No. 18-9762

IN THE SUPREME COURT OF THE UNITED STATES

KWAME A. INSAIDOO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, on review for plain error, the court of appeals correctly determined that the district court adequately instructed the jury on the elements of embezzlement from a federally funded program, in violation of 18 U.S.C. 666(a)(1)(A).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

United States v. Kwame Insaidoo, No. 16-cr-156 (Oct. 4, 2017)

United States v. Roxanna Insaidoo, No. 16-cr-156 (Oct. 4, 2017)

United States Court of Appeals (2d Cir.):

United States v. Kwame Insaidoo, No. 17-3178 (Mar. 15, 2019)

United States v. Roxanna Insaidoo, No. 17-3230 (Mar. 15, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is not published in the Federal Reporter but is reprinted at 765 Fed. Appx. 522.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 2019. The petition for a writ of certiorari was filed on June 13, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. 1349; two counts of wire fraud, in violation of 18 U.S.C. 1343 and 2; one count of conspiracy to commit embezzlement from a federally funded program, in violation of 18 U.S.C. 371; one count of embezzlement from a federally funded program, in violation of 18 U.S.C. 666(a)(1)(A) and 2; and one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h). Judgment 1-2. The district court sentenced petitioner to 48 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed in almost all respects, although it vacated one condition of petitioner's supervised release and remanded for further proceedings. Pet. App. A1-A5.

1. Petitioner was the executive director of United Block Association, Inc. (UBA), a government-funded, nonprofit organization that operated four senior centers in upper Manhattan pursuant to contracts with New York City's Department for the Aging. Gov't C.A. Br. 3, 5-6. Those contracts were funded in part by federal grants. Id. at 6. During each of the relevant years, UBA received hundreds of thousands of federal dollars to operate the senior centers. Id. at 7. According to the City's records, some of those federal funds were disbursed under grants

pursuant to the Older Americans Act of 1965 (OAA), 42 U.S.C. 3001 et seq. Gov't C.A. Br. 7.

Although several of UBA's bank accounts were audited by the City and an outside company, UBA maintained at least two accounts that were not audited. Gov't C.A. Br. 7. Petitioner was a signatory on both of those accounts and his wife was a signatory on one of them. Id. at 3, 7. From those two UBA accounts, petitioner and his wife wrote checks totaling more than $580,000 to themselves, to their son, and to a sham nonprofit called Allied Home Care, Inc. (Allied). Id. at 3, 7-8. Specifically, between 2008 and 2015, petitioner received approximately $200,000 in checks that exceeded his salary from UBA; his wife received approximately $195,000; their son received more than $70,000; and Allied received approximately $190,000. Id. at 7-8. Petitioner and his wife spent the money on, among other things, their home mortgage, a Mercedes Benz, and shopping trips at upscale department stores. Id. at 8. They concealed their scheme by omitting the money from their personal tax returns, omitting it from UBA's tax returns, and lying about the money during sworn testimony in a federal civil case. Ibid.

In 2015, the New York City Department of Investigation began investigating UBA. Gov't C.A. Br. 9. Petitioner asked UBA's accountant to help prepare accounting records for one of the unaudited bank accounts and to assist in preparing Allied's tax returns, which had never previously been filed. Ibid. To offset

the substantial amounts paid from the UBA account to Allied, petitioner supplied the accountant with purported expenses for Allied, to be used in preparing Allied's tax returns. Id. at 9-10. Based on those asserted expenses, the tax returns claimed that Allied had negative taxable income each year. Id. at 10. Petitioner's wife signed the tax returns as Allied's "Nurse/Director." Ibid. Petitioner and his wife then sought to dissolve Allied after it came under investigation for failing to file annual reports with the New York Attorney General's Office's Charities Bureau. Ibid.

In 2011, petitioner and his wife also requested a "hardship" modification to their mortgage under the federally funded Home Affordable Modification Program (HAMP). Gov't C.A. Br. 10. The application process required petitioner and his wife to disclose their income and assets as well as their tax returns. Ibid. The application was completed under penalty of perjury and signed by both petitioner and his wife. Ibid. Petitioner and his wife misrepresented their income, failing to disclose the money that they had been taking from UBA, including through Allied. Ibid. In addition, to hide that undisclosed income, they stated that they had no bank accounts and made no reference to the Allied account that they used for their banking activities. Id. at 10-11. In March 2012, as a result of those statements, petitioner and his wife obtained the HAMP modification, which resulted in the

forgiveness of approximately $200,000 of their mortgage over the next three years. Id. at 11.

2. a. A federal grand jury returned a superseding indictment charging petitioner (and his wife) with two counts of conspiracy to commit wire fraud, in violation of 18 U.S.C. 1343 and 1349;[1] two counts of wire fraud, in violation of 18 U.S.C. 1343 and 2; one count of conspiracy to commit embezzlement from a federally funded program, in violation of 18 U.S.C. 371; one count of embezzlement from a federally funded program, in violation of 18 U.S.C. 666(a)(1)(A) and 2; and one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h). Superseding Indictment 1-18.

Under 18 U.S.C. 666, it is a crime for an agent of an organization that "receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance" to "embezzle[], steal[], obtain[] by fraud, or otherwise without authority knowingly convert[]" property valued at $5000 or more. 18 U.S.C. 666(a)(1)(A) and (b). In Fischer v. United States, 529 U.S. 667 (2000), this Court explained that "[t]o determine whether an organization participating in a federal assistance program receives 'benefits,' an examination must be undertaken of the program's structure, operation, and purpose."

[1] Before trial, the government elected not to proceed against petitioner on the wire-fraud conspiracy described in Count 1 of the superseding indictment. Gov't C.A. Br. 2 & n.1.

Id. at 681. The Court in Fischer then concluded that health care providers participating in the Medicare program receive "benefits" within the meaning of Section 666. Id. at 669, 682.

b. At trial in this case, the government presented evidence that, between 2013 and 2015, UBA received more than $450,000 annually in federal funds. Gov't C.A. Supp. App. 60. Those funds came from, among other sources, the U.S. Department of Health and Human Services, in connection with programs such as "Title III-B of the [OAA]," and "Title[]III-C1 of the OAA—Nutrition Services in a Congregate setting," and from the Administration on Aging in connection with the "Nutrition Service Incentive Program." E.g., id. at 6-7, 47.

The district court instructed the jury that "the government must prove, beyond a reasonable doubt * * * that [UBA] received more than $10,000 in federal benefits within a one-year period during or surrounding the commission of the offense." Pet. C.A. App. A1205. The court explained that "[t]he term 'benefits,' as used here, includes federal funds or any other form of financial assistance, such as a grant, contract, subsidy, loan, or guarantee." Id. at A1205-A1206. At petitioner's request, the court further instructed the jury that, although "[t]he government need not prove that the federal benefits were paid directly to [UBA] by the federal government," the government was required to prove that "in a one-year period, [UBA] received, directly or through an intermediary, more than $10,000 that originated as

federal money under a federal program." Id. at A1206. Petitioner did not object to those instructions or request additional language further defining the term "benefits." See D. Ct. Doc. 35, at 29-30 (Mar. 24, 2017).

The jury found petitioner guilty on all counts. Judgment 1-2; see p. 5 n.1, supra. The district court sentenced petitioner to 48 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4.

3. The court of appeals affirmed petitioner's convictions in an unpublished summary order. Pet. App. A1-A5.

On appeal, petitioner claimed for the first time that the district court had erred in omitting to instruct the jury that the government must prove that UBA received funds tied to an identifiable federal program whose "structure, operation, and purpose" qualify the funds as federal benefits. Pet. App. A3. The court of appeals explained that petitioner "did not raise this objection below, and the parties agree that an unpreserved challenge to the specific language of a jury instruction must be reviewed for plain error." Ibid.

Applying plain-error review, the court of appeals rejected petitioner's claim. Pet. App. A3. The court observed that it had previously "treated the question of what constitutes a benefit as a legal question for the court." Ibid. (citing United States v. Bahel, 662 F.3d 610, 626-629 (2d Cir. 2011)). The court stated that "determining whether the OAA provides a federal benefit is a

matter of statutory interpretation," and "[t]he district court did not err in not assigning this task to the jury." Ibid.

The court of appeals further determined that the government had adduced sufficient evidence that UBA received benefits from a federal program. Pet. App. A4. The court stated that, because "the determination of whether the OAA's 'structure, operation, and purpose' establishes a federal program that provides benefits was not a question for the jury," the government could satisfy "Section 666's jurisdictional element" through proof that "UBA received more than $10,000 in federal funds in a one-year period between 2007 and 2017." Ibid. The court found that "the government provided testimonial and documentary evidence that UBA received federal funds well in excess of $10,000 in at least three fiscal years: $454,529 in 2013; $556,015 in 2014; and $548,960 in 2015." Ibid. The court thus determined that "the government supplied sufficient evidence to prove Section 666's jurisdictional element." Ibid.[2]

ARGUMENT

Petitioner contends (Pet. 4-14) that, in a prosecution for embezzlement from a federally funded program under 18 U.S.C. 666, the jury must find that the organization from which a defendant

[2] The court of appeals also rejected petitioner's challenge to a different aspect of the jury instructions. Pet. App. A3-A4. Petitioner does not renew that challenge in this Court. Separately, the court of appeals vacated one condition of petitioner's supervised release and remanded for further proceedings. Id. at A4-A5.

embezzled funds received money pursuant to a federal program with a "structure, operation, and purpose" that render the funds a "benefit" to that organization under the statute. The court of appeals correctly concluded that petitioner did not establish plain error, and its decision does not conflict with any decision of this Court. Although some tension exists between the decision below and other court of appeals decisions that have obliquely addressed the issue outside of the plain-error context, no square conflict exists. And given both the plain-error posture and the unpublished nature of the decision below, this case would be a poor vehicle in which to resolve any tension. Further review is therefore not warranted.

1. Petitioner did not request the jury instruction he now contends should have been given or object to the omission of the language he now contends was required. Pet. App. A3. Therefore, as he acknowledged below, ibid., his claim is reviewable only for plain error. See Fed. R. Crim. P. 30, 52(b).

When a defendant fails to object to an alleged error in the district court, he may not obtain relief from that error on appeal unless he establishes reversible "plain error" under Federal Rule of Criminal Procedure 52(b). See Puckett v. United States, 556 U.S. 129, 134-135 (2009). Reversal for plain error "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." United States v. Young, 470 U.S. 1, 15 (1985) (citation and internal quotation marks omitted). To

establish reversible plain error, a defendant must show "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" Johnson v. United States, 520 U.S. 461, 467 (1997) (quoting United States v. Olano, 507 U.S. 725, 732 (1993)) (brackets in original). If those prerequisites are satisfied, the court of appeals has discretion to correct the error based on its assessment of whether "(4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Ibid. (citations and internal quotation marks omitted; brackets in original) (quoting Young, 470 U.S. at 15). "Meeting all four prongs is difficult, 'as it should be.'" Puckett, 556 U.S. at 135 (quoting United States v. Dominguez Benitez, 542 U.S. 74, 83 n.9 (2004)).

2. The court of appeals correctly determined that petitioner cannot establish plain error here. To sustain a conviction under Section 666, the government is required to prove that the organization from which the defendant embezzled money "receive[d], in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(b). In petitioner's case, the district court instructed the jury that "the government must prove, beyond a reasonable doubt * * * that [UBA] received more than $10,000 in federal benefits within a one-year period during or surrounding the commission of the offense"; that "[t]he term 'benefits,' * * * includes federal

funds or any other form of financial assistance, such as a grant, contract, subsidy, loan, or guarantee"; and that the government was required to prove that UBA had received "more than $10,000 that originated as federal money under a federal program." Pet. C.A. App. A1205-A1206. That language tracked the parties' jointly proposed instruction and the statutory language. D. Ct. Doc. 35, at 29-30.

Petitioner contends (Pet. 4-14) that the district court should have given a more specific instruction on the meaning of the term "benefits," to incorporate this Court's interpretation of that statutory term in Fischer v. United States, 529 U.S. 667 (2000). In Fischer, the defendant had been convicted under Section 666 for defrauding a county hospital authority that received more than $10 million annually in Medicare reimbursements. Id. at 669-670. The defendant argued that the hospital had not received "benefits in excess of $10,000 under a Federal program," as required by Section 666, id. at 670 (quoting 18 U.S.C. 666(b)), because Medicare reimbursements are benefits to patients, not to hospitals, id. at 671. This Court rejected that argument and held that Medicare reimbursements qualified as benefits to the hospital. Id. at 672-681. The Court explained that health care providers "derive significant advantage" from Medicare payments by fulfilling the regulatory requirements imposed by the government to participate in the program, and that Medicare payments "assist the hospital in making available and maintaining a certain level

and quality of medical care, all in the interest of both the hospital and the greater community." Id. at 678-680. Those features, the Court explained, distinguish a hospital from "a contractor whom the Government does not regulate or assist for long-term objectives or for significant purposes beyond performance of an immediate transaction." Id. at 680. In discussing how to assess whether other federal assistance programs provide "'benefits,'" the Court stated that "an examination must be undertaken of the program's structure, operation, and purpose" and "should examine the conditions under which the organization receives the federal payments." Id. at 681.

The Court's decision in Fischer, in which the Court itself concluded that federal funds provided by a federal spending program qualified as "benefits" for purposes of a prosecution under Section 666, did not state that juries must decide that issue in future cases. Pet. App. A3. The nature of the analysis described in Fischer, which requires an examination of the underlying "structure, operation, and purpose" of the federal program, 529 U.S. at 681, suggests that the relevant inquiry could involve a legal analysis of the federal program in question, rather than a case-specific analysis of the particular defendant's use of those funds, see id. at 671-681 (determining whether payments to providers under Medicare program constituted "benefits" by analyzing "nature and purpose" of Medicare program, Medicare implementing regulations, congressional intent, and legislative

history). Accordingly, some courts of appeals have treated the issue of whether a particular funding stream confers "benefits" as a legal question for the court. See United States v. Bahel, 662 F.3d 610, 626-630 (2d Cir. 2011) (analyzing whether the payment of dues to the United Nations establishes a "benefit" program); United States v. Peery, 977 F.2d 1230, 1233 n.2 (8th Cir. 1992) (upholding the district court's determination that "the classification of the [Central Interstate Low-Level Radioactive Waste] Compact Commission's rebate [under Section 666] is a matter of law for judicial determination"), cert. denied, 507 U.S. 946 (1993).

It is not uncommon for a court to decide a legal question that in turn determines whether a fact found by the jury satisfies the element of a crime. For example, "[t]here is no question that the Government in a Hobbs Act prosecution must prove beyond a reasonable doubt that the defendant engaged in conduct that satisfies the Act's commerce element, but the meaning of that element is a question of law." Taylor v. United States, 136 S. Ct. 2074, 2080 (2016). As a result, although a defendant is entitled to have a jury find that his attempted robbery involved marijuana, it is for the court to determine as a matter of law that robberies involving marijuana "obstruct[], delay[], or affect[] commerce" within the meaning of the Hobbs Act, 18 U.S.C. 1951(a). See Taylor, 136 S. Ct. at 2080-2081. Similarly here, although the government was required to -- and did -- prove to the jury beyond a reasonable doubt that UBA received more than $10,000

in funds that originated as federal money during the relevant time period, see Pet. App. A4, the district court did not plainly err to the extent it determined as a matter of law that the regulatory structure, operation, and purpose behind the federal funding programs through which UBA received that money demonstrated that the funds were federal "benefits." See James v. United States, 550 U.S. 192, 214 (2007) (explaining that the court did not invade the province of the jury when it "avoided any inquiry into the underlying facts of [the] particular offense"), overruled on other grounds by Johnson v. United States, 135 S. Ct. 2551 (2015).

Petitioner nevertheless contends (Pet. 10-14) that the court of appeals' decision conflicts with decisions of this Court stating that each element of a criminal offense must be submitted to the jury. That contention is incorrect. In United States v. Gaudin, 515 U.S. 506 (1995), the Court held that, in a prosecution under 18 U.S.C. 1001 (1988), a defendant is constitutionally entitled to a jury determination of the materiality of his allegedly false statement. See 515 U.S. at 509-523. The government had conceded that materiality is an element of the Section 1001 offense, which involves the making of false statements in a matter within the jurisdiction of a federal agency. Id. at 509. As the Court explained, the materiality analysis in Section 1001 cases poses a "mixed question of law and fact," in that the jury will need to decide what statement was made and what decision the agency was trying to make, then ask whether the statement tended to influence

that decision. Id. at 512. Such mixed questions, the Court determined, fall within the jury's province. Id. at 512-515. But the Court reiterated that courts, not juries, decide "pure questions of law in a criminal case." Id. at 513 (emphasis omitted); see Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 3-4 (1794). And because the court of appeals determined that the question whether a certain federal funding program is properly classified as a federal "benefit" for purposes of Section 666 can be a purely legal question, the court's decision here does not conflict with Gaudin or similar decisions of this Court.

At the very least, the court of appeals correctly determined that petitioner's claim fails on plain-error review. See Pet. App. A3. As discussed, it is far from "plain" that, as petitioner asserts (Pet. 11-12), "the federal benefit element of § 666 is a mixed question of law and fact" that only the jury in his case could address. Moreover, even if the district court's jury instructions had been plainly erroneous, petitioner could not show that any error affected his substantial rights or undermined the integrity of judicial proceedings. See United States v. Marcus, 560 U.S. 258, 262 (2010). Petitioner makes no attempt to demonstrate that grants like the ones given to UBA do not benefit recipient organizations in the same way that Medicare reimbursements benefit a health care provider under Fischer. As the government has explained, the evidence presented at trial was more than sufficient to prove that the relevant grants were federal

benefits. See Gov't C.A. Br. 25-32 (explaining that UBA received funds under contracts to operate senior centers that provided meals and other senior services, which furthers innovation and benefits the community as a whole). And the court of appeals determined that sufficient evidence supported the Section 666 conviction. Pet. App. A4.

3. Petitioner contends (Pet. 4-10) that the decision below conflicts with decisions of the First and Eleventh Circuits. Although some tension exists, none of the decisions on which petitioner relies -- which neither directly addressed the question presented nor applied plain-error review -- squarely conflicts with the decision below.

a. In United States v. McLean, 802 F.3d 1228 (2015), the Eleventh Circuit determined that the government had failed to present sufficient evidence of a Section 666 violation because it had not shown that federal funds received by the organization in question were connected to any particular federal program. Id. at 1243-1244. The court explained that it did not need to decide the question whether funds can be classified as a "benefit" under Section 666 as a matter of law, because it determined that the government had invited the error by proposing that the jury be instructed on the question. Id. at 1245. The court added, however, that "if [it] were to address th[e] issue, [it] would determine that the decision to classify assistance as a federal benefit was properly submitted to the jury." Id. at 1247. As the

court's formulation makes clear, its analysis of the issue was dicta. See id. at 1245 (noting that "there is no need * * * to wade into this issue").

Petitioner's reliance on the Eleventh Circuit's subsequent decision in United States v. Doran, 854 F.3d 1312 (2017), is likewise misplaced. In that case, the court of appeals reversed a defendant's conviction under Section 666 on the ground that the defendant had embezzled money from a Student Investment Fund (SIF), a non-profit corporation established by Florida State University (FSU), which was a distinct entity that did not itself receive any federal benefits. See id. at 1315 ("The relevant organization under the statute is the SIF since it was the organization that was the subject of the embezzlement."); see also id. at 1314. The court specifically declined to address the defendant's argument that the government had failed to prove that any federal funds received by FSU "were part of any program with a sufficiently comprehensive structure, operation, or purpose to meet the requirements under [Section] 666(b) as a federal benefit," finding an inquiry into that issue unnecessary in light of its analysis. Id. at 1316.

b. In United States v. Bravo-Fernández, 913 F.3d 244 (2019), the First Circuit noted that Section 666 required the government to establish that the Commonwealth of Puerto Rico, for which one of the defendants had been acting as an agent, had "received at least $10,000 in federal 'benefits' within the meaning

of th[e] statute." Id. at 246. Although the parties had stipulated before trial that Puerto Rico had received more than $10,000 in federal funds during the relevant year, the defense argued that this stipulation was not enough to prove that Puerto Rico had received $10,000 in benefits, and moved for a judgment of acquittal on that basis. Id. at 248. In charging the jury, the district court had stated that Section 666 "only required jurors to find that [Puerto Rico] received federal 'funds of more than $10,000'"; "the word 'benefits' d[id] not appear even once throughout the instructions." Ibid. The court of appeals determined that, on those facts, the government had failed to meet its burden to prove that the entity for which the defendants acted as an agent "received the amount of benefits required under [Section] 666(b)." Ibid. Although some of the reasoning of that decision is in some tension with the decision below, the results are not inconsistent. Here, unlike in Bravo-Fernández, the jury was instructed that it needed to find that UBA had received at least $10,000 in benefits during the relevant time period, and that the benefits had to come from a federal program, as defined by statute. See Pet. C.A. App. A1205-A1206.

Petitioner also relies on the First Circuit's prior decision in United States v. Dubón-Otero, 292 F.3d 1 (2002), cert. denied, 537 U.S. 1171 (2003). In that case, the court of appeals analyzed the federal funds received by the organization at issue under the Court's framework in Fischer and stated: "[W]e conclude, and the

jury supportably could have so found, that the * * * payments that [the organization] received constituted benefits." Id. at 8. The court did not purport to analyze the question whether a judge or a jury should determine whether a federal funding program constitutes a "benefit" under this Court's analysis in Fischer.

c. In any event, because the decision below was unpublished and non-precedential, it cannot of its own force create or deepen any circuit conflict. And although the government suggested otherwise below, petitioner takes the view (Pet. 9) that "binding" Second Circuit precedent does not itself answer "whether the federal benefit requirement is a mixed question of law and fact for a jury's determination." This case would therefore be a poor vehicle in which to address any circuit division. That is especially so in light of the case's plain-error posture. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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