NO._____

IN THE SUPREME COURT OF THE UNITED STATES

LISA YVETTE COFFMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the first paragraph of 18 U.S.C. § 641 – which makes it illegal to embezzle, steal, purloin, or knowingly convert to one's own or another's use property of the United States – set out separate offenses or different means of committing one offense?

II. Did the Fifth Circuit misapply the substantial-rights prong of plain-error review under Fed. R. Crim. P. 52(b) in contravention of the dictates of *United States v. Olano*, 507 U.S. 725 (1993), and *Kotteakos v. United States*, 328 U.S. 750 (1946), by failing to consider the entire record to determine whether the improper admission of the highly prejudicial guilt-by-association evidence about a defendant's intent affected substantial rights where the sole defense to the charge of fraud was a lack of criminal intent?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are named in the caption of the case before this Court.

LIST OF DIRECTLY RELATED CASES

United States v. Coffman, 969 F.3d 186 (5th Cir. 2020), *reh'g denied*, No. 18-20736 (5th Cir. Sept. 16, 2020).

United States v. Coffman, Case No. 4:16-CR-460-1 (S.D. Tex.).

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PRAYER

Petitioner Lisa Yvette Coffman respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the judgment of conviction and sentence in this case.

OPINIONS BELOW

On August 6, 2020, the Fifth Circuit entered its judgment and opinion affirming Ms. Coffman's judgment of conviction and sentence. *See United States v. Coffman*, 969 F.3d 186 (5th Cir. 2020). The Fifth Circuit's opinion is reproduced as Appendix A to this petition. On September 16, 2020, the Fifth Circuit entered its order denying rehearing. *See* Order, *United States v. Coffman*, No. 18-20736 (5th Cir. Sept. 16, 2020). The order denying rehearing is reproduced as Appendix B to this petition.

JURISDICTION

On August 6, 2020, the Fifth Circuit entered its opinion and judgment in this case. On September 16, 2020, the Fifth Circuit entered its order denying Ms. Coffman's petition for rehearing in this case. This petition is filed within 150 days after the order denying rehearing and thus is timely. *See* Sup. Ct. R. 13.1; *see also* Miscellaneous Order Addressing the Extension of Filing Deadlines (Sup. Ct. Mar. 19, 2020). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

U.S. Const. amend. VI

Section 641 of Title 18, United States Code, provides as follows:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—
>
> Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of $1,000, he shall be fined under this title or imprisoned not more than one year, or both.
>
> The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

18 U.S.C.A. § 641.

Rule 702 of the Federal Rules of Evidence provides as follows:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

Rule 704 of the Federal Rules of Evidence provides as follows:

(a) In General--Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Fed. R. Evid. 704.

STATEMENT OF THE CASE

On October 11, 2016, the petitioner, Lisa Yvette Coffman, was charged by a two-count indictment alleging that, from November 15, 2011, through May 4, 2016, she: (1) made false representations by filing false Form 957 reports in connection with the receipt of medically-related workers' compensation travel benefits, in violation of 18 U.S.C. § 1920 (Count 1); (2) "did willfully and knowingly embezzle, steal, convert and purloin money from the Department of Labor" related to workers' compensation travel reimbursements, in violation of 18 U.S.C. § 641 (Count 2). The case was tried to a jury from June 11, 2018, through June 13, 2018, and the jury returned a verdict of guilty on both counts of the indictment.

The evidence introduced at trial, in relevant part, showed the following. Ms. Coffman worked for the United States Postal Service for many years and had been elected by her fellow employees to be a union steward representing letter carriers in disputes with management for about 8 years. On May 16, 2011, Ms. Coffman injured her back at work while lifting a package, and she initially stopped working because of the injury on May 18, 2011. She was approved to receive workers' compensation benefits on July 5, 2011, based on displacement of lumbar intervertebral disc without myelopathy. Among the benefits available to Ms. Coffman and other injured workers is the benefit of medical reimbursement for roundtrip mileage for treatment by a physician or a physical therapist.

At trial, the government introduced evidence that, from 2011 through May 4, 2016, Ms. Coffman submitted numerous Form 957 requests for reimbursement for travel for

medical treatment, which claimed a total of 95,000 travel miles during those years amounting to a total of just over $48,000. Through its exhibits and witnesses, the government showed that this amounted to an overpayment of $46,310.77 and that this overpayment was unsubstantiated by the mileage to and the records of Ms. Coffman's health care providers.

Among the health care providers called as witnesses, the government presented the testimony of Dr. Jennifer Johnson-Caldwell, who had treated Ms. Coffman from 2012 to 2014. At the beginning of her testimony, the government asked Dr. Johnson-Caldwell to describe her expertise in medicine, as well as her medical education and experience, including her medical degree, her residency, her experience as a physician, her current practice, the illnesses she treats, her office set up, its location, and the number of employees. The government then had Dr. Johnson-Caldwell testify about her treatment of Ms. Coffman and how her medical records did not match the number of times that Ms. Coffman had claimed she had been treated by her.

During this testimony, the government asked the following questions, and Dr. Johnson-Caldwell gave the following answers:

> Q. Do you any longer take any Department of Labor workers' comp cases?
>
> A. No.
>
> Q. Could you explain to the jury why?
>
> A. In the process of doing these cases, I discovered that people aren't the most honest people, and it just was a little unsettling for me to be doing things that I didn't agree with, and so I just completely stopped.

ROA.533. The government then asked the following question to which defense counsel objected:

Q. Did you have that feeling about Ms. Coffman?

ROA.533. The court sustained defense counsel's objection to that question. ROA.533.

In her own defense, Ms. Coffman did not contend that the Form 957s were correct. Ms. Coffman did contend, however, that she was not guilty because she was so overmedicated by the painkillers prescribed for her pain that she did not have the requisite knowledge and intent to commit the crimes charged. In support of this defense, Ms. Coffman introduced evidence showing that her memory and mental state had severely deteriorated due to the numerous painkillers her physicians prescribed, including Zanaflex, a muscle relaxer, Vicodin, a narcotic, Naprosyn, an anti-inflammatory, Ambien, for sleep, and Narco, a narcotic for pain consisting of hydrocodone and acetaminophen Vicodin and hydrocodone can create addiction and cause dizziness, lightheadedness, and a feeling of tiredness. Over time, taking Ambien can be addictive, cause dizziness and significant memory loss, and result in strange and dangerous behavior. Ms. Coffman's physicians also prescribed a morphine patch for her to wear to ease her pain. However, morphine is a serious painkiller that is taken after surgery, should be used only for a very short time, and should not be prescribed as a painkiller for back pain. In fact, people on morphine have hallucinations and confusion as side effects.

In support of her defense, Ms. Coffman also called six longtime friends, coworkers, and family members to testify as character witnesses and also about the deterioration of

her mental state over the years from the excruciating pain and the medication she was taking. Among other things, those witnesses testified that Ms. Coffman had trouble staying focused, could not remember conversations they had had on the previous day or even what they had just talked about in the same conversation, would stop mid-sentence at times, would go into a zone and just could not answer a question or engage in conversation, failed to remember places she had traveled to previously, would forget that she had had phone conversations, lost focus during and track of conversations, which required her to be redirected back to the topic of the conversation, had forgotten that she had dined with her daughter and engaged in an extended conversation on the previous evening, and had repeatedly called her daughter, who lived with her, on her phone thinking she was not at home because she did not remember that her daughter had gone upstairs to her bedroom. The defense witnesses testified that Ms. Coffman was an honest and law-abiding person and that she lacked the ability to keep accurate records given the deterioration in her memory and mental state.

At the close of the evidence, the district court instructed the jury that the elements of the second count of the indictment were, in pertinent part, as follows:

> Title 18 – closed quote. Title 18, United States Code, Section 641 makes it a crime for anyone to embezzle, steal, knowingly convert any money, property, or thing of value belonging to the United States having an aggregate value of more than $1,000.
>
> For you to find Ms. Coffman guilty, the government must prove each of the following beyond a reasonable doubt: First, that the money described in the indictment belonged to the United States government and had a value in excess of $1,000;

> Second, that Lisa Yvette Coffman embezzled, stole, or knowingly converted such money to her own use;
>
> And, third, that Lisa Yvette Coffman did so knowingly and willfully and with specific intent to deprive the owner of the use of the money.

The jury found Ms. Coffman guilty of both counts in the indictment. The court imposed five years of probation, $46,310.77 in restitution, and a special assessment of $200, but no fine. Ms. Coffman timely filed notice of appeal.

On appeal, Ms. Coffman raised two issues. First, she contended that it was reversible plain error for the district court to admit into evidence the testimony of her treating physician that people involved in workers' compensation cases "aren't the most honest people" because this testimony was irrelevant to Ms. Coffman's treatment and records and had no probative value and because the unfair prejudice from the statement that people involved in workers' compensation cases (e.g., like Ms. Coffman) are not very honest substantially outweighed any value in admitting it. She additionally argued that this testimony was plainly improper because it was profile testimony and was an impermissible opinion on the ultimate issue of Ms. Coffman's intent. Moreover, the error affected her substantial rights and seriously affected the fairness, integrity, and reputation of the proceedings, she contended, because this testimony went to the heart of the defense in this case, giving the clear suggestion that Ms. Coffman acted with criminal intent when her defense was that she did not have the criminal intent required to convict her because she had been terribly overmedicated with powerful drugs that cause confusion, memory loss, and even hallucinations.

In her second issue on appeal, Ms. Coffman argued that the district court committed reversible plain error by submitting an instruction to the jury that allowed it to convict her without unanimously deciding whether she had committed the offense of embezzlement or the offense of theft in light of the fact they were two different crimes. She argued that, especially in light of her defense that her mental state was severely impaired by the prescription pain medications she was taking, the jury instructions allowed some jurors to convict her of stealing and other jurors to convict her of embezzlement depending on when they thought she formed the requisite mental state to commit an offense.

On August 6, 2020, the Fifth Circuit issued its opinion affirming Ms. Coffman's convictions. *United States v. Coffman*, 969 F.3d 186, 188-92 (5th Cir. 2020), *reh'g denied*, No. 18-20736 (5th Cir. Sept. 16, 2020). With regard to the first issue, although the Fifth Circuit was unpersuaded that the treating physician's testimony was "improper expert profile evidence," *id.* at 189 n.2, it acknowledged "that the challenged remark was of little relevance," and it "assume[d] without deciding that it was a clear error to admit the testimony about the general honesty of workers' compensation patients." *Id.* at 189. The Fifth Circuit found that this guilt-by-association testimony was highly prejudicial but refused to reverse because it found no effect on substantial rights in light of the fact that the prosecution did not use the testimony in closing argument and that other similar but less prejudicial testimony by a different witness had been admitted into evidence. *Id*. at 189-90.

With regard to Ms. Coffman's argument on the jury instruction that included the multiple offenses set out in § 641, the Fifth Circuit recognized a defendant's constitutional right to a unanimous jury verdict but concluded that "[t]he alternative verbs in the first paragraph of Section 641 are means of committing the offense, not elements. Therefore, the district court's jury instruction was not erroneous." *Coffman*, 969 F.3d at 192.

On August 21, 2020, Ms. Coffman timely filed a petition for rehearing en banc again arguing, based on this Court's precedent, Tenth Circuit precedent, and legislative history, that the first paragraph of § 641 contained different offenses and not merely means of committing a single offense. On September 16, 2020, the Fifth Circuit denied rehearing. *See* Order, *United States v. Coffman*, No. 18-20736 (5th Cir. Sept. 16, 2020).

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari to decide whether the first paragraph of 18 U.S.C. § 641 – which makes it illegal to embezzle, steal, purloin, or knowingly convert to one's own or another's use property of the United States – sets out separate offenses or different means of committing one offense because the Fifth Circuit's opinion is in conflict with this Court's and another federal circuit's opinions.

This case presents an important question of statutory interpretation regarding 18 U.S.C. § 641. The plain language of the first paragraph of that statute contains multiple crimes, including stealing and embezzling, and this Court and the Tenth Circuit have made clear that those two crimes are not the same. In conflict with these opinions, the Fifth Circuit's opinion in this case held that all of the crimes listed in the first paragraph of § 641 are mere means of committing just one offense. In light of this conflict and the importance of correctly interpreting a principal federal criminal statute and ensuring a criminal defendant the right to a unanimous jury verdict, this Court should grant certiorari.

The second count of the indictment charged that Ms. Coffman "did willfully and knowingly embezzle, steal, convert and purloin money" related to workers' compensation travel reimbursements, in violation of 18 U.S.C. § 641. The first paragraph of § 641 provides in relevant part that a person commits an offense if that person "***embezzles, steals, purloins, or knowingly converts to his use or the use of another*** . . . any record, voucher, money, or thing of value of the United States or of any department or agency thereof." 18 U.S.C. § 641 (emphasis added).

As noted at the outset, the Fifth Circuit's opinion in this case held: "The alternative verbs in the first paragraph of Section 641 are means of committing the

offense, not elements. Therefore, the district court's jury instruction was not erroneous." *Coffman*, 969 F.3d at 192. Contrary to the Fifth Circuit's opinion, the decisions of the Court and a decision of the Tenth Circuit, as well as federal jury instructions and treatises, show that the acts listed in the first paragraph of § 641 are separate offenses and not means of committing one and the same offense.

Long ago, this Court defined the term "embezzlement" and made clear that it differs from theft:

> Embezzlement is the fraudulent appropriation of property by a person to whom such property has been intrusted, or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.

Moore v. United States, 160 U.S. 268, 269-70 (1895); *see also* 3 Wayne R. LaFave, *Substantive Criminal Law* § 19.6 (3rd ed.) (available on Westlaw); Fifth Cir. Pattern Jury Instr. (Criminal) No. 2.27, at 163 (2019) (defining "embezzle," "steal," and "knowingly convert"); 1A *Fed. Jury Prac. & Instr.* § 16:01 (6th ed. 2020) (available on Westlaw). In other words, embezzlement is just one of the offenses that § 641 criminalizes. *See* 50 No. 4 Crim. Law Bulletin ART 3, at 5 (footnote omitted) (available on Westlaw).[1]

Moreover, using the methodology set out in this Court's opinion in *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016) (approving looking at "jury instructions," among other documents, "to determine what crime, with what elements, a defendant was convicted of"),

[1] No page number available, and cited by page number on the hard copy printed out from Westlaw.

it is clear from various federal jury instructions that the acts listed in the first paragraph of § 641 are separate offenses. For example, the Fifth Circuit Pattern Jury Instruction for the first paragraph of § 641 distinguishes between the offenses in the first paragraph of the statute by placing brackets around alternative offenses to ensure that the correct offense among the alternatives is submitted to the jury, and it also defines "embezzlement" and "steal" separately. *See* Fifth Cir. Pattern Jury Instr. (Criminal) No. 2.27, at 160 (2019). Other federal jury instructions do the same. *See, e.g.*, Fed. Crim. Jury Instr. 7th Cir. 641[1]; Model Crim. Jury Instr. 8th Cir. 6.18.641; Model Crim. Jury Instr. 9th Cir. 8.39; S3 Modern Federal Jury Instr.—Criminal 2.31 (2020) (10th Cir. Pattern Jury Instr. for 18 U.S.C. § 641); S3 Modern Federal Jury Instr.—Criminal 21 (2020) (11th Cir. Pattern Jury Instr. for 18 U.S.C. § 641 (First Paragraph)).[2]

Furthermore, in *Morissette v. United States*, 342 U.S. 246 (1952), which was decided a few years ***after*** the enactment of 18 U.S.C. § 641, this Court made clear that the offenses of stealing and conversion, two of the offenses listed in the first paragraph of § 641, are not the same:

> . . . Probably every stealing is a conversion, but certainly not every knowing conversion is a stealing, 'To steal means to take away from one in lawful possession without right with intention to keep wrongfully.' Conversion, however, may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Money rightfully taken into one's

[2] The Seventh, Eighth, and Ninth Circuits' jury instructions are available in *Federal Jury Practice & Instructions* on Westlaw, and the Tenth and Eleventh Circuits' jury instructions are available in *Modern Federal Jury Instructions—Criminal* on Lexis.

> custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and intact. . . .

Morissette 342 U.S. at 271-72 (italics, citation, and parenthetical omitted). Relying on *Morissette*, the Tenth Circuit has held that one cannot be convicted of both stealing and conversion under § 641 at the same time with regard to the same property because "[t]he concepts of stealing and conversion are mutually exclusive." *United States v. Hill*, 835 F.2d 759, 764 (10th Cir. 1987) (citing *Morissette*, 342 U.S. at 271-72); *see also* 1A *Fed. Jury Practice & Instr.* § 16:03 (6th ed. 2020) (discussing the difference between conversion and stealing).

In fact, the Court made clear in *Morissette* that the terms used in § 641 were to be given their traditional legal meaning:

> The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute. And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Morissette, 342 U.S. at 263 (footnote omitted).

The Court also made clear that the 1948 revision that brought about § 641 was a consolidation of four former sections of the federal criminal code and that "[t]he 1948 Revision ***was not intended to create new crimes but to recodify those then in existence***."

Morissette, 342 U.S. at 266 & n.28 (emphasis added).[3] "The history of [§] 641 demonstrates that it was to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions." *Morissette*, 342 U.S. at 266 n.28. For example, "conversion," which was not mentioned in the four former statutes, was included in § 641 and appears to have been derived from language in some of those statutes that made it illegal for a person to "knowing apply to his own use" property of the United States. *Morissette*, 342 U.S. at 266 n.28.

In sum, *Morissette*, other case law, jury instructions, and treatises make clear that the acts in the first paragraph of § 641 are offenses with different meanings derived from various former statutes and from their common-law definitions. The terms "embezzles, steals, purloins, or knowingly converts," therefore, are separate offense elements and not merely means of a single offense. This Court thus should grant certiorari because the Fifth Circuit's opinion is contrary to *Morissette* in a number of respects and because it renders a decision on an important question regarding the proper construction of the statute underlying federal prosecutions and jury instructions for theft of government property under the first paragraph of 18 U.S.C. § 641. In addition, this Court should grant certiorari

[3] *See also* H.R. Rep. No. 79-152, at 6, A49 (1945) (stating, with regard to consolidation of sections, that "[i]n many instances sections were consolidated without making fundamental changes to the offenses involved," that "[g]ood examples of such consolidations will be found in the chapter Embezzlement and Theft," that § 641 is based on 18 U.S.C. §§ 82, 87, 100, and 101 (1940) and precursor statutes, and that "[c]hanges necessary to effect consolidation were made").

because the Fifth Circuit's opinion misapplies other opinions of this Court, as discussed below.

The Fifth Circuit's opinion reaches its conclusion about the acts in the first paragraph of § 641 by first acknowledging this Court's holding in *Moore*, which set out the clear differences between embezzlement and theft, *see supra* text, at 13 (quoting *Moore*), but then by stating: "The question before us, though, 'is one of statutory construction, not of common law distinctions.'" *Coffman*, 969 F.3d at 191 (quoting *Milanovich v. United States*, 365 U.S. 551, 554 (1961), with the parenthetical "(analyzing Section 641)"). The Fifth Circuit's disregard of the traditional and common law meaning of the offenses in the first paragraph of § 641 is in conflict with *Moore* and *Morissette*, which define the meaning of those offenses, and in conflict with the clear statement that the Court made in *Morissette*, in interpreting the language of § 641, that, "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette*, 342 U.S. at 263. The question of the meaning of the offenses in the first paragraph of § 641 thus is not merely "'one of statutory construction.'" *Coffman*, 969 F.3d at 191 (quoting *Milanovich*, 365 U.S. at 554).

The Fifth Circuit's erroneous reasoning arises from the fact that the phrase it plucked from *Milanovich* does not apply to the analysis of the offenses in the ***first***

paragraph of § 641. In *Milanovich*, the issue was whether a defendant could be convicted of stealing government property, as prohibited by the first paragraph of § 641, ***and*** of receiving that same stolen property, as prohibited by the second paragraph of § 641.[4] *See Milanovich*, 365 U.S. at 552-54. The Court relied on its decision in *Heflin v. United States*, 358 U.S. 415 (1959), which held that a defendant could not be convicted of both robbery and of receiving funds stolen in the same robbery under the federal bank robbery statute, 18 U.S.C. § 2113, because Congress had enacted the "receiving" section of the statute to reach "those who receive the loot from the robbers" and not to multiply the punishment for those who commit the robbery. *Heflin*, 358 U.S. at 419-20. In *Milanovich*, the Court applied *Heflin*'s reasoning to the first and second paragraphs of 18 U.S.C. § 641 and held that a defendant could not be convicted of stealing property under the first paragraph and receiving the same stolen property under the second paragraph of § 641. *See Milanovich*, 365 U.S. at 553-54. However, the Court's statutory analysis of why Congress would add a separate, second section to a statute supplies no reason to ignore or even contradict two of this Court's opinions that define the terms in the first paragraph of § 641 and discuss their common-law meanings and statutory foundations.

The Fifth Circuit's opinion also discusses the holding in *United States v. Fairley*, 880 F.3d 198 (5th Cir. 2018) – that it was reversible plain error to "conflate the elements" in the first and second paragraphs of § 641 in the same jury instruction, *see Coffman*, 969

[4] The second paragraph of § 641 provides as follows: "Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—[commits an offense]." 18 U.S.C. § 641.

F.3d at 191 – but reasons that, "[a]lthough *Fairley* characterized Section 641's first paragraph as having three elements, the court did not resolve the issue of whether the verbs in each paragraph were elements or mere means." *Id.* (citation omitted).

From its discussion of *Fairley*, the Fifth Circuit's opinion jumps to this Court's statement in *Morissette* about the consolidation of the overlapping statutes into § 641 and the codifiers' concern that there were gaps in larceny-type offenses and that "'guilty men have escaped through the breaches.'" *See Coffman*, 969 F.3d at 192 (quoting *Morissette*, 342 U.S. at 266-67). The Fifth Circuit's opinion then concludes that "[t]he alternative verbs in the first paragraph of Section 641 are means of committing the offense, not elements." *Coffman*, 969 F.3d at 192. But, the fact that the revisers consolidated the crimes in four statutes into a single statute does not mean that it transformed those crimes into one crime. Quite the contrary, because this Court expressly stated in *Morissette* that the crimes in the first paragraph of § 641 are defined by "the cluster of ideas that were attached to each borrowed word" in the statute and that "[t]he 1948 Revision was not intended to create new crimes but to recodify those then in existence." *Morissette*, 342 U.S. at 266 n.28; *see also supra* text, at 15-16 & n.3.

Finally, because the Fifth Circuit never conducted a harm analysis of the § 641 jury instruction under plain-error review and instead reached a conclusion on the merits that the first paragraph of § 641 contains means and not elements, *see Coffman*, 969 F.3d at 192, this Court need not engage in any analysis regarding the harm resulting from this error. Rather, this Court should, "[c]onsistent with [its] practice," remand this case to the Fifth

Circuit for it to consider in the first instance whether the jury instruction error affects substantial rights and the fairness, integrity, and reputation of the judicial proceedings under Fed. R. Crim. P. 52(b). *Tapia v. United States*, 564 U.S. 319, 335 (2011); *see also United States v. Marcus*, 560 U.S. 258, 266-67 (2010) (remanding for a determination of "whether the error at issue satisfies this Court's "plain error" standard—*i.e.*, whether the error affects "substantial rights" and the "fairness, integrity, or public reputation of the judicial proceedings"); *Hicks v. United States*, 137 S. Ct. 2000, 2000 (2017) (Gorsuch, J., concurring) (stating that, when this Court identifies a legal error or an unpreserved but plain legal error, it "routinely remands" the case so that the court of appeals may resolve whether the error was harmless or "whether the error affected the defendant's substantial rights and implicated the fairness, integrity, or public reputation of judicial proceedings").

In sum, this Court should grant certiorari to decide this important question of federal law concerning the proper construction of the first paragraph of 18 U.S.C. § 641.

II. This Court should grant certiorari to clarify how the substantial-rights prong of plain-error review under Fed. R. Crim. P. 52(b) applies to expert testimony by a government witness on the defendant's intent in a fraud case where the sole defense is the lack of criminal intent.

As discussed at the outset, *see supra* text, at 5-6, at trial the government presented testimony of Dr. Jennifer Johnson-Caldwell, who had treated Ms. Coffman from 2012 to 2014. At the beginning of her testimony, the government asked Dr. Johnson-Caldwell to describe her expertise in medicine, as well as her medical education and experience, including her medical degree, her residency, her experience as a physician, her current practice, the illnesses she treats, her office set up, its location, and the number of employees. The government then had Dr. Johnson-Caldwell testify about her treatment of Ms. Coffman and Ms. Coffman's medical records. Dr. Johnson-Caldwell also testified that, at the time she treated Ms. Coffman for her back injury, she "was doing some workers' comp in the office, both Department of Labor and Texas Workforce Commission."

Against this backdrop, the government asked Dr. Johnson-Caldwell if she continued to handle workers' compensation cases. When Dr. Johnson-Caldwell answered that she did not, the government then asked her to explain to the jury why that was. Dr. Johnson-Caldwell answered: "In the process of doing these cases, I discovered that people aren't the most honest people, and it just was a little unsettling for me to be doing things that I didn't agree with, and so I just completely stopped." The government then asked: "Did you have that feeling about Ms. Coffman?" ROA.533. At that point, the district court sustained defense counsel's objection. ROA.533.

On appeal, Ms. Coffman contended that it was reversible plain error for the district court to admit into evidence the testimony of her treating physician that people involved in workers' compensation cases "aren't the most honest people" because this testimony was irrelevant to Ms. Coffman's treatment and records and had no probative value and because the unfair prejudice from the statement that people involved in workers' compensation cases (*e.g.*, like Ms. Coffman) are not very honest substantially outweighed any value in admitting it. She additionally argued that this testimony was plainly improper because it was profile testimony and was an impermissible opinion on the ultimate issue of Ms. Coffman's intent. Moreover, the error affected her substantial rights and seriously affected the fairness, integrity, and reputation of the proceedings, she contended, because this testimony went to the heart of the defense in this case, giving the clear suggestion that Ms. Coffman acted with criminal intent when her defense was that she did not have the criminal intent required to convict her because she had been terribly overmedicated with powerful drugs that cause confusion, memory loss, and even hallucinations

In its opinion, the Fifth Circuit was unpersuaded that the treating physician's testimony was "improper expert profile evidence," *Coffman*, 969 F.3d 189 n.2, but it acknowledged "that the challenged remark was of little relevance," and it "assume[d] without deciding that it was a clear error to admit the testimony about the general honesty of workers' compensation patients." *Id.* at 189. The Fifth Circuit then found that this guilt-by-association testimony was highly prejudicial. *Id.* However, it refused to reverse because it found no effect on substantial rights in light of the fact that the prosecution did not use

the testimony in closing argument and that other similar less prejudicial testimony by a different witness had been admitted into evidence. *Id*. at 189-90.

In light of the Fifth Circuit's misapplication of the substantial-rights prong of plain-error review under Fed. R. Crim. P. 52(b) by finding that Dr. Johnson-Caldwell's testimony did not affect substantial rights where the sole defense was a lack of criminal intent to the charges of fraud, this Court should grant certiorari to clarify how the third prong of plain-error review applies in these circumstances. In *United States v. Olano*, 507 U.S. 725 (1993), this Court made clear that the substantial-rights analysis under Fed. R. Crim. P. 52(b) is the same as the harm analysis under Fed. R. Crim. P. 52(a) except for the placement of the burden:

> The third and final limitation on appellate authority under Rule 52(b) is that the plain error "affec[t] substantial rights." This is the same language employed in Rule 52(a), and in most cases it means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings. When the defendant has made a timely objection to an error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record—a so-called "harmless error" inquiry—to determine whether the error was prejudicial. Rule 52(b) normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. In most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial. This burden shifting is dictated by a subtle but important difference in language between the two parts of Rule 52: While Rule 52(a) precludes error correction only if the error "does not affect substantial rights" (emphasis added), Rule 52(b) authorizes no remedy unless the error does "affec[t] substantial rights."

Olano, 507 U.S. at 734-35 (citations and parentheticals omitted).

Among the cases cited by the Court in this passage was *Kotteakos v. United States*, 328 U.S. 750 (1946), *see Olano*, 507 U.S. at 734, in which this Court made clear that the

indispensable feature of the traditional harmless-error analysis is its focus on the error's potential effect on the jury's verdict, in view of the entire record:

> In the final analysis judgment in each case must be influenced by conviction resulting ***from examination of the proceedings in their entirety***, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations. Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment.
>
> . . .
>
> But this does not mean that the appellate court can escape altogether taking account of the outcome. To weigh ***the error's effect against the entire setting of the record*** without relation to the verdict or judgment would be almost to work in a vacuum. In criminal causes that outcome is conviction. This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen. And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

Kotteakos, 328 U.S. at 762, 764 (emphasis added; citations and footnote omitted).

In the present case, the Fifth Circuit misapplied the substantial-rights prong of Fed. R. Crim. P. 52(b) in contravention of the dictates of *Olano* and *Kotteakos*. The Fifth Circuit acknowledged that the testimony about dishonesty was irrelevant and was guilt-by-association evidence and thus highly prejudicial. *Coffman*, 969 F.3d at 189. Its analysis, however, it treated this testimony as an "isolated remark" and relied on the fact another witness had given what it counted "similar" testimony that "the workers' compensation office originally started reviewing travel-benefits applications for 100-mile plus trips 'because people haven't been as honest as they should.'" *Id.* The Fifth Circuit admitted,

however, that this other testimony "may not be as prejudicial as the challenged testimony." *Id.* This constituted the Fifth Circuit's entire substantial-rights analysis under Fed. R. Crim. P. 52(b).

The Fifth Circuit's truncated analysis is in direct contravention of *Kotteakos*'s directive to lower courts to conduct an "examination of the proceedings in their entirety" and to consider "the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting." *Kotteakos*, 328 U.S. at 762, 764. An analysis of "the proceedings in their entirety" should have included the fact that the government used Dr. Johnson-Caldwell as an expert with substantial training and experience in medicine and with handling workers' compensation cases and had her offer her opinion concerning the dishonesty of people – including Ms. Coffman – involved in worker's compensation cases. In other words, the government used Dr. Johnsons-Caldwell to offer an irrelevant, highly prejudicial, and impermissible opinion on the ultimate issue of Ms. Coffman's intent. Nor can the government argue to the contrary, because the next question asked by the government following Dr. Johnson-Caldwell's testimony about the dishonesty of people involved in workers' compensation cases shows that tarring Ms. Coffman with criminal intent was the sole purpose of the government in eliciting this testimony. *See* ROA.533 ("Q. Did you have that feeling about Ms. Coffman?").

In light of the fact that this improper testimony by an expert who actually treated Ms. Coffman was engineered to have an effect "on the minds of" the jury, "in the total setting," *Kotteakos*, 328 U.S. at 764, a proper analysis based on the entire record should

have found that the error here affected Ms. Coffman's substantial rights. The government purposely elicited Dr. Johnson-Caldwell's irrelevant testimony on the dishonesty of people involved in workers' compensation cases to cause the jury to conclude that Mr. Coffman was dishonest and had knowingly and intentionally committed the crimes charged in the indictment. And, this testimony went to the heart of the defense in this case – that Ms. Coffman did ***not*** have the criminal intent required to convict her because she had been terribly overmedicated with powerful drugs that cause confusion, memory loss, and even hallucinations. *See supra* text, at 6. Moreover, Ms. Coffman presented a number of witnesses in support of her defense who had observed the substantial negative effects that the overmedication had on her mental state. *See supra* text, at 6-7. The highly prejudicial testimony on dishonest intent by an expert experienced in both medicine and workers' compensation who was a treating physician of Ms. Coffman, therefore, clearly affected her substantial rights based on an "examination of the proceedings in their entirety." *Kotteakos*, 328 U.S. at 762.

In light of the Fifth Circuit's misapplication of the substantial rights analysis required by *Olano* and *Kotteakos*, this Court should grant certiorari to clarify how that analysis applies in a fraud case in which the government improperly introduces evidence on the defendant's intent. This Court has granted certiorari and clarified how the substantial-rights analysis applies in other contexts, *see, e.g.*, *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1342-49 (2016), and it should do so here. In the alternative, this Court should grant certiorari, vacate the judgment, and remand for the Fifth Circuit to

conduct a proper substantial-rights analysis in accordance with *Olano* and *Kotteakos*.

CONCLUSION

For the foregoing reasons, the petitioner, Lisa Yvette Coffman, prays that this Court grant certiorari.

Date: December 23, 2020

Respectfully submitted,

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Kimbrough makes clear that separate special assessments violate the double jeopardy clause only if the assessments were imposed for the *same* criminal act. *See, e.g.*, *Whalen v. United States*, 445 U.S. 684, 688, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). There is no double jeopardy problem if the special assessments were imposed for "distinct criminal acts." *Danhach*, 815 F.3d at 239.

Portillo was sentenced to concurrent sentences on counts 1, 4, 5, 6, 7, 10, 11, 12, and 13. Those counts charged him with: a racketeering conspiracy, conspiracy to commit murder in aid of racketeering, conspiracy to commit an assault with a deadly weapon in aid of racketeering, assault with a dangerous weapon in aid of racketeering in Palo Pinto, assault with a dangerous weapon in aid of racketeering in Port Aransas, conspiracy to distribute and possession with intent to distribute a controlled substance, possession with intent to distribute cocaine, conspiracy to interfere with commerce by threats or violence, and possession of a firearm as a felon. These crimes all involve distinct offenses and required the jury to find distinct elements to convict. Portillo fails to argue how those offenses "should be considered to constitute the same offense." *Lopez*, 426 F. App'x at 264. He has therefore failed to establish plain error, and we affirm.[7]

III. Conclusion

For the foregoing reasons, the judgment of the district court is AFFIRMED.

7. The defendants also argue that the cumulative error doctrine requires reversal of their convictions. Though we agree that the district court's admission of the Romo brothers' prior consistent statements was erroneous, this single harmless error does not require reversal. *See United States v. Ceballos*, 789 F.3d 607, 621 (5th Cir. 2015) (holding that reversal is required only when otherwise harmless "errors so fatally infected the trial that they violated the trial's fundamental fairness" (cleaned up)); *United States v. Delgado*, 672 F.3d at 343–44.

UNITED STATES of America, Plaintiff - Appellee

v.

Lisa Yvette COFFMAN, Defendant - Appellant

No. 18-20736

United States Court of Appeals, Fifth Circuit.

FILED August 6, 2020

Background: Defendant was convicted in the United States District Court for the Southern District of Texas, Andrew S. Hanen, J., of making false statements to obtain federal workers' compensation benefits and theft of public money, and she appealed.

Holdings: The Court of Appeals, Southwick, Circuit Judge, held that:

(1) district court did not commit plain error in admitting treating physician's testimony that she no longer took workers' compensation cases because "I discovered that people aren't the most honest people," and

(2) jurors did not have to agree on defendant committed theft or embezzlement in order to convict her of theft of public money.

Affirmed.

1. Criminal Law ⚿1036.1(1), 1153.1

Generally, Court of Appeals reviews trial court's decision to admit evidence for

abuse of discretion, but where defendant did not object to challenged testimony at trial, review is for plain error.

2. Criminal Law ⚿1030(1)

To establish plain error, defendant must show (1) error that was (2) clear or obvious and (3) affects defendant's substantial rights, and if there was such error, Court of Appeals had discretion to remedy (4) if error seriously affected fairness, integrity, or public reputation of judicial proceedings.

3. Criminal Law ⚿1030(1)

Under plain error standard of review, to show that her substantial rights were affected, defendant ordinarily must show reasonable probability that, but for error, proceeding's outcome would have been different.

4. Criminal Law ⚿1036.1(8)

District court did not commit plain error in prosecution for making false statements to obtain federal workers' compensation benefits and theft of public money in admitting treating physician's testimony that she no longer took workers' compensation cases because "I discovered that people aren't the most honest people," where statement was isolated remark, government did not mention it during closing argument, and different witness gave unchallenged testimony that "people haven't been as honest as they should."

5. Criminal Law ⚿1038.1(2)

Jury instruction error does not amount to plain error unless it could have meant difference between acquittal and conviction.

6. Jury ⚿32(4)

Jurors must unanimously agree that government proved all elements of offense.

7. Criminal Law ⚿872.5

Jury need not always decide unanimously which of several possible sets of underlying brute facts make up particular element of crime; crucial distinction is between fact that is element of crime and one that is but means to commission of element.

8. Criminal Law ⚿872.5

Federal statute prohibiting embezzlement, stealing, or conversion of property of United States described alternative means of committing offense, rather than elements of separate crimes, and thus jurors did not have to agree on whether defendant committed stealing or embezzlement in order to convict her under statute. 18 U.S.C.A. § 641.

Appeal from the United States District Court for the Southern District of Texas, Andrew S. Hanen, U.S. District Judge

John A. Reed, Carmen Castillo Mitchell, Assistant U.S. Attorneys, U.S. Attorney's Office, Southern District of Texas, Houston, TX, for Plaintiff-Appellee.

Marjorie A. Meyers, Federal Public Defender, Kayla R. Gassmann, H. Michael Sokolow, Assistant Federal Public Defenders, Federal Public Defender's Office, Southern District of Texas, Houston, TX, for Defendant-Appellant.

Before CLEMENT, SOUTHWICK, and HIGGINSON, Circuit Judges.

LESLIE H. SOUTHWICK, Circuit Judge:

The defendant was indicted for making false statements to obtain federal workers' compensation benefits under 18 U.S.C. § 1920 and for theft of public money under 18 U.S.C. § 641. A jury convicted her on both counts. On appeal, she argues that she was prejudiced by inadmissible testi-

mony and a flawed jury instruction. We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

Lisa Yvette Coffman was a mail carrier for the United States Postal Service. In 2011, she injured her back while lifting a package, and she applied for workers' compensation benefits, including travel reimbursement for her mileage to and from doctor appointments related to her injury. Between November 2011 and May 2016, Coffman submitted travel reimbursement forms for over 95,000 miles. She received more than $48,000 for travel reimbursement — over $46,000 of overpayment.

Coffman claimed travel reimbursement for nonexistent doctor appointments and for treatment unrelated to her covered back injury. For example, she sought travel reimbursement for 190 appointments with Dr. Tri Le — who was not an approved workers' compensation provider — when she in fact had only 31 appointments with that doctor. Coffman also told an investigator that Coffman paid Dr. Le through private insurance, implying Coffman knew that Dr. Le was not an approved provider.

In one 122-day period in 2016, Coffman sought travel reimbursement for 327 appointments. She submitted claims for four and five appointments on many days, and sometimes she claimed to have visited the same office twice on a single date. Coffman also sought travel reimbursement for weekend appointments when the doctors' offices were closed. On a single day in 2016, Coffman claimed to have driven nearly 400 miles to five different doctors. Four of those doctors or their representatives testified that Coffman either had no appointment that day or did not show up for her appointment.

On October 11, 2016, Coffman was charged with one count of making false statements to obtain federal workers' compensation benefits and one count of theft of public money. At trial, Coffman conceded that she had submitted improper claims, but she argued that she lacked criminal intent. She presented evidence showing that she was heavily medicated with a combination of pain pills, muscle relaxers, and sleeping pills that could cause confusion, hallucinations, memory loss, and the inability to focus.

A jury found Coffman guilty on both counts. The district court sentenced her to five years of probation and ordered her to pay $46,310.77 in restitution. Coffman timely appealed.

DISCUSSION

On appeal, Coffman challenges a portion of trial testimony from Dr. Jennifer Johnson-Caldwell, who was one of Coffman's treating physicians. Coffman also argues that the district court failed to instruct members of the jury that they must unanimously agree on the basis of the verdict — whether Coffman committed theft of public funds by embezzlement *or* by stealing. We begin with the claim of evidentiary error.

I. Admissibility of testimony

At trial, the Government asked its witness, Johnson-Caldwell, a doctor who treated Coffman for her back injury, to explain why the doctor no longer takes workers' compensation cases. She answered, "In the process of doing these cases, I discovered that people aren't the most honest people, and it just was a little unsettling for me to be doing things that I didn't agree with, and so I just completely stopped." Coffman did not object to the testimony. The Government asked a follow-up question: "Did you have that feeling about Ms. Coffman?" Coffman objected,

and the district court sustained the objection. Coffman now contends that Johnson-Caldwell's first remark about the honesty of workers' compensation patients was inadmissible. Coffman asserts that the testimony was irrelevant, unfairly prejudicial, improper expert profile evidence, and an impermissible opinion on the ultimate issue (whether Coffman had the requisite criminal intent).

[1, 2] "Generally, we review a trial court's decision to admit evidence for abuse of discretion." *United States v. Akpan*, 407 F.3d 360, 373 (5th Cir. 2005). Our review here, though, is for plain error because Coffman did not object to the now-challenged testimony at trial. *See United States v. Espino-Rangel*, 500 F.3d 398, 399 (5th Cir. 2007). There are four steps to our plain-error analysis: whether (1) an error that was (2) clear or obvious (3) affects the defendant's substantial rights, and if there was such an error, we have discretion to remedy (4) if the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (quotation marks omitted).

Acknowledging that the challenged remark was of little relevance, we assume without deciding that it was a clear error to admit the testimony about the general honesty of workers' compensation patients.[1]

[3] Now we ask whether Coffman's substantial rights were affected. "To satisfy [the] third condition, the defendant ordinarily must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Rosales-Mireles v. United States*, —— U.S. ——, 138 S. Ct. 1897, 1904–05, 201 L.Ed.2d 376 (2018) (quotation marks omitted). An error generally affects a defendant's substantial rights if the error was prejudicial. *Olano*, 507 U.S. at 734, 113 S.Ct. 1770.

[4] Guilt-by-association evidence is "highly prejudicial." *United States v. Polasek*, 162 F.3d 878, 887 (5th Cir. 1998). In addressing harmlessness, we stated that "[o]ne relevant consideration, of course, is the amount of time spent" on the evidence. *Id.* Here, the challenged testimony was similar to guilt-by-association evidence, offering a negative opinion about a group to which Coffman belonged. The bigger picture, though, reveals that the isolated remark was just that. The challenged testimony was just a single sentence. The Government did not even mention it during closing argument. *See United States v. Ricardo*, 472 F.3d 277, 285 (5th Cir. 2006).

In addition, a different witness, whose testimony is not challenged on appeal, testified that the workers' compensation office originally started reviewing travel-benefits applications for 100-plus mile trips "because people haven't been as honest as they should." This comment may not be as prejudicial as the challenged testimony, but it is similar, generalizing about the honesty of workers' compensation patients. Even without hearing Johnson-Caldwell's comment on the honesty of workers' compensation patients, the jury still would

1. We are also unpersuaded by Coffman's other arguments about the admissibility of Johnson-Caldwell's statement. Johnson-Caldwell's testimony was based on her personal experience treating workers' compensation patients, so she did not provide improper expert profile evidence. *See United States v. Breland*, 366 F. App'x 548, 552 (5th Cir. 2010). Similarly, Johnson-Caldwell's testimony did not give an opinion on the ultimate legal issue — whether Coffman had the intent to commit theft of public funds — and instead described her own impressions about the honesty of workers' compensation patients more generally. *See United States v. Montes-Salas*, 669 F.3d 240, 250 (5th Cir. 2012).

have heard a similar sentiment. We therefore are unable to conclude that but for the challenged testimony, the outcome of the proceeding would have been different. *United States v. Holmes*, 406 F.3d 337, 365 (5th Cir. 2005).

II. Non-unanimous jury verdict under 18 U.S.C. § 641

Coffman was convicted on Count Two under Section 641, which provides:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted--

commits theft of public funds. 18 U.S.C. § 641. Coffman was charged under paragraph one. The district court instructed the jury that the Government had to prove beyond reasonable doubt that Coffman "embezzled, stole, or knowingly converted such money to her own use." The district court also told the jury that its verdict needed to be unanimous. On appeal, Coffman challenges the jury instruction for this count, contending the district court erred by failing to instruct the jury that it must unanimously agree whether she engaged in embezzling or stealing. She argues that embezzlement and stealing are different crimes, meaning jurors had to agree on which offense Coffman committed.

[5] Our review, again, is for plain error because Coffman did not object to the jury charge in the district court. *United States v. Creech*, 408 F.3d 264, 267–68 (5th Cir. 2005). "Jury instruction error does not amount to plain error unless it could have meant the difference between acquittal and conviction." *United States v. Fairley*, 880 F.3d 198, 208 (5th Cir. 2018) (quotation marks omitted).

[6, 7] The Constitution requires that jurors unanimously agree that the Government proved all the elements of an offense. *Richardson v. United States*, 526 U.S. 813, 816–17, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999). The jury "need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *Id.* at 817, 119 S.Ct. 1707. "The crucial distinction is thus between a fact that is an element of a crime and one that is but the means to the commission of an element." *United States v. Talbert*, 501 F.3d 449, 451 (5th Cir. 2007) (quoting *United States v. Verrecchia*, 196 F.3d 294, 299 (1st Cir. 1999)). Whether a fact constitutes an element or an alternative means of committing an offense is a "value choice[ ] more appropriately made in the first instance by a legislature than by a court." *Schad v. Arizona*, 501 U.S. 624, 638, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) (plurality opinion).

We faced a similar question in *Fairley*. There, we considered whether the verbs in the first paragraph of Section 641 were interchangeable with those in the second paragraph. 880 F.3d at 208–10. The indictment and jury charge combined acts from Section 641's first and second paragraphs, alleging that the defendant "received, retained, concealed, or converted" government property. *Id.* at 209. We explained that "the verbs animating [Section] 641's first two paragraphs are not fungible." *Id.* at 205. "The verbs in paragraph one —

embezzle, steal, purloin, and convert — describe takings or possessions that are fraudulent or otherwise illegal," while "[p]aragraph two's verbs — receive, conceal, and retain — are broader, and cover innocent as well as illicit acts." *Id.* Thus, Section 641 "criminalizes two distinct acts": "paragraph one covers stealing from the United States and paragraph two covers knowingly receiving stolen United States property." *Id.* at 204. Because the jury instruction conflated the elements of the two paragraphs, we vacated the defendant's conviction under Section 641. *Id.* at 212. Although *Fairley* characterized Section 641's first paragraph as having three elements, *id.* at 209, the court did not resolve the issue of whether the verbs in each paragraph were elements or mere means.

When analyzing whether a requirement is an element of a statute, we consider the statute's language, structure and history, and the fairness to the defendant. *Talbert*, 501 F.3d at 451. Courts traditionally "require[e] juror unanimity where the issue is whether a defendant has engaged in conduct that violates the law." *Richardson*, 526 U.S. at 819, 119 S.Ct. 1707. The Court provided a hypothetical that helps in understanding these principles:

> Where, for example, an element of robbery is force or the threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement — a disagreement about means — would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely, that the defendant had threatened force.

Id. at 817, 119 S.Ct. 1707. "Force" and "threat of force" are alternatives, and jurors could decide on either — the elements of the crime are met either way. *Id.* In *Richardson*, though, the statute applied where a defendant committed a "series of violations." *Id.* at 815, 119 S.Ct. 1707. The "violations" were separate elements because the government needed to prove the defendant committed a series of discrete violations. *See id.* at 818–20, 119 S.Ct. 1707. Otherwise, unfairness could have resulted because the jury would not need to discuss whether each alleged violation was in fact a violation. *Id.* at 819, 119 S.Ct. 1707.

The first paragraph of Section 641 provides that "[w]hoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States" commits theft of public money. 18 U.S.C. § 641. The statutory language does not specify whether the verbs in the first paragraph constitute elements or means of committing the offense. *See id.* The verbs have similar meanings, but they are not the same. Coffman notes that the Supreme Court long ago observed a difference between embezzlement and larceny. *Moore v. United States*, 160 U.S. 268, 269–70, 16 S.Ct. 294, 40 L.Ed. 422 (1895). The question before us, though, "is one of statutory construction, not of common law distinctions." *Milanovich v. United States*, 365 U.S. 551, 554, 81 S.Ct. 728, 5 L.Ed.2d 773 (1961) (analyzing Section 641).

The first and second paragraphs of Section 641 list different kinds of acts and thus different crimes. *Fairley*, 880 F.3d at 205. That structural point helps the Government; there are two separate crimes, not seven in the first paragraph alone. The verbs in paragraph one of Section 641 are also listed as alternatives. Indeed, the earliest Supreme Court case discussing the first paragraph of Section 641 treated the

larceny-like crimes together, holding a showing of intent was required:

> We find no other purpose in the 1948 reenactment than to collect from scattered sources crimes so kindred as to belong in one category. . . .
>
> . . . .
>
> It is not surprising if there is considerable overlapping in the embezzlement, stealing, purloining and knowing conversion grouped in this statute. What has concerned codifiers of the larceny-type offense is that gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches.

Morissette v. United States, 342 U.S. 246, 266–67, 271, 72 S.Ct. 240, 96 L.Ed. 288 (1952).

[8] The alternative verbs in the first paragraph of Section 641 are means of committing the offense, not elements. Therefore, the district court's jury instruction was not erroneous.

AFFIRMED.

UNITED STATES of America, Plaintiff - Appellee

v.

Noel JONES, also known as Skinny Jones, Defendant - Appellant

No. 17-30829

United States Court of Appeals, Fifth Circuit.

FILED August 7, 2020

Background: Defendant pled guilty in the United States District Court for the Eastern District of Louisiana, Kurt D. Engelhardt, J., to conspiracy to distribute a kilogram or more of heroin. Defendant appealed.

Holdings: The Court of Appeals, Higginson, Circuit Judge, held that:

(1) statements in factual basis formed adequate evidentiary foundation for guilty plea;

(2) district court's instruction that government would have to prove that overall scope of conspiracy involved at least one kilogram of heroin was not plain error; and

(3) Court of Appeals would not consider ineffective assistance of counsel claims.

Affirmed.

1. Criminal Law ⚿1030(1)

In order to prevail under plain error standard, defendant must show that he did not intentionally relinquish or abandon the claim of error, the error was plain, clear, or obvious, and the error affected his substantial rights; where those three conditions are met, and the error also seriously affects the fairness, integrity or public reputation of judicial proceedings, then the appellate court should exercise its discretion to correct the forfeited error.

2. Criminal Law ⚿273(4.1)

District court cannot enter a judgment of conviction based on a guilty plea unless it is satisfied that there is a factual basis for the plea. Fed. R. Crim. P. 11(b)(3).

3. Criminal Law ⚿1158.7

Appellate court reviews the district court finding that there was a factual basis for a guilty plea according to a clear error standard. Fed. R. Crim. P. 11(b)(3).

United States Court of Appeals for the Fifth Circuit

No. 18-20736

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

LISA YVETTE COFFMAN,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:16-CR-460-1

ON PETITION FOR REHEARING EN BANC

(Opinion 8/6/20, 5 CIR., _____, _____ F.3D _____)

Before CLEMENT, SOUTHWICK, and HIGGINSON, *Circuit Judges*.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc

(FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.