en banc* court or the Supreme Court tells us otherwise." App. 13a. The court rejected petitioner's argument that this Court's decision in *United States v. Haymond*, 139 S. Ct. 2369 (2019), which held that a criminal penalty could not be imposed on facts proven to a judge only by a preponderance of the evidence, entitled him to a jury trial on restitution. *Id.*

On September 17, 2020, the Eighth Circuit denied petitioner's petition for rehearing and rehearing *en banc*. App. 39a.

REASONS FOR GRANTING THE PETITION

I. The Eighth Circuit Decision Expands the Existing Conflict among the Circuits Regarding the Requirements to Accept a Guilty Plea.

1. The vast majority of defendants in the criminal justice system plead guilty. *Missouri v. Frye*, 566 U.S.

134, 143 (2012) (noting 97% in the year under review). During a guilty plea colloquy, "the court must inform the defendant of, and determine that the defendant understands…the nature of each charge to which the defendant is pleading." Fed. R. Crim. P. 11(b)(1)(G). This Court has held, "[T]he defendant must be instructed in open court on 'the nature of the charge to which the plea is offered,'" and "the plea 'cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.'" *United States v. Broce*, 488 U.S. 563, 570 (1989) (quoting *McCarthy*, 394 U.S. at 466).

2. The manual for federal district court judges has long provided a specific outline for the acceptance of guilty pleas. Fed. Judicial Ctr., *Benchbook for U.S. District Court Judges* (6th ed. 2013). The *Benchbook* provides that, *after* reading or summarizing the indictment, the court "further explain the essential elements of the offense, i.e., what the government would be required to prove at trial," and "have the defendant explain and assent to the facts constituting the crime(s) charged." *See id.* § 2.01(O).

3. In *McCarthy*, the defendant pleaded guilty to tax evasion and, at the defendant's change of plea hearing, "the judge did not personally inquire whether petitioner understood the nature of the charge." 394 U.S. at 464. This Court rejected the government's argument that the plea was voluntary, noting that Rule 11 serves the dual purposes of aiding the "judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary," and producing "a complete record at the time the plea is entered of the factors relevant to this voluntariness determination." *Id.* at 465. This Court highlighted

that the "elements of the offense were not explained to petitioner." *Id*. at 470. Moreover, this Court noted that despite the plea, counsel argued that petitioner acted without intent to violate the law, *id.,* similar to arguments petitioner made prior to sentencing.

4. In response to *McCarthy*, Rule 11 was amended to allow appellate courts to find violations to be harmless error. Nonetheless, this Court in *United States v. Vonn*, 535 U.S. 55, 74-75 (2002), reiterated the mandate from *McCarthy* "that '[t]here is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him.'"

5. This Court last discussed the guilty plea requirements for a federal offense more than twenty-two years ago. In *Bousley v. United States*, 523 U.S. 614 (1998), the defendant challenged the voluntariness of his plea in a habeas petition. The defendant contended that he was misinformed of the nature of the charges against him based on an intervening case interpreting the term "use" with respect to a firearm. *Id.* at 617. Since the government disagreed with the appellate decision, this Court appointed *amicus curiae* to defend it. *Id.* at 618. The *amicus* contended "that petitioner's plea was intelligently made because, prior to pleading guilty, he was provided with a copy of his indictment, which charged him with 'using' a firearm." *Id*. This Court rejected that argument, holding that if the petitioner could overcome procedural hurdles and establish that he did not understand the essential elements of the crime, "he will then be entitled to have his defaulted claim of an unintelligent plea considered on its

merits." *Id.* at 624. So too here. The words of the indictment alone cannot suffice adequately to inform a defendant of the nature of the charges.[6]

6. The Eighth Circuit below acknowledged that the elements of a *Klein* Conspiracy differed among the Circuits. App. 6a. The Eighth Circuit stated that the differences in the elements of the offense did not matter because the decisions "all describe the same crime" and "the district court read aloud the relevant counts of his indictment, ensured he understood, and had discussed those counts with his attorneys…." App. 5a-6a. The appellate court concluded that, regardless of the elements of a *Klein* Conspiracy (where the Circuits disagree), and without citation to any authority, "the district court properly applied the well-settled law in this circuit and the elements of Flynn's offense were laid out in his indictment and read to him aloud to him at his charge of plea hearing." App. 6a.[7]

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[6] Fifteen years ago, the Court addressed the voluntariness of a plea in a state law conviction. *Bradshaw v. Stumpf*, 545 U.S. 175 (2005). There, this Court recited the principle that, in addition to the advice from the trial judge required by Rule 11, "the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel." *Id.* at 183. The record in this case contains no such representation.

[7] The Eighth Circuit's recitation of facts is unsupported and the trial court never read aloud the *Klein* Conspiracy count of the Indictment. Instead, the trial court read aloud only the first paragraph of the charge, stated that she "assumed" that Flynn had gone over the charges with counsel, and then assumed counsel (not petitioner) would waive any further reading or explanation. App. 22a.

The citation to the "well-settled law" of the Circuit—which, as discussed below, is anything but well-settled—underscores the division among the Circuits as to the level of advice necessary to satisfy the requirement that the defendant be advised of the nature of the charges to which he or she is pleading guilty.

7. Since this Court's opinion in *McCarthy,* the Circuits have adopted a hodgepodge of subjective tests to determine whether a defendant's plea was voluntary. While many purport to employ a "totality of the circumstances" standard, they have widely differing interpretations of what the standard entails. Currently, the Circuit Courts employ no fewer than five conflicting tests, not counting intra-circuit conflicts. Some require a review of the elements of the offense, some do not; some require the reading of the indictment, some do not; some only require more review only for "complex" offenses, some do not; some create differing requirements for "sophisticated" and "less sophisticated" defendants, some do not, among other differences.

8. Four Circuit Courts have stated that the individual elements of the charged crime must be explained to the defendant in open court, regardless of the nature of the offense or any particular characteristics of the defendant.

In the Seventh Circuit, the government must "identify the elements of the charged offense followed with an inquiry by the court confirming the defendant's understanding of the crime." *United States v. Fernandez,* 205 F.3d 1020, 1025 (7th Cir. 2000). This Circuit stated that "We have repeatedly held that simply asking a defendant if he has read and

discussed the indictment with his attorney is insufficient to determine if he truly understands the nature of the charge against him." *Id.*; *see also United States v. Fard*, 775 F.3d 939, 947 (7th Cir. 2015) (rejecting plea because record lacked explanation of the nature of "fraudulent intent"); *United States v. Pineda-Buenaventura*, 622 F.3d 761, 771 (7th Cir. 2010) (rejecting plea because the record failed to adequately explain elements of conspiracy to defendant).

The Tenth Circuit, following the Seventh Circuit, likewise requires an explanation of the elements beyond mere recitation of the indictment or plea agreement. *United States v. Carillo*, 860 F.3d 1293, 1302 (10th Cir. 2017). This Circuit stated that it was not "free to create a special exception for conspiracy cases to the general rule that to comply with Rule 11(b)(1)(G) a district court must identify the elements of the crime charges on the record." *Carillo,* 860 F.3d at 1302, n.4. The Court further stated, "[A] district court [must] ensure the defendant understands the 'essential' elements of the offense…. [T]he district court did not discuss the essential elements of the drug-conspiracy charge. Furthermore, the elements of the charge are not set out in the indictment [or] a written plea agreement." *Id.* at 1303.

So, too, in the Ninth Circuit. There, "[i]t is incumbent upon a district judge accepting a plea to make the minor investment of time and effort necessary to set forth the meaning of the charges and to demonstrate on the record that the defendant understands." *United States v. Kamer*, 781 F.2d 1380, 1385 (9th Cir. 1986). That is, "the trial judge is required to engage in a colloquy with the defendant

and elicit responses from him which demonstrate, on the record, that the accused does so understand." *Id.*

The Ninth Circuit has also held that waiving the reading of the indictment cannot be employed to establish a defendant's understanding of the nature of the offense. "Merely asking [the defendant] whether he had read the plea agreement and asking his attorney whether the attorney, not [the defendant] understood and agreed with the elements of the offense is insufficient… '[A] waiver of reading the indictment does not excuse the district court's obligation to explain the nature of the charges.'" *United States v. Pena,* 314 F.3d 1152, 1156 (9th Cir. 2003) (citation omitted).

The Second Circuit holds similarly. "Reading the elements of a crime to a defendant is not a difficult task, but it is essential." *United States v. Lloyd*, 901 F.3d 111, 121 (2d Cir. 2018) (quotation omitted); *see also*, *id.* (urging the district courts "in the strongest possible terms" to take steps to ensure "rigorous compliance with Rule 11" to establish that a defendant's plea is knowing and voluntary).

Because these Circuits require the district court to take affirmative measures to make sure the defendant understands the elements of the charges, a defendant cannot waive this step and the elements must be discussed by the district court. *See, e.g., Pena*, 314 F.3d at 1156; *United States v. Wetterlin*, 583 F.2d 346, 350 n.6 (7th Cir. 1978) ("We are not persuaded by the government's argument that because the defendant waived the reading of the indictment at the plea hearing, the judge was relieved of his duty under Rule 11 to inform the defendant of the charges and determine that he understood them."); *United States*

v. McCutcheon, 765 Fed App'x. 507, 511 (2d Cir. 2019) (rejecting plea where district court summarized charges and did not recite the elements of the offense).

9. A second group of Circuit Courts employ a totality of the circumstances "sliding scale," requiring very little explanation in some cases but more detailed discussion of the elements in others.

In the Sixth Circuit, for example, "the district court may need only to read the indictment and allow the defendant to ask questions about the charge" in a "simple case," but "[w]hen the case is more complex, further explanation may be required." *United States v. Syal*, 963 F.2d 900, 905 (6th Cir. 1992).[8] In vacating a plea, this Circuit noted:

> While a defendant in Syal's circumstance may not need as much explanation as an unrepresented defendant, the district court must meet the minimum requirements of Rule 11. Some rehearsal of the elements of the offense is necessary for any defendant. Failure to identify the elements of the offense is error and cannot be said to be harmless, even for an educated, well-represented defendant.

Syal, 963 F.2d at 905 (citations omitted).

The same rule obtains in the Fifth Circuit. "For simple charges such as those in this case, a reading of

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[8] As noted in *Syal*, and despite its holding to the contrary, there is an intra-circuit conflict in this Circuit, which has held that a mere reading of the indictment may be satisfactory for simple offenses. *See, e.g.*, *United States v. Valdez*, 362 F.3d 903, 910 (6th Cir. 2004).

the indictment, followed by an opportunity given the defendant to ask questions about it, will usually suffice. Charges of a more complex nature, incorporating esoteric terms or concepts unfamiliar to the lay mind, may require more explication." *United States v. Dayton*, 604 F.2d 931, 938 (5th Cir. 1979) (en banc). Reading of the indictment is sufficient to establish the elements of an offense in this Circuit. *United States v. Lujano-Perez,* 274 F.3d 219, 225 (5th Cir. 2001).

10. A third group of Circuit Courts likewise employ a totality of the circumstances "sliding scale," but hold that Rule 11 *never requires* a district court to explain the elements of the charged offense. The Eleventh Circuit, for example, has held that "Rule 11 does not specify that a district court must list the elements of an offense." *United States v. Presendieu*, 880 F.3d 1228, 1238 (11th Cir. 2018). The D.C. Circuit has held the same. *See In re Sealed Case*, 283 F.3d 349, 352 (D.C. Cir. 2002) ("There is no requirement that the elements of the offense be explained.") (quoting *United States v. Liboro,* 10 F.3d 861, 865 (D.C. Cir. 1993)).

The Third Circuit focuses on a broader array of factors for its totality of the circumstances analysis, but requires no recitation of the elements of the offense. *See, e.g.*, *United States v. McLaughlin*, 647 Fed. App'x 136, 142 (3d Cir. 2016) (no reading of elements required, but courts "look to the totality of the circumstances to determine whether a defendant was informed of the nature of the charges against him, considering factors such as the complexity of the charge, the age, intelligence, and education of the defendant, and whether the defendant was

represented by counsel.") (citing *United States v. Cefaratti*, 221 F.3d 502, 508 (3d Cir. 2000)).

11. The Fourth Circuit looks to the totality of the circumstances, but does not require the recitation of the elements of the offense or apply a sliding scale. Instead, this Circuit "refuses to script the Rule 11 colloquy" and defers to the district court's judgment and discretion as to whether the defendant understood the nature of the offense. *See United States v. Wilson*, 81 F.3d 1300, 1307-08 (4th Cir. 1996) ("We therefore decline to require across-the-board the recitation of the essential elements of the charged offense at a Rule 11 hearing….district courts are wholly capable of guaranteeing that guilty pleas are knowing and voluntary without flyspecking on the appellate level."); *United States v. Ghanjanasak*, 789 F. App'x 368, 370 (4th Cir. 2019) (same; stating that defendant may learn elements of the offense before plea hearing).

12. Finally, two Circuit Courts *currently* employ the bright-line rule that the district court need only read the indictment (or at least part of it), and that further review of the elements of the charged offense is not required.

In this very case, for example, the Eighth Circuit held that it is "the well-settled law in this circuit" that reading the indictment suffices to inform the defendant of the nature of the offense. App. 6a.[9]

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[9] Earlier cases in the Eighth Circuit were less clear on the issue of what level of advice is required for a pleading defendant. The Eighth Circuit had suggested that the recitation of the indictment is not the established method to inform a defendant of the nature of the charges, and that some probing as to the elements of the offense is necessary. *Harvey v. United States*, 850 F.2d 388, 395 n.5 (8th Cir. 1988) ("While a verbatim reading of

The First Circuit holds similarly, at least of late. *See*, *e.g.*, *United States v. Díaz-Concepción*, 860 F.3d 32, 36-37 (1st Cir. 2017) ("[I]t is sufficient in a plea colloquy for a district court to ascertain that a defendant is aware of the nature of the charge against him by reading the charge in the indictment to the defendant and obtaining his competent acknowledgment that he understands the charge.") (quoting *United States v. Ramos-Mejía,* 721 F.3d 12, 15 (1st Cir. 2013)).[10]

13. The Eighth Circuit's decision in this case deepens the conflict with the Circuits around the nation. The expediency of reading an indictment, even if it had occurred here, is insufficient to sustain a plea. This Court should take the opportunity to resolve the inconsistency among the Circuits and hold that, at a minimum, the elements of the offense must be reviewed and that this cannot be accomplished simply by reading the indictment. Demanding adherence with Rule 11 is not too much to require of our district

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the indictment may not be required under Rule 11, we believe a more thorough probing of the charges is required").

[10] However, until these recent pronouncements, the First Circuit was among those courts that considered a variety of factors, including the sophistication of the defendant and the complexity of the offense into the level of process required. This Circuit previously held that reading the indictment is not "sufficient in every case...One size does not fit all." *Ramos-Mejía*, 721 F.3d at 15; *see also*, *United States v. Corporan-Cuevas*, 244 F.3d 199, 203 (1st Cir. 2001); *United States v. Allard*, 926 F.2d 1237, 1245 (1st Cir. 1991).

courts in a system where almost all defendants plead guilty.[11]

Explaining the elements of the offense matters all the more when the offense is complex, such as in a *Klein* Conspiracy, where the elements are unclear and vary from Circuit to Circuit. *See infra* § II. Indeed, it is clear that petitioner *did not* understand that charge, as factual disputes as to the import of his plea arose immediately thereafter. App. 10a. Petitioner would not have pleaded guilty had he been properly advised of the elements of a *Klein* Conspiracy.

II. This Court Should Grant Certiorari to Address the Constitutional Limitations of 18 U.S.C. § 371 in the Context of a *Klein* Conspiracy.

1. The *Klein* Conspiracy's Genesis as a Court-Created Crime Has Created Division among the Circuits.

1. 18 U.S.C. § 371 prohibits two general types of conspiratorial conduct. The first clause is known as the "offense" clause because it applies to conspiracies to violate an offense set forth in another statutory provision. The second clause, the "defraud" clause, which prohibits any agreement to defraud any

[11] A reviewing court may review the entire record to determine whether a defendant was aware of the nature of the offense. *See, e.g.*, *Vonn*, 535 U.S. at 75. However, in this case, neither the indictment, the plea agreement, the plea colloquy, nor the presentence investigation report contain any recitation of the elements of the *Klein* Conspiracy offense.

department of government, was first applied with respect to the Internal Revenue Service ("IRS") in *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957). There, the defendants were charged with tax evasion and a "defraud conspiracy" in connection with their whiskey-selling business. The Second Circuit affirmed on appeal, holding that the statute included the interference with lawful government functions by deceit or trickery, or at least by means that are dishonest. *Id.* at 916. The Second Circuit found sufficient evidence to support the 18 U.S.C. § 371 conspiracy conviction based on twenty "acts of concealment of income," including false statements on tax returns and in interrogatory responses. *Id*. at 915-16. The Circuit Courts have adopted the concept of the *Klein* Conspiracy, including the Eighth Circuit. *See United States v. Derezinski,* 945 F.2d 1006, 1011 (8th Cir. 1991).

The "defraud" clause has been sharply criticized as hopelessly vague. "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 constitutional prohibitions against vagueness and double jeopardy." Abraham S. Goldstein, *Conspiracy to Defraud the U.S.,* 68 YALE L.J. 405, 408 (1959). Despite repeated challenges in the lower courts to the validity of the *Klein* Conspiracy offense under 18 U.S.C. § 371, this Court has never considered its validity in any of its opinions. Moreover, recent opinions of this Court have eroded the justification for the *Klein* Conspiracy, and this Court's review is warranted.

18 U.S.C. § 371 originated from a provision that was part of the tax code, although early on it was moved from the tax code to what is now Title 18. Goldstein, *Conspiracy to Defraud the U.S.*, 68 YALE L.J. at 418, n.36. As its name from the eponymous case suggests, the *Klein* Conspiracy was "created by the courts, not Congress." *See, e.g.*, *Coplan*, 703 F.3d at 61.

The *Klein* Conspiracy offense originated not from statutory language itself, but as a consequence of this Court's decision over 100 years ago in *Haas v. Henkel,* 216 U.S. 462 (1910). There, the defendant was charged in a conspiracy to obtain information as to crop futures from an agricultural department employee. *Id.* at 477-79. This Court upheld the conviction, stating that 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." *Id.* at 479.

In *Hammerschmidt v. United States*, 265 U.S. 182 (1924), this Court noted that the statute went beyond "fraud as that term has been defined in the common law," *Dennis v. United States*, 384 U.S. 855, 861 (1966) (quoting *Haas v. Henkel*, 216 U.S. 462, 479 (1910)), and interpreted the concept of fraud "broadly." To limit the statute, this Court held that "[t]o 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 or trickery, or at least by means that are dishonest.*" *See McNally v. United States*, 483 U.S. 350, 359 n.8 (1987) (describing *Hammerschmidt* as a "broad construction of § 371") (emphasis in original).

Hammerschmidt did not solve, however, the overbreadth problem. "When it is stripped, as it has been, of its roots in the law of theft, fraud and perjury, 'dishonesty' stands only as an incorporation into the criminal law of current ethical standards-whatever a jury may think them to be." Goldstein, *Conspiracy to Defraud the U.S.,* 68 YALE L.J. at 436.

2. As noted, the defraud clause was first applied with respect to the IRS in *Klein*. More recently, in *Coplan,* the Second Circuit reviewed the history of the doctrine and noted that the government conceded that the *Klein* Conspiracy was a common law crime, created by the courts, rather than Congress. *Coplan,* 703 F.3d at 61-62.

3. This Court has long held that there are no federal common law crimes. *United States v. Hudson*, 7 Cranch 32 (1812); *United States v. Lanier*, 520 U.S. 259, 267 n. 6 (1997) ("Federal crimes are defined by Congress, not the courts…"); *Sorich v. United States*, 555 U.S. 1204 (2009) (Scalia, J., dissenting from denial of certiorari) ("[T]he notion of a common-law crime is utterly anathema today, and for good reason.").

This Court reaffirmed this principle two terms ago in *United States v. Davis*, 139 S. Ct 2319 (2019). There, this Court ruled that the residual clause of the definition of violent felony in 18 U.S.C. § 924(c)(3)(B) was void for vagueness. This Court found that Congress had "hand[ed] off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges" by not defining "violent" acts by specific conduct. *Id.* at 2323. Because the statute did not clearly define the scope of conduct it forbade, this Court held that it was unconstitutionally vague. *Id.* at 2335-36. Justice

Gorsuch wrote, "[v]ague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges." *Id*. at 2325. "Respect for due process and the separation of powers suggest a court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe." *Id.* at 2333.[12] Although applying the rule of lenity permits federal courts to adopt narrower constructions of federal statutes to avoid having to hold them unconstitutional, "[e]mploying the avoidance canon to expand a criminal statute's scope would risk offending the very same due process and separation-of-powers principles on which the vagueness doctrine itself rests." *Id.*

4. *Klein* Conspiracies, as currently construed, fall squarely within that category of offenses that *Davis* decried as unconstitutional. Because it is a criminal charge borne of judicial doctrine, the law surrounding a *Klein* Conspiracy has also engendered disagreement among the Circuits and the basic elements of the conspiracy differ. Some courts have defined a *Klein* Conspiracy as consisting of two elements. *United States v. Fletcher*, 322 F.3d 509, 513 (8th Cir. 2003) (existence of an agreement and an overt act). Cases

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[12] Justice Gorsuch found that a review of other federal statutes "winds up confirming that legislatures know how to write risk-based statutes that require a case-specific analysis—and that § 924(c)(3)(B) is not a statute like that." *Id.* at 2334. The Internal Revenue Code's conspiracy statute aimed at federal officers and employees, 26 U.S.C. § 7214(a)(4), establishes that Congress indeed "knows how" to create a conspiracy statute specific to tax collection had it intended to do so.

from the Third and Fourth Circuit cited by *Fletcher* added a third element necessary to establish a *Klein* conspiracy. *United States v. Shoup*, 608 F.2d 950, 956 (3d Cir. 1979) (agreement, overt act and intent to defraud the United States); *United States v. Vogt*, 910 F.2d 1184, 1202 (4th Cir. 1990) (same). The Department of Justice Criminal Tax Manual also adds a third element necessary for a *Klein* Conspiracy charge, but states the elements differently. *See* DEPARTMENT OF JUSTICE CRIMINAL TAX MANUAL, § 23.03. The Second Circuit recognizes four elements for a *Klein* Conspiracy. *Coplan*, 703 F.3d at 61 (quoting *United States v. Ballistrea*, 101 F.3d 827, 832 (2d Cir. 1996)) (entry into agreement, intent to obstruct, deceitful or dishonest means, and an overt act).

Likewise, there is no consensus on the proof of the mental state required to establish a *Klein* Conspiracy. Typically, tax crimes require an intentional violation of a known legal duty, or willfulness. *See, e.g.*, *Cheek v. United States*, 498 U.S. 192, 200-01 (1991). The better-reasoned authority is that a *Klein* Conspiracy requires proof that a defendant knew his or her conduct was illegal based upon the substantive offense that was the object of the conspiracy. *See Coplan,* 703 F.3d at 66 (holding that to secure a conviction, the government must prove that the intended conduct agreed upon includes all the elements of the substantive offense); *compare United States v. Khalife*, 106 F.3d 1300, 1302–03 (6th Cir. 1997) (collecting authorities on the *Klein* Conspiracy knowledge requirement).

2. Requiring a *Marinello* Nexus between the Charged Conduct and an IRS Proceeding Is Necessary to Save the Constitutionality of the *Klein* Conspiracy

1. In *Marinello*, this Court considered the "Omnibus Clause" in Section 7212(a) of the Internal Revenue Code. Section 7212(a) forbids "corruptly or by force or threats of force…obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, the due administration of [the Internal Revenue Code]." 26 U.S.C. § 7212(a). The government argued that the statute reached all conduct of the IRS but this Court held that prosecutors must establish a nexus between a particular administrative proceeding and a taxpayer's conduct in order to obtain a conviction. *Marinello*, 138 S. Ct. at 1109.

Marinello reviewed the scope of the language "obstruct or impede" and noted its enormous breadth. Justice Breyer, writing for the majority, noted that the phrase the "due administration of this title" could be read literally to refer to every "'[a]ct or process of administering' including every act of 'managing' or 'conduct[ing]' any 'office', or 'performing the executive duties' of any 'institution business or the like.'" *Marinello*, 138 S. Ct. at 1106 (quotations and citations omitted). Justice Breyer found that the reading sought by the government that any obstructive conduct came within the scope of the statute "'would risk the lack of fair warning and related kinds of unfairness that led this court in *Aguilar* to 'exercise' interpretative

'restraint.'" *Id.* at 1108 (citation omitted).[13] Justice Breyer posited that if Congress had intended such a result, "it would have spoken with more clarity than it did." *Id.*

Marinello held that the proof of a nexus between the conduct and the proceeding must be accompanied by proof "that the proceeding was pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant." 138 S. Ct. at 1110. This Court held that the obstructive conduct must have a nexus to a particular investigation or proceeding, requiring a "relationship in time, causation or logic with the [administrative] proceeding." *Id.* at 1109.

2. Historically, a *Klein* Conspiracy under 18 U.S.C. § 371 has been aligned with the Omnibus Clause of 26 U.S.C. § 7212(a). *See, e.g.*, *United States v. Armstrong*, 974 F. Supp. 528, 540 (E.D. Va. 1997) ("Section 7212(a) is analogous to the general conspiracy statute, 18 U.S.C. § 371."). The Department of Justice recognized the relationship between the two statutes in its Criminal Tax Manual - Tax Division Directive No. 77, which provides, "In general, the use of the 'omnibus' provision of Section 7212(a) should be reserved for conduct…designed to impede or obstruct an audit or criminal tax investigation, when 18 U.S.C. § 371 charges are

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[13] These same concerns apply under the *Klein* Conspiracy doctrine if any of these actions were undertaken in concert with others. *See United States v. Caldwell*, 989 F.2d 1056, 1059-60 (9th Cir. 1993), *overruled on other grounds by Neder v. United States*, 527 U.S. 1 (1999) (positing the extreme potential "crimes" under the expansive reach of 18 U.S.C. § 371).

unavailable due to insufficient evidence of a conspiracy."[14] *See* DEPARTMENT OF JUSTICE CRIMINAL TAX MANUAL, Tax Directive No. 77.

Whatever theoretical differences the government may seek to portray between 26 U.S.C. § 7212(a) and the *Klein* Conspiracy, the language employed in the Indictment warrants the same construction as this Court reached in *Marinello*. The "due administration" and "lawful government functions" require the same interpretative analysis, differentiated only because the *Klein* Conspiracy requires two participants but is otherwise identical to the 26 U.S.C. § 7212(a) charge limited by *Marinello*. Indeed, the Oxford English Dictionary defines "function" as "A duty attached to a role or office; an official duty." *Function*, OXFORD ENGLISH DICTIONARY (3d Ed. 2017). By definition, there is no material difference between "function" and "administration," as used in the charges.

Indeed, the *Klein* Conspiracy charge employed in the Indictment was almost identical in language to that at issue in *Marinello*. *Compare* 26 U.S.C. § 7212(a) ("corruptly… obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, the due administration of [the Internal Revenue Code]") and Indictment at Count I (alleging petitioner "imped[ed], impair[ed], obstruct[ed], and defeat[ed] the lawful government functions of the Internal Revenue

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[14] Tax Division Directive No. 77 was superseded by Tax Division Directive No. 129, which continued to recognize the relationship without directly referencing 18 U.S.C. § 371, noting that the fact that a violation of 26 U.S.C. § 7212(a) may also be part of a conspiracy, and does not preclude prosecution under 26 U.S.C. § 7212(a).

Service…"). While the "due administration" language of § 7212(a), and § 371 contain different words, the meaning is identical and the nexus requirement in *Marinello* should extend to the *Klein* Conspiracy charged under Section 371.

Indeed, to highlight the lack of distinction between "due administration" and "lawful government function," the Eighth Circuit couched *Klein* Conspiracy claims in the exact language of 26 U.S.C. § 7212(a), involving interference with the "due administration" of the tax code. *See United States v. Ervasti*, 201 F.3d 1029, 1037-38 (8th Cir. 2000) (defendants "did unlawfully, willfully and knowingly combine, conspire, confederate and agree...to impede and impair the due administration of the Internal Revenue Code [sic] of the U.S. in the ascertainment, computation, assessment and collection of taxes.").

3. If the Court seeks to preserve the constitutionality of the *Klein* Conspiracy, the breadth of the statute should be narrowed. *Davis*, 139 S. Ct. at 2332; *Marinello*, 138 S. Ct. at 1109 (quoting *United States v. Aguilar*, 515 U.S. 593, 600 (1995)). Applying the nexus requirement from *Marinello* would limit the overbroad application of 18 U.S.C. § 371 in the context of the *Klein* Conspiracy.

4. The Eighth Circuit relied upon the long history of the *Klein* Conspiracy and stated that any arguments against its application should be directed to this Court. Petitioner's sentence of 87 months cannot stand if the Count 1 *Klein* Conspiracy charge is invalid. This Court should review this decision, hold that 18 U.S.C. § 371 requires the same "restraint in assessing the reach" of the statute as 26 U.S.C. §

7212(a), and find that the nexus requirement from *Marinello* must be applied to a *Klein* Conspiracy.

III. This Court Should Consider Whether a Jury Trial Right Exists for Restitution.

1. The extent of the jury trial right under the Sixth Amendment is one that this Court has continued to discuss in recent years. The current line of Sixth Amendment jurisprudence arises from *Apprendi v. New Jersey*, 530 U.S. 466, 409 (2000), where this Court held that, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Court has since expounded, "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely v. Washington,* 542 U.S. 296, 303 (2004) (citing *Ring v. Arizona*, 536 U.S. 584, 602 (2002)) (emphasis in original). "In other words, the relevant 'statutory maximum'…is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Id.*

Thereafter, this Court held "that the rule of *Apprendi* applies to the imposition of criminal fines." *Southern Union Co. v. United States*, 567 U.S. 343, 360 (2012). This Court found, "In stating *Apprendi*'s rule, we never distinguished one form of punishment from another. Instead, our decisions broadly prohibit judicial factfinding that increases maximum criminal 'sentence[s],' 'penalties,' or 'punishment[s]'–terms that

each undeniably embrace fines." *Id.* at 350 (citations omitted).

Restitution is criminal penalty and only a jury can determine the facts necessary to support it. Nevertheless, the Eighth Circuit, and every other Circuit to address the issue, has concluded for a variety of reasons that *Southern Union* does not apply to criminal restitution. *See, e.g.*, *United States v. Thunderhawk*, 799 F.3d 1203, 1209 (8th Cir. 2015) (finding restitution is civil, not criminal); *United States v. Wolfe*, 701 F.3d 1206, 1216-17 (7th Cir. 2012) (same); *United States v. Bengis*, 783 F.3d 407, 412-13 (2d Cir. 2015) (no maximum limit on restitution, so not within *Apprendi*); *United States v. Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014) (same); *United States v. Jarjis*, 551 Fed. App'x. 261 (6th Cir. 2014) (same); *United States v. Day*, 700 F.3d 713, 731 (4th Cir. 2012) (same); *United States v. Burns,* 800 F.3d 1258, 1261 (10th Cir. 2015) (same); *United States v. Green*, 722 F.3d 1146, 1150 (9th Cir. 2013) (finding restitution to be a civil remedy that has no maximum).

This Court had the opportunity to consider this issue but declined to do so in *Hester v. United States*, 139 S. Ct. 509 (2019). Justice Gorsuch, joined by Justice Sotomayor, dissented from the denial of certiorari because, *inter alia*, "the Sixth Amendment's jury trial right expressly applies '[i]n all criminal prosecutions,' and the government concedes that 'restitution is imposed as part of a defendant's criminal conviction.'" *Id.* at 510-11. Justice Gorsuch further noted a litany of authority indicating that restitution is part of a criminal penalty. *Id.* at 511. And, even if restitution were to be considered a civil remedy, Justice Gorsuch emphasized the need to

consider the Seventh Amendment right to a jury trial applicable to civil suits. *Id.*

Since the Sixth Amendment applies to all criminal cases and since restitution is imposed as part of a criminal sentence, restitution should be afforded the same treatment as other criminal penalties. Even if considered as a civil penalty, the Seventh Amendment would apply.

This argument has only been strengthened since *Hester*. In *United States v. Haymond*, 139 S. Ct 2369 (2019), this Court ruled that the right to a jury trial extended to post-conviction proceedings under 18 U.S.C. § 3583(k), where a penalty was imposed on facts proven to a judge only by a preponderance of the evidence. This Court reiterated the principle that "a jury must find beyond a reasonable doubt every fact which the law makes essential to [a] punishment." *Id.* at 2376 (quotations omitted). Justice Gorsuch recounted an ever-growing list of cases in which "this Court has not hesitated to strike down other [judicial] innovations that fail to respect the jury's supervisory function." *Id.*

Applying the framework of *Haymond* to restitution requires the provision of a jury trial to the accused. *Haymond* reasoned, "logically it would seem to follow that any facts necessary to increase a person's minimum punishment (the 'floor') should be found by a jury no less than the facts necessary to increase his maximum punishment (the 'ceiling')." *Id.* at 2378 (applying *Apprendi*). And, as Justice Gorsuch noted in *Hester*, "[T]he statutory maximum for restitution is usually *zero*, because a court cannot impose any restitution without finding additional facts about the victim's loss." *Hester*, 139 S. Ct. at 510

(emphasis in original); *see also, United States v. Carruth*, 418 F.3d 900, 905-06 (8th Cir. 2005) (Bye, J., dissenting); *United States v. Leahy*, 438 F.3d 328, 343-44 (3d Cir. 2006) (McKee, J., concurring in part and dissenting in part). The logical extension of the holding in *Haymond* requires this Court's review of the extent of the accused's Sixth Amendment rights vis-à-vis restitution.

2. The Eighth Circuit's decision in this case, which relies upon *Thunderhawk*, is erroneous and conflicts with decisions of this Court. *Thunderhawk* is premised on the Eighth Circuit's holding that restitution is a civil remedy. 799 F.3d at 1209. However, this Court and federal statutes describe restitution as part of the criminal penalty against a convicted defendant. *Hester*, 139 S. Ct. at 511 ("Federal statutes, too, describe restitution as a 'penalty' imposed on the defendant as part of his criminal sentence, as do our cases.") (citing 18 U.S.C. §§ 3663(a)(1)(A), 3663A(a)(1), 3572(d)(1); *Paroline v. United States*, 572 U.S. 434, 456 (2014); *Pasquantino v. United States*, 544 U.S. 349, 365 (2005)). Contrary to *Thunderhawk*'s holding, even the Eighth Circuit, as well as a litany of other Circuit Courts, has found restitution to be part of a criminal sentencing and not a civil proceeding engrafted in a criminal case. *See, e.g.*, *United States v. United Sec. Sav. Bank*, 394 F.3d 564, 567 (8th Cir. 2004) ("A criminal restitution order is penal, not compensatory"); *United States v. Brooks*, 872 F.3d 78, 90 (2d Cir. 2017) ("[W]e cannot separate restitution from conviction"); *United States v. Rostoff*, 164 F.3d 63, 71 (1st Cir. 1999) ("The nature of restitution is penal and not compensatory"). Despite this Court's continued emphasis of Sixth Amendment

guarantee of the right to a jury trial in *Haymond* and the overwhelming authority undercutting the basis for its precedent in *Thunderhawk*, the Eighth Circuit declined any extensive analysis of the issue absent further ruling by the *en banc* court or this Court.[15] App. 13a.

This case is an excellent vehicle for the Court to reconsider this issue. Here, the district court admittedly imposed a restitution award that did not "in any way reflect the amount that should actually be paid back." App. 78a-79a. Instead, the district court relied on government testimony "ballpark[ing]" the loss, stating that a "proxy" number was being provided, and conceding that it was "not contending [its calculation] is a completely accurate number." App. 76a. The Eighth Circuit erred because the award of restitution was not based on a jury's finding of proof of the actual loss. *See, e.g.*, *United States v. Jenkins*, 884 F.2d 433, 440 (9th Cir. 1989) (restitution must be based on finding of actual loss "with certainty"); *United States v. Bagley*, 907 F.3d 1096, 1098 (8th Cir. 2018) (restitution must be based on proof of actual loss).

This case would allow this Court to resolve the issue as to whether restitution is criminal in nature and declare that restitution is subject to the Sixth Amendment or alternatively is subject to the Seventh Amendment at sentencing.

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[15] Despite its reliance on *Thunderhawk*, which held that restitution is a civil remedy and not a criminal penalty, the Eighth Circuit failed to address the effect of the Seventh Amendment guarantee for jury trials in civil matters.

CONCLUSION

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

Respectfully submitted,

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