No. 13-___

IN THE

Supreme Court of the United States

DONALD MAYNARD BUFFIN, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit, in addressing an issue that has deeply divided the federal courts of appeals following this Court's decision in *United States v. Santos*, 553 U.S. 507 (2008), erred in defining "proceeds" in 18 U.S.C. § 1956(a)(1) as profits for purposes of § 1956(a)(1)(A)(i), but "receipts" in the context of § 1956(a)(1)(B)(i).

2. Whether the Sixth Circuit erred not only in applying the concurrent-sentence doctrine, in conflict with the Ninth Circuit's conclusion that the doctrine is invalid, but also in creating a new divide in the circuits by concluding the doctrine applies even to convictions the government concedes are invalid.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Sixth Circuit (App. 1a) is not published in the Federal Reporter but is available at 2013 WL 331565. The Court of Appeals' order denying rehearing (App. 15a) is unreported. The opinion of the district court (App. 18a) is not reported in the Federal Supplement but is available at 2010 WL 2802477.

JURISDICTION

The Sixth Circuit entered judgment on January 30, 2013, and denied panel rehearing and rehearing en banc on April 10, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

LEGAL PROVISION INVOLVED

The applicable version of 18 U.S.C. § 1956(a)(1) provides:

> **§ 1956. Laundering of monetary instruments**
>
> **(a)(1)** Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

STATEMENT OF THE CASE

I. CRIMINAL PROCEEDINGS

Buffin joined Sanctuary Ministries and Access Financial Group ("Access"), an investment business, as a sales representative in 1999. App. 38a. Beginning in 2001, Buffin also served as Access's office manager. *Id.* According to the government, Access actually operated as a Ponzi scheme, using new investors' principal to pay returns to existing investors. App. 2a. The government also alleged Access paid employees' salaries and other expenses using investors' principal. *E.g.*, App. 93a-94a.

Based on Buffin's association with Access, the government charged Buffin (along with other Access employees) with thirty-nine counts of mail fraud in violation of 18 U.S.C. § 1341 (Counts 1-39); one count of mail-fraud conspiracy in violation of 18 U.S.C. § 371; one count of money-laundering conspiracy in violation of 18 U.S.C. § 1956(a)(1)(A)(i), 1956(a)(1)(B)(i), and 1956(h) (Count 41); fifteen counts of "promotion" money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i) (Counts 43-57); and three counts of "concealment" money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i) (Counts 66-68).[1] App. 42a. Mail fraud served as the predicate offense for each count of money laundering. *E.g.*, App. 96a.

In charging mail fraud, the government relied on interest checks sent to Access investors. App. 70a-

[1] The government also charged Buffin with conspiracy to defraud the United States in violation of 18 U.S.C. § 1371 and criminal forfeiture under 18 U.S.C. § 981(a)(1)(C). App. 42a-43a.

73a. That same conduct formed the basis for Counts 43-57 charging promotion money laundering. App. 96a-97a. Indeed, certain checks were charged as both mail fraud and promotion money laundering. *Compare* App. 128a (mail fraud), *with* App. 136a (money laundering).

On June 14, 2005, a jury found Buffin guilty on all counts. App. 19a, 143a. The district court sentenced Buffin to 180 months' imprisonment on Count 41 (money-laundering conspiracy), Counts 43-57 (promotion money laundering), and Counts 66-68 (concealment money laundering), and 60 months on each of the mail-fraud and other fraud-based counts, all to be served concurrently. App. 19a. Buffin appealed his convictions and sentence to the Sixth Circuit, which affirmed on February 14, 2008. App. 54a-55a, 36a-37a.

II. COLLATERAL-REVIEW PROCEEDINGS

In June 2008, this Court decided *United States v. Santos*, 553 U.S. 507 (2008), addressing the meaning of "proceeds" in the federal money-laundering statute, 18 U.S.C. § 1956. In light of *Santos*, on February 19, 2009, Buffin timely filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, seeking vacatur of his convictions and sentences for promotion money laundering, concealment money laundering, and money-laundering conspiracy. App. 19a-20a.

The district court denied Buffin's § 2255 motion, finding Buffin procedurally defaulted his claim and could not overcome that default. App. 20a-33a. The district court also denied a certificate of appealability. App. 33a. Buffin appealed to the Sixth Circuit, which issued a certificate of appealability and

ordered briefing on the issue of "whether the government failed to establish that the proceeds used to convict Buffin of money laundering were profits rather than gross income, and whether such a showing was required by *United States v. Santos*." App. 16a-17a.

In the Sixth Circuit, Buffin argued that this Court's decision in *Santos*, as interpreted in *United States v. Kratt*, 579 F.3d 558 (6th Cir. 2009), required the court to define "proceeds" in § 1956(a)(1) as profits for each of the money-laundering charges. *See* App. 10a. Buffin further contended that, because the government failed to present evidence establishing that the transactions charged as money laundering involved the profits of mail fraud, his money-laundering convictions were invalid.

The Sixth Circuit affirmed the district court's denial of Buffin's § 2255 motion. The court of appeals first determined that the actual-innocence rather than the cause-and-prejudice framework governed the procedural-default analysis. App. 5a. Concluding that Buffin satisfied the first three prongs of the actual-innocence inquiry, the panel found Buffin's entitlement to relief turned on "whether the *Santos* decision, as applied to the merits of the petition, 'make[s] it more likely than not that no reasonable juror would have convicted [Buffin].'" App. 6a (quoting *Wooten v. Cauley*, 677 F.3d 303, 308 (6th Cir. 2012) (alterations in original)).

As to the promotion-money-laundering convictions, the government "readily concede[d] that 'Buffin has satisfied the requirements for collateral relief' as to [those] counts." App. 9a. Specifically, the government conceded that "proceeds" in § 1956(a)(1)

means profits in the context of § 1956(a)(1)(A)(i), and further acknowledged that it had failed to present any evidence that the transactions charged as promotion money laundering involved the profits of mail fraud. The panel thus found that "Buffin's convictions for promotion money laundering are invalid," App. 14a, "obviat[ing] any need to address the issue further," App. 9a.

The panel then turned to the concealment-money-laundering convictions under § 1956(a)(1)(B)(i). Rejecting Buffin's argument that "proceeds" in § 1956(a)(1) must have the same meaning in § 1956(a)(1)(B)(i) as in § 1956(a)(1)(A)(i), the panel concluded that *Santos* did not require a profits definition of "proceeds" in the context of § 1956(a)(1)(B)(i). App. 9a-13a. The panel therefore did not address Buffin's argument that the government failed to prove that the transactions charged as concealment money laundering involved the profits of mail fraud. Nor did it address (or even acknowledge) Buffin's challenge to his conviction for money-laundering conspiracy.

Having concluded that "Buffin's convictions for promotion money laundering are invalid," but that his concealment-money-laundering convictions could be sustained, the court confronted what it called "a Solomonic dilemma." App. 14a. Faced with that dilemma, the Sixth Circuit invoked its so-called "discretion of inaction . . . in the form of the concurrent sentencing doctrine." *Id.* Casting aside the potential adverse collateral consequences of the fifteen convictions as not "salient," the panel found "no compelling reason" to depart from its "general principle of 'declin[ing] to collaterally review

sentences that fall within the statutory maximum.'" *Id.* (alteration in original). The Sixth Circuit thus refused to vacate fifteen convictions that the government conceded, and the court held, were invalid.

On February 12, 2013, Buffin timely filed a petition for rehearing and rehearing en banc. At the Sixth Circuit's request, the government submitted a response on March 22, 2013. On April 10, 2013, the Sixth Circuit denied the petition for rehearing and rehearing en banc. App. 34a.

REASONS FOR GRANTING THE PETITION

In *United States v. Santos*, this Court considered whether the term "proceeds" in the federal money-laundering statute, 18 U.S.C. § 1956(a)(1), means "receipts" or "profits." 553 U.S. 507, 509 (2008). The Court, however, could not agree on an answer to that question. The four Justices in the plurality concluded "proceeds" always means profits. The four dissenting Justices reached the opposite result, defining "proceeds" as gross receipts. Justice Stevens provided the fifth vote in favor of the judgment. He disagreed with both the plurality and dissent that the Court must "pick a single definition of 'proceeds' applicable to every unlawful activity." In his view, the definition of "proceeds" would vary depending on the predicate offense underlying the money-laundering charges in a particular case.

In light of the splintered opinion in *Santos*, the circuits have divided over *Santos*'s holding and, thus, the meaning of "proceeds" in § 1956(a)(1). Indeed, at least five different approaches to defining "proceeds" under *Santos* have emerged in the courts of appeals. *See, e.g.*, *United States v. Van Alstyne*, 584 F.3d 803,

814 (9th Cir. 2009) (defining "proceeds" based solely on whether a "merger problem" arises); *United States v. Rubashkin*, 655 F.3d 849, 864-65 (8th Cir. 2011) (same); *Garland v. Roy*, 615 F.3d 391, 402 (5th Cir. 2010) (defining "proceeds" as profits based on *either* a merger problem or § 1956's legislative history); *United States v. Halstead*, 634 F.3d 270, 279 (4th Cir. 2011) (requiring a profits definition to resolve a merger problem in the illegal-gambling context, but only some "judicial solution" in other contexts); *United States v. Kratt*, 579 F.3d 558, 562 (6th Cir. 2009) ("proceeds" means profits where a merger problem radically increases the statutory maximum sentence if the legislative history does not suggest Congress intended that result); *United States v. Thornburgh*, 645 F.3d 1197, 1209 (10th Cir. 2011) (limiting *Santos* to the illegal-gambling context); *United States v. Jennings*, 599 F.3d 1241, 1252 (11th Cir. 2010) (same); *United States v. Hodge*, 558 F.3d 630, 632 (7th Cir. 2009) (applying pre-*Santos* precedent defining "proceeds" as net income). And these different approaches have resulted in courts defining "proceeds" differently for the same set of facts.

The circuits' approaches, however, fail to account for the principle that the same word cannot have different meanings depending on the statute's application. As this Court explained in *Clark v. Martinez*, 543 U.S. 371 (2005), where "one of the statute's applications" calls for a "limiting construction" of an ambiguous term, that "limiting construction" prevails for all contexts, "even though other of the statute's applications, standing alone, would not support the same limitation." *Id.* at 380.

Different contexts, in short, "cannot justify giving the *same* [statutory] provision a different meaning." *Id.*

But the circuit courts have concluded that, under *Marks v. United States*, 430 U.S. 188 (1977), the holding of *Santos* is that different contexts *do* justify giving "proceeds" a different meaning. The Sixth Circuit below, for example, held that although "proceeds" means profits for Buffin's promotion-money-laundering offenses under § 1956(a)(1)(A)(i), "proceeds" means receipts in the context of his convictions for concealment money laundering under § 1956(a)(1)(B)(i). The circuit courts have thus read *Santos* in conflict with this Court's decision in *Martinez*.

The meaning of "proceeds" as interpreted by *Santos* is therefore a question of substantial importance. Although Congress, in a 2009 amendment to § 1956, superseded *Santos* by adding a statutory definition of "proceeds," *see* 18 U.S.C. § 1956(c)(9), *Santos*'s interpretation of "proceeds" remains controlling for the potentially thousands of cases to which the pre-amendment version of § 1956 applies. Absent this Court's intervention, courts will continue to define "proceeds" on a case-by-case basis, producing not only inconsistent outcomes, but also litigation over the meaning of "proceeds" for years to come. Accordingly, this Court should grant certiorari to resolve the meaning of "proceeds."

This case also presents the opportunity to consider the role of the concurrent-sentence doctrine in the federal courts, a question on which this Court granted certiorari in *Ray v. United States*, 481 U.S. 736, 737 (1987) (per curiam), but did not reach because the petitioner's sentences were not

concurrent. The circuits remain split regarding the validity of the concurrent-sentence doctrine—the Ninth Circuit has rejected it in all circumstances, while other circuits continue to recognize the doctrine. *Compare United States v. DeBright*, 730 F.2d 1255, 1256 (9th Cir. 1984) (en banc) (rejecting the doctrine "in this and future cases"), *with e.g.*, *Cheeks v. Gaetz*, 571 F.3d 680, 689 (7th Cir. 2009) (applying the doctrine to decline review of challenged convictions).

Creating a further divide in the circuits, the Sixth Circuit's novel use of the concurrent-sentence doctrine below to decline to vacate convictions that the government conceded, and the court determined, were invalid conflicts with decisions from the Fourth, Fifth, and Eleventh Circuits. Remarkably, the Sixth Circuit is on the wrong side of both circuit splits. For the reasons identified by the Ninth Circuit in *DeBright*, the concurrent-sentence doctrine's disadvantages outweigh its advantages, and it should be rejected. And even if it remains valid, it does not apply to convictions that the government concedes are invalid.

The Sixth Circuit below further erred in concluding that, for purposes of deciding whether to apply the concurrent-sentence doctrine to convictions challenged on collateral review, a conviction's adverse collateral consequences are not "salient."

Finally, the Sixth Circuit's refusal to vacate the invalid convictions ignores the plain text of 28 U.S.C. § 2255(b). Speaking in mandatory language, § 2255(b) provides a court "shall vacate" convictions it concludes are invalid—a court has no discretion

under the concurrent-sentence doctrine (or any other theory) to do otherwise.

For these reasons, the Court should grant the petition for certiorari.

I. ADDRESSING A QUESTION THAT HAS DIVIDED THE CIRCUITS, THE SIXTH CIRCUIT ERRED IN CONCLUDING THAT, UNDER *SANTOS*, THE MEANING OF "PROCEEDS" IN § 1956(a)(1) VARIES DEPENDING ON THE STATUTE'S APPLICATION.

In *Santos*, this Court addressed the meaning of "proceeds" in § 1956(a)(1) in the context of illegal-gambling and money-laundering convictions arising out of an illegal lottery operation. Santos, the lottery operator, was convicted under § 1956(a)(1)(A)(i) based on payments he made to runners, collectors, and winners of the illegal lottery. 553 U.S. at 509. Another defendant was convicted based on payments he received as an employee of the lottery. *Id.* at 524. The defendants subsequently challenged their money-laundering convictions under § 2255. *Id.* at 510. Applying the Seventh Circuit's rule that "proceeds" means profits, the district court vacated the convictions, finding no evidence the transactions charged as money laundering involved profits of illegal gambling. *Id.* The Seventh Circuit affirmed.

This Court agreed the convictions under § 1956(a)(1)(A)(i) were invalid. Justice Scalia, writing for the plurality, held that "proceeds" in § 1956 always means profits. *Id.* at 514 (plurality opinion). Invoking the rule of lenity, the plurality explained that, if "proceeds" means gross receipts, "nearly every violation of" a number of predicate

offenses also would violate the money-laundering statute, creating a "merger problem." *Id.* at 515. "Interpreting 'proceeds' to mean 'profits,'" the plurality reasoned, "[would] eliminate[] the merger problem." *Id.* at 517.

Writing for the four dissenting justices, Justice Alito concluded "proceeds" means gross receipts. The dissent noted that the primary definition of "proceeds" is gross receipts and, in the context of money-laundering statutes, lawmakers use "proceeds" to refer to gross receipts. *Id.* at 532-33 (Alito, J., dissenting). He further reasoned that Congress could not have intended that "proceeds" mean profits, since a profits definition would present accounting and proof problems that "would serve no discernable purpose." *Id.* at 536-42.

Justice Stevens, writing for himself, concurred in the judgment. He agreed that "proceeds" means profits where the predicate offense is illegal gambling. *Id.* at 528 (Stevens, J., concurring). But Justice Stevens disagreed that the Court must "pick a single definition of 'proceeds' applicable to every unlawful activity." *Id.* at 525. According to Justice Stevens, the definition of "proceeds" instead varies depending on the underlying predicate offense. *Id.* And to define "proceeds" in a particular case, Justice Stevens would examine whether the predicate offense creates a "merger problem" and whether the legislative history suggests Congress intended that "perverse result." *Id.* at 527-28.

The dissenting Justices and Justices Scalia, Souter, and Ginsburg rejected Justice Stevens's position that the meaning of "proceeds" varies depending on the statute's application. *Id.* at 523

(plurality opinion); *id.* at 532 (Alito, J., dissenting). And Justice Scalia's opinion, noting that *Clark v. Martinez*, 543 U.S. 371 (2005) "forcefully rejected" the proposition that "the same word, *in the same statutory provision*, [can have] different meanings *in different factual contexts*," cautioned that those adopting Justice Stevens's approach would need "to explain why it does not overrule" *Martinez*. *Santos*, 553 U.S. at 522, 524 (plurality opinion).

A. The Circuits Disagree Regarding How To Define "Proceeds" In § 1956(a)(1) Following This Court's Splintered Decision In *Santos*.

When "no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds.'" *Marks*, 430 U.S. at 193. In applying that directive to the splintered decision in *Santos*, the courts of appeals have failed to reach any consensus as to *Santos*'s holding. Indeed, following *Santos*, the circuits have developed no fewer than five approaches to defining "proceeds."

To start, the Eighth and Ninth Circuits define "proceeds" based solely on whether the predicate offense "merges" with the money-laundering offense—the merger-problem inquiry is determinative. Concluding "[o]nly the desire to avoid a 'merger problem' united the five justices who held that Santos' payments to winners and runners did not constitute money laundering," these courts have determined that "the holding that commanded five votes in *Santos* [is] that 'proceeds' means 'profits' where viewing 'proceeds' as 'receipts' would present a

'merger' problem." *Van Alstyne*, 584 F.3d at 814; *Rubashkin*, 655 F.3d at 864-65 ("The narrowest holding in *Santos* was Justice Stevens's concurrence stating that 'proceeds' must mean 'profits' whenever a broader definition would 'perverse[ly]' result in a 'merger problem.'" (quoting *Santos*, 553 U.S. at 527) (alterations in original)). If no merger problem arises, "proceeds" means gross receipts.

The First Circuit has suggested it would agree with the Eighth and Ninth Circuits' approach, but it has not expressly addressed *Santos*'s holding. *United States v. Bucci*, 582 F.3d 108, 123-24 (1st Cir. 2009) (noting the "same 'merger' problem . . . concerned the four members of the *Santos* plurality" as well as Justice Stevens). The same is true of the Third Circuit. *United States v. Richardson*, 658 F.3d 333, 340 (3d Cir. 2011) (concluding "'proceeds' means gross receipts under the circumstances of this case" because "the merger problem that impelled a majority of the Supreme Court to throw out Santos' conviction is not present here"). *But see United States v. Yusuf*, 536 F.3d 178, 186 n.12 (3d Cir. 2008) ("'[T]he Court's holding is limited . . . ,' to the holding ' . . . that proceeds means profits when there is no legislative history to the contrary.'" (quoting *Santos*, 553 U.S. at 523) (omissions in original)).

The Fifth Circuit has interpreted Justice Stevens' concurrence differently, finding it created "a two-part holding." *Garland*, 615 F.3d at 402. Under this second reading of *Santos*, "'proceeds' must be defined as 'profits' in cases where defining 'proceeds' as 'gross receipts' would result in the 'perverse result' of the 'merger problem.'" *Id.* (quoting *Santos*, 553 U.S. at 528). But where no merger problem arises,

"proceeds" means gross receipts unless there is "adequate legislative history . . . indicating that 'proceeds' should be defined as 'profits.'" *Id.* Thus, in the Fifth Circuit, the existence of a merger problem conclusively requires a profits definition. The absence of a merger problem, however, is not determinative.

The reverse is true under the third reading of *Santos*, adopted by the Fourth Circuit—the absence of a merger problem always requires a gross-receipts definition, but its existence does not always compel a profits definition. According to the Fourth Circuit, while both the plurality and Justice Stevens resolved the merger problem in the illegal-gambling context by defining "proceeds" as profits, they "disagreed on the proper scope of the remedy" outside that context. *Halstead*, 634 F.3d at 279. Thus, "when a merger problem arises in the context of money laundering and illegal gambling," "proceeds" must mean profits. *Id.* For other predicate offenses, "Justice Stevens' opinion . . . require[s] addressing [the merger problem]" on a "case-by-case basis." *Id.* And in doing so, courts must find "a judicial solution . . . to eliminate [the merger problem's] unfairness," such as (but not necessarily) by defining "proceeds" as profits. *Id.*

Adopting a fourth interpretation of *Santos*, the Sixth Circuit has defined "proceeds" based on "[t]wo factors" that, according to the court, "drove Justice Stevens' assessment." *Kratt*, 579 F.3d 558 at 562. First, defining "proceeds" as receipts "created a 'merger problem' that 'radically increased the sentence for that crime.'" *Id.* (quoting *Santos*, 553 U.S. at 527). Second, "nothing in the legislative

history of § 1956 suggested that Congress was aware of [the merger] problem and yet still chose to treat 'proceeds' as gross receipts." *Id.* Accordingly, "proceeds" means profits "only when the § 1956 predicate offense creates a merger problem that leads to a radical increase in the statutory maximum sentence *and* only when nothing in the legislative history suggests that Congress intended such an increase." *Id.* (emphasis added). The Sixth Circuit, moreover, has adopted an "offense-by-offense inquiry," *Wooten v. Cauley*, 677 F.3d 303, 310 n.3 (6th Cir. 2012), under which "proceeds" has the same meaning throughout the money-laundering statutes for a particular predicate offense, *Kratt*, 579 F.3d at 563. Other circuits, by contrast, define "proceeds" separately for each money-laundering count even where those counts are based on the same predicate offense. *E.g.*, *Van Alystyne*, 584 F.3d at 807, 814.

The fifth view, embraced by the Tenth and Eleventh Circuits, is the narrowest. These circuits have limited *Santos* to its facts, *e.g.*, *United States v. Demarest*, 570 F.3d 1232, 1242 (11th Cir. 2009), concluding "'proceeds' means 'profits' for the purpose of the money laundering statute *only* where an illegal gambling operation is involved," *Thornburgh*, 645 F.3d at 1209; *Jennings*, 599 F.3d at 1252.

Finally, the Seventh Circuit has taken yet another approach to defining "proceeds." Rather than definitively address the holding in *Santos*, the Seventh Circuit has applied its pre-*Santos* rule, set forth in *United States v. Scialabba*, 282 F.3d 475 (7th Cir. 2002), that "'proceeds' in § 1956 means an illegal business's net income rather than its gross income—in other words, that 'proceeds' are profits, not

receipts." *Hodge*, 558 F.3d at 632. And it has expressly declined to determine whether *Scialabba* "survived the Supreme Court's decision in *Santos*." *Id.* at 633-34; *see also United States v. Aslan*, 644 F.3d 526, 547 (7th Cir. 2011) (noting *Scialabba*'s validity "is an open and 'difficult' question"). *But compare Garland*, 615 F.3d at 403 (including the Seventh Circuit among circuits defining "proceeds" as profits "any time the legislative history of the money-laundering statute does not affirmatively indicate otherwise"), *with Halstead*, 634 F.3d at 277 (grouping the Seventh Circuit with circuits "conclud[ing] that whenever a predicate offense presents a merger problem, the term 'proceeds' should be defined as 'net profits'").

B. The Circuits' Different Approaches Result In Different Outcomes For The Same Facts.

In view of the circuit split, whether the government must establish transactions involving the profits of unlawful activity or only its receipts will vary depending on the jurisdiction, even for the same facts. In a case like this one, for instance, involving charges for mail fraud and promotion money laundering based on sending interest checks to investors in a purported Ponzi scheme, the Eighth, Ninth, and Fifth (and likely the First and Third) Circuits would define "proceeds" as profits. These circuits would conclude that a money-laundering conviction based on transactions inherent in the mail-fraud scheme creates a merger problem, conclusively requiring a "profits" definition. *E.g.*, *Van Alstyne*, 584 F.3d at 815; *Garland*, 615 F.3d at 404.

The Sixth Circuit likewise would conclude a merger problem exists. And it also would define "proceeds" as profits. *United States v. Crosgrove*, 637 F.3d 646, 655 (6th Cir. 2011). The money-laundering charges carry "a far heavier statutory maximum than the mail[] fraud charge," at least under the pre-2002 version of the mail fraud statute applicable here, and nothing in the legislative history indicates Congress intended that result for the predicate offense of mail fraud. *Id.*

The Eleventh and Tenth Circuits, by contrast, would define "proceeds" as gross receipts, because they have limited *Santos* to the illegal-gambling context. *E.g.*, *United States v. Hill*, 643 F.3d 807, 856 (11th Cir. 2011) (declining to apply *Santos* to a case involving mail fraud).

The outcome would be uncertain in the Fourth and Seventh Circuits. The Fourth Circuit, although it would conclude mail fraud merges with money laundering, would not necessarily define "proceeds" as profits, because it might find some other "judicial solution" to eliminate the merger problem's unfairness. *United States v. Cloud*, 680 F.3d 396, 409 (4th Cir. 2012). For its part, the Seventh Circuit likely would apply *Scialabba* to conclude interest checks are not part of net income, and therefore are not "proceeds." *Hodge*, 558 F.3d at 634. But it might instead decide that *Scialabba* does not survive *Santos* and apply a different test.

The alignment on either side of the proceeds-versus-receipts divide, moreover, changes with the facts of each case. For instance, if the conduct here occurred after the 2002 amendment increasing the statutory maximum sentence for mail fraud, the

Sixth Circuit would switch sides, joining the Eleventh and Tenth Circuits in applying the gross-receipts definition of "proceeds." The Sixth Circuit again would conclude a merger problem exists. But it would "not [be] the kind of merger that troubled Justice Stevens"—and so would not require a profits definition—because "a § 1956 . . . conviction [would not] radically increase[] the statutory maximum sentence." *Kratt*, 579 F.3d at 563. As another example, for a predicate offense that creates no merger problem, but for which legislative history indicates Congress intended to reach only transactions involving profits, the Fifth Circuit alone would define "proceeds" as profits. *See Garland*, 615 F.3d at 402.

In sum, although multiple circuits have expressly resolved the meaning of "proceeds" under § 1956(a)(1) in light of *Santos*, no majority view has emerged. The existing "degree of confusion following [the] splintered decision" in *Santos* "is itself a reason for" reexamining the question addressed there. *Nichols v. United States*, 511 U.S. 738, 746 (1994).

C. The Circuits Have Interpreted *Santos* In Conflict With Another Decision From This Court.

In defining "proceeds" under § 1956(a)(1), the circuits have failed to account for this Court's holding in *Martinez* that a statutory term cannot change meaning depending on the statute's application.

In *Martinez*, the Court addressed whether the phrase "may be detained beyond the removal period" in 8 U.S.C. § 1231(a)(6) has the same meaning as applied to each of the three categories of aliens set

forth in the statute. 543 U.S. at 377. The Court previously had interpreted that phrase "to authorize the Attorney General (now the Secretary) to detain aliens in the *second* category only as long as 'reasonably necessary' to remove them from the country." *Id.* (emphasis added) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 689, 699 (2001)). The specific question in *Martinez* was whether that same construction also applied to the *first* category of aliens listed in the statute. *Id.* at 378.

The Court held that "the answer must be yes," reasoning that the phrase "'may be detained beyond the removal period[]' applies without differentiation to all three categories of aliens that are its subject." *Id.* That was true, the Court found, even if "the statutory purpose and the constitutional concerns that influenced [the Court's] statutory construction in *Zadvydas* are not present for" the first category of aliens—that difference could not "justify giving the *same* detention provision a different meaning when [the first category of] aliens are involved." *Id.* at 380. The Court noted "[i]t is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern." *Id.*

These principles would apply equally to interpreting § 1956(a)(1). Like the provision addressed in *Martinez*, § 1956(a)(1)'s prefatory language—"[w]hoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts

or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity"—"applies without differentiation" to each subdivision of § 1956(a)(1), including (A)(i) (promotion money laundering) and (B)(i) (concealment money laundering). Accordingly, that language, including the term "proceeds," must have the same meaning regardless of § 1956(a)(1)'s application, *Martinez*, 543 U.S. at 380, as seven Justices in *Santos* concluded, *Santos*, 553 U.S. at 522-23 (plurality opinion); *id.* at 532 (Alito, J., dissenting.).

Martinez further would require that "proceeds" in § 1956(a)(1) always mean "profits." *Santos* held that "proceeds" means profits where the specified unlawful activity is illegal gambling. *Santos*, 553 U.S. at 514 (plurality opinion); *id.* at 528 (Stevens, J., concurring). *Santos* thus "g[a]ve [§ 1956(a)(1)]'s ambiguous language" (proceeds) "a limiting construction" (profits) "called for by one of the statute's applications" (illegal gambling). *Martinez*, 543 U.S. at 380. And "even though other of the statute's applications," such as money-laundering charges based on different predicate offenses, "standing alone[] would not support the same limitation," *Santos*'s limiting construction of "proceeds" controls. *Id.* "The lowest common denominator"—the profits definition—"must govern." *Id.*

The circuit courts, however, have generally failed to address *Martinez* in interpreting § 1956(a)(1). Instead, they have relied entirely on *Santos*, read according to *Marks*, to define "proceeds." And in doing so, the circuits have concluded the definition of

"proceeds" changes depending on the statute's application. The Sixth Circuit, for example, has determined that a "straightforward application of *Marks*" precludes giving "proceeds" in § 1956(a)(1) a uniform meaning. *Kratt*, 579 F.3d at 563. Under *Santos*, the Sixth Circuit has concluded, "'[p]roceeds' does not always mean profits." *Id.* at 562. Nor does it always mean gross receipts. The definition of "proceeds" instead varies depending on the predicate offense. *Id.* at 563. Indeed, the panel below found Buffin's argument that "proceeds" must mean profits for each of his money-laundering convictions "contradicts the very heart of [the Sixth Circuit's] post-*Santos* jurisprudence." App. 11a.

Other circuits likewise have concluded that, under *Santos*, the definition of "proceeds" changes depending on the statute's application. *E.g.*, *Van Alstyne*, 584 F.3d at 811, 814; *see also Halstead*, 634 F.3d at 277-79 (applying *Marks* and adopting Justice Stevens' "case-by-case approach"); *Garland*, 615 F.3d at 399, 401 ("[Under *Marks*] Justice Stevens' concurrence . . . dictates that the definition of 'proceeds'" "be determined via a bifurcated analysis" in each case). The same is true in the Tenth and Eleventh Circuits, even though those courts have limited *Santos* to its facts—"proceeds" means profits for illegal gambling but it means receipts for other predicate offenses.

Accordingly, in relying on *Santos* to define "proceeds," the circuits have done exactly what *Martinez* forbids. They have given "the same word *in the same statutory provision* different meanings *in different factual contexts*," *Santos*, 553 U.S. at 522 (plurality opinion), "render[ing] [§ 1956(a)(1)] a

chameleon," *Martinez*, 543 U.S. at 382. But *Santos* does not authorize lower courts to ignore *Martinez*—*Santos*, after all, did not overrule or otherwise reject *Martinez*. *See, e.g.*, *Skilling v. United States*, 130 S. Ct. 2896, 2931 n.43 (2010) (citing *Martinez* for the proposition that "when adopting a limiting construction, '[t]he lowest common denominator, as it were, must govern' (alteration in original)). To the contrary, seven justices in *Santos* reaffirmed the principle established in *Martinez* that the meaning of a statutory provision cannot change with the statute's application. *Santos*, 553 U.S. at 522-23 (plurality opinion); *id.* at 532 (Alito, J., dissenting.).

The circuits' reliance on *Santos* to interpret "proceeds" in § 1956(a)(1) in conflict with *Martinez* is yet another reason this case merits the Court's attention.

D. The Meaning Of "Proceeds" In § 1956(a)(1) Is An Important Federal Matter.

Although Congress superseded this Court's decision in *Santos* by amending § 1956 to define "proceeds," 18 U.S.C. § 1956(c)(9); *see* Fraud Enforcement and Recovery Act of 2009, Pub. L. 111-21, § 2(f), 123 Stat. 1617, 1618 (2009), the meaning of "proceeds" in the pre-amendment version of § 1956 remains a question of substantial importance. As a decision that "narrow[ed] the scope of a criminal statute by interpreting its terms," *Santos* applies retroactively. *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004); *see also Halstead*, 634 F.3d at 274 (concluding *Santos* "narrow[ed] the scope of the money-laundering statute" and so "applies retroactively"); *Wooten*, 677 F.3d at 308 (same). Thus, *Santos*'s interpretation of "proceeds" governs

the cases of thousands of defendants who were convicted or who are being prosecuted under the pre-amendment version of § 1956. *See, e.g.*, Department of Justice, 2007 National Money Laundering Strategy at 94 (2007), *available at* http://www.justice.gov/criminal/afmls/pubs/pdf/mlstrategy07.pdf (last visited June 20, 2013) (reporting that, from 2002-2005, approximately 3700 individuals were convicted of money laundering under § 1956). And in many circuits, the definition of "proceeds" adopted in one case will not necessarily apply in future cases, "generat[ing] . . . *Santos* litigation for years to come." *Kratt*, 579 F.3d at 563. Indeed, since *Santos*, petitions in no fewer than fourteen cases have requested that the Court address an appellate court's definition of "proceeds" in § 1956, many stressing the need for guidance from this Court in light of the circuit divide. *See* Petition for Writ of Certiorari, *Hosseini v. United States*, 133 S. Ct. 623 (2012) (No. 12-455), 2012 WL 4842990, at *i; Petition for Writ of Certiorari, *King v. United States*, 132 S. Ct. 1128 (2012) (No. 11-764), 2011 WL 6396579, at *i; Petition for Writ of Certiorari, *Fishman v. United States*, 132 S. Ct. 1046 (2012) (No. 11-623), 2011 WL 5834667, at *i; Petition for Writ of Certiorari, *Quinones v. United States*, 132 S. Ct. 830 (2011) (No. 11-563), 2011 WL 5254649, at *i; Petition for Writ of Certiorari, *Prost v. Anderson*, 132 S. Ct. 1001 (2012) (No. 11-249), 2011 WL 3821360, at *i; Petition for Writ of Certiorari, *Cawthorn v. United States*, 131 S. Ct. 2976 (2011) (No. 10-10324), 2011 WL 2134987, at *i; Petition for Writ of Certiorari, *Webster v. United States*, 131 S. Ct. 1836 (2011) (No. 10-1095), 2011 WL 806199, at *i; Petition for Writ of Certiorari, *Bueno v. United States*, 130 S. Ct. 2359

(2010) (No. 09-1072), 2010 WL 3019689, at *i; Petition for Writ of Certiorari, *Kratt v. United States*, 130 S. Ct. 2115 (2010) (No. 09-1084), 2010 WL 3029885, at *i; Petition for Writ of Certiorari, *Combs v. United States*, 129 S. Ct. 2812 (2009) (No. 08-1405), 2009 WL 1370167, at *i; Petition for Writ of Certiorari, *Yusuf v. United States*, 129 S. Ct. 2764 (2009) (No. 08-981), 2009 WL 255606, at *i; Petition for Writ of Certiorari, *Sinibaldi v. United States*, 129 S. Ct. 663 (2008) (No. 08-590), 2008 WL 4792493, at *i; Petition for Writ of Certiorari, *Tyrell v. United States*, 129 S. Ct. 2790 (2009) (No. 08-910), 2008 WL 5537238, at *i; Petition for Writ of Certiorari, *Martinelli v. United States*, 129 S. Ct. 762 (2008) (No. 08-148), 2008 WL 3200261, at *i. Amicus curiae, too, have requested this Court's intervention. *E.g.*, Amicus Brief of Florida Association of Criminal Defense Lawyers, *Cawthorn*, 2011 WL 2134987, at *i (No. 10-10324).

Circumstances like these justify this Court's intervention. In *Watson v. Commissioner*, for instance, the Court granted certiorari to resolve a "conflict of statutory construction" of a pre-amendment version of a statute, finding that version "still affect[ed] many sales made before [the amendment]." 345 U.S. 544, 547 (1953). Similarly, in *Immigration & Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the Court concluded that a recent Congressional enactment did not warrant dismissal of the writ as improvidently granted. *Id.* at 426 n.3. The Court emphasized that "[t]he question presented in this case will arise, and has arisen, in hosts of other asylum proceedings brought by aliens [not covered by the new Act]," and "[t]he importance of the legal issue makes it

appropriate for [the Court] to address the merits now." *Id.* This Court's intervention is likewise appropriate here.

II. THE SIXTH CIRCUIT ERRED IN APPLYING THE CONCURRENT-SENTENCE DOCTRINE, NOT ONLY TAKING THE WRONG SIDE OF TWO CIRCUIT SPLITS, BUT ALSO DISREGARDING THIS COURT'S PRECEDENT AND § 2255'S PLAIN TEXT.

In its decision below, the Sixth Circuit invoked the concurrent-sentence doctrine to decline to vacate convictions it had determined were invalid. The court erred in doing so. To start, the concurrent-sentence doctrine's disadvantages outweigh its advantages, and it therefore should be abandoned in all cases, as the Ninth Circuit has held.

Even assuming the doctrine remains valid, it does not apply here, as all circuits that have addressed the issue, save the Sixth Circuit, have concluded. Because the doctrine gives a court discretion to *decline to review the merits* of challenged convictions, it is by its own terms irrelevant here, where the government admitted the challenged convictions are invalid. The Sixth Circuit's novel application of the doctrine to invalid convictions creates a circuit split—the four other circuits to directly address the issue have declined to apply the doctrine to such convictions.

The decision below additionally disregards this Court's repeated recognition that convictions have adverse collateral consequences "that cannot be ignored," inexplicably concluding such consequences are not "salient" when a conviction is challenged on collateral review. What is more, in applying the

concurrent-sentence doctrine to decline to vacate invalid convictions, the Sixth Circuit flouted § 2255's plain-text requirement that a court "shall vacate" convictions it concludes are "not authorized by law." 28 U.S.C. § 2255(b).

A. In Conflict With The Ninth Circuit, Which Has Rejected The Doctrine In All Cases, The Sixth Circuit Erred In Applying The Concurrent-Sentence Doctrine.

In *Benton v. Maryland*, 395 U.S. 784 (1969), this Court addressed the scope of the concurrent-sentence doctrine. Noting that there is no "satisfactory explanation for the concurrent sentence doctrine," the Court concluded that "whatever the underlying justifications," the doctrine is not a "jurisdictional bar to consideration of challenges to multiple convictions, even though concurrent sentences were imposed." *Id.* at 789-91. The Court suggested "[t]he concurrent sentence rule may have some continuing validity as a rule of judicial convenience," permitting a court to decline to review a challenged conviction if the sentence for that conviction runs concurrently with a sentence for a valid conviction. *Id.* at 791. But the Court observed that the adverse collateral consequences "flow[ing] from a potentially invalid conviction" favor reviewing each challenged conviction "notwithstanding the existence of concurrent sentences on other[] unchallenged or affirmed convictions." *United States v. Harris*, 695 F.3d 1125, 1139 (10th Cir. 2012) (citing *Benton*, 395 U.S. at 790).

Following *Benton*, the circuits have split regarding the concurrent-sentence doctrine's validity. The Ninth Circuit has rejected the doctrine

"as a discretionary means of avoiding the review of criminal convictions," finding that the doctrine's "disadvantages outweigh its advantages." *DeBright*, 730 F.2d at 1256, 1260.

Outside the Ninth Circuit, by contrast, the concurrent-sentence doctrine remains valid. *See, e.g.*, *United States v. Contenti*, 735 F.2d 628, 632 n.3 (1st Cir. 1984); *United States v. Vargas*, 615 F.2d 952, 956 (2d Cir. 1980); *Kendrick v. Dist. Attorney of Cnty. of Philadelphia*, 488 F.3d 217, 219 (3d Cir. 2007); *United States v. Webster*, 639 F.2d 174, 182-83 (4th Cir. 1981); *United States v. Tolliver*, 116 F.3d 120, 126 (5th Cir. 1997); *United States v. Wade*, 266 F.3d 574, 578 (6th Cir. 2001); *Cheeks*, 571 F.3d at 689; *United States v. Holder*, 560 F.2d 953, 955 (8th Cir. 1977); *Harris*, 695 F.3d at 1139; *United States v. Bradley*, 644 F.3d 1213, 1293 (11th Cir. 2011); *United States v. Hooper*, 432 F.2d 604, 606 (D.C. Cir. 1970). In the Sixth Circuit, for example, "[t]he concurrent sentencing doctrine allows a court to 'exercise its discretion not to review an issue where it is clear that there is no collateral consequence to the defendant and the issue does not otherwise involve a significant question meriting consideration.'" *Wade*, 266 F.3d at 578 (quoting *United States v. Hughes*, 964 F.2d 536, 541 (6th Cir. 1991)).

The Sixth Circuit has taken the wrong side of this circuit split. As the Ninth Circuit concluded, the concurrent-sentence doctrine should be abandoned.

First, the necessary and time-consuming inquiry into potential adverse collateral consequences of unreviewed convictions eviscerates the doctrine's only justification—judicial economy. This Court has repeatedly recognized "the obvious fact of life that

most criminal convictions do in fact entail adverse collateral legal consequences." *Sibron v. New York*, 392 U.S. 40, 55 (1968). And therefore, as the circuits have recognized, the concurrent-sentence doctrine's "discretionary use is justifiable only if the unreviewed conviction has no 'adverse collateral legal consequences' for the convicted individual." *DeBright*, 730 F.2d at 1258; *see also, e.g.*, *Wade*, 266 F.3d at 578.

The potential adverse consequences of an unreviewed conviction are many. Such convictions may "result in an increased sentence under a recidivist statute for a future offense, . . . may be used to impeach the defendant's credibility[,] and certainly carr[y] the societal stigma accompanying any criminal conviction." *Ball v. United States*, 470 U.S. 856, 865 (1985); *see also Vargas*, 615 F.2d at 959-60 (identifying effect on parole, possible application of recidivist statutes, potential impeachment in future trials, effect on pardon, and possible stigma as potential adverse collateral consequences). "[M]aking the necessary exploration of all possible adverse collateral legal consequences before affirming a conviction under the concurrent sentence doctrine," then, is "very time-consuming." *DeBright*, 730 F.2d at 1258. And that "necessary exploration" negates any convenience or economy benefits achieved by declining to review the challenged convictions. Absent those benefits, however, the doctrine has no role—this Court made clear that the doctrine survives, if at all, only as a "rule of judicial convenience." *Benton*, 395 U.S. at 791; *see also DeBright*, 730 F.2d at 1258 ("Judicial economy . . . is the only justification for the doctrine.").

Second, courts cannot avoid the collateral-consequences inquiry by vacating the convictions they decline to review. *See, e.g.*, *Tolliver*, 116 F.3d at 126 (adopting this approach). As the Ninth Circuit explained, vacating unreviewed convictions is "fundamentally erroneous." *DeBright*, 730 F.2d at 1257. That practice infringes on the prosecutorial discretion to determine the offenses that should be prosecuted, violating separation-of-powers principles. It also undermines the interests of the government and society in retaining the convictions. *Id.*

Accordingly, courts should address "the merits of all [challenged] convictions." *Id.* at 1259. Doing so will avoid devoting "time and effort[]" to assessing whether a conviction "does or does not harbor any future adverse collateral legal consequences," and "will guarantee that no individual will suffer because of [a court's] inability to foretell the future effects of an unreviewed conviction." *Id.* Reviewing challenged convictions "will also protect society's interest in holding convicted criminals accountable for each of their convictions unless there is an adequate legal reason to set them aside." *Id.*

As the Ninth Circuit's analysis demonstrates, the Sixth Circuit's (and other circuits') continuing application of the concurrent-sentence doctrine is wrong. This Court should grant certiorari to resolve the divide in the circuits, and reject the concurrent-sentence doctrine.

The validity and applicability of the doctrine is a question of substantial importance. Indeed, this Court previously "granted certiorari to review the role of the concurrent sentence doctrine in the federal courts." *Ray*, 481 U.S. at 737. The Court,

however, did not have the opportunity to consider that important question, because "the District Court imposed a $50 assessment on each count," meaning the "petitioner [was] not in fact serving concurrent sentences." *Id.*

This case provides that opportunity. Here, the district court remitted the assessments for each count of conviction, meaning the sentences are fully concurrent. This case, then, presents the facts that *Ray* did not (and that not many cases will, since 18 U.S.C. § 3031 requires district courts to impose separate assessments on each count of conviction). Accordingly, the Court should grant certiorari to address the role of the concurrent-sentence doctrine.

B. Creating A Circuit Split, The Sixth Circuit Erroneously Applied The Concurrent-Sentence Doctrine To Decline To Vacate Invalid Convictions.

In its decision below, the Sixth Circuit invoked the concurrent-sentence doctrine "to 'decline to hear a substantive challenge'" to Buffin's convictions for promotion money laundering, App. 14a, even though the government conceded "that 'Buffin ha[d] satisfied the requirements for collateral relief' as to [those] counts," App. 9a. The Sixth Circuit's position that the concurrent-sentence doctrine applies to convictions the government concedes are invalid conflicts with that of at least four other circuits.

The Fourth Circuit, for example, has held that "[t]he [concurrent-sentence] doctrine presupposes one conviction that is valid and one that has not been passed upon, not one valid and one invalid conviction." *United States v. Hill*, 859 F.2d 325, 326 (4th Cir. 1988). Applying that principle, the court

vacated the conviction the government admitted was invalid, even though it carried a sentence concurrent with a sentence for a valid conviction. *Id.*

The Fifth Circuit has reached the same conclusion. In *United States v. Evans*, 572 F.2d 455 (5th Cir. 1978), "[t]he government admit[ted] that it ha[d] failed to meet its burden of proof on count twelve," yet urged the court "to apply a doctrine of appellate judicial economy to uphold the conviction." *Id.* at 477. Declining to invoke the concurrent-sentence doctrine, the court found "dispositive" the government's admission that "there was not sufficient evidence on which to convict." *Id.*; *see also United States v. Osunegbu*, 822 F.2d 472, 481 (5th Cir. 1987) (rejecting the government's argument "that the conviction and sentence may stand because the sentences on all counts run concurrently" where "[t]he government effectively concede[d] that the . . . conviction was improper").

The Eleventh Circuit likewise has declined to apply the concurrent-sentence doctrine where "[t]he government . . . conceded [the error]." *United States v. Jones*, 28 F.3d 1574, 1582 (11th Cir. 1994), *vacated and modified on other grounds*. And the Ninth Circuit, before it rejected the concurrent-sentence doctrine altogether, reversed "[w]ithout further inquiry" convictions the government conceded were invalid despite the existence of concurrent sentences on valid convictions. *United States v. Holman*, 436 F.2d 863, 866 (9th Cir. 1970).

To be sure, the Second Circuit has reached a different conclusion, although without mentioning the doctrine. In *United States v. DeNoia*, 451 F.2d 979 (2d Cir. 1971) (per curiam), the court found that

even "assuming the insufficiency of the evidence to support DeNoia's conviction on the conspiracy count, ... [s]ince DeNoia received concurrent sentences, valid convictions on the two substantive counts provide sufficient basis to affirm the judgment from which DeNoia appeals." *Id.* at 981. In a subsequent decision, however, the Second Circuit noted that *DeNoia* was inconsistent with other decisions from the court that applied the doctrine to only unreviewed convictions. *Vargas*, 615 F.2d at 956-57.

Accordingly, the circuits are split regarding whether the concurrent-sentence doctrine applies to convictions the government has admitted cannot be sustained. And again the Sixth Circuit is on the wrong side of the split. The concurrent-sentence doctrine, if it applies at all, gives courts discretion to *avoid review* of a challenged conviction carrying a sentence concurrent with a sentence on a valid conviction. *E.g.*, *Benton*, 395 U.S. at 791. By its terms, then, the concurrent-sentence doctrine does not apply to convictions that the government concedes are invalid. After all, the issue the court would decline to resolve—the validity of the challenged conviction—is resolved by the government's concession. Stated differently, there is no issue to "decline to consider." *Andresen v. Maryland*, 427 U.S. 463, 469 n.4 (1976).

Moreover, while this Court has not decided whether the concurrent-sentence doctrine applies when the government admits the convictions are invalid, *Mariscal v. United States*, 449 U.S. 405 (1981) (per curiam) implies that it does not. In *Mariscal*, the Ninth Circuit had "affirmed the

interstate transportation convictions on the merits, and declined to address . . . the mail fraud convictions, invoking the discretionary 'concurrent sentence' doctrine." *Id.* at 405. The government subsequently conceded "that the mail fraud convictions were invalid." *Id.* In view of that concession, this Court "grant[ed] certiorari, vacate[d] the judgment of the Ninth Circuit affirming the mail fraud convictions, and remand[ed] for reconsideration of the applicability of the 'concurrent sentence' doctrine to a conviction conceded by the United States to be erroneous." *Id.* at 405-06. This Court thus signaled that the concurrent-sentence doctrine has no role where, as here, the government concedes the challenged convictions are improper.

The Sixth Circuit's approach suffers from yet another fatal defect. Applying the concurrent-sentence doctrine to decline to vacate invalid convictions, as the panel did below, is contrary to the Fourteenth Amendment's "due process guarantee[] . . . that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). Where the government admits that it presented insufficient evidence to prove "beyond a reasonable doubt . . . the existence of every element of the offense," but the court sustains the invalid conviction, as occurred here, the court in effect imposes "the onus of a criminal conviction" without "sufficient proof." *Id.* The concurrent-sentence doctrine cannot justify that result.

C. The Sixth Circuit Erred In Concluding That The Adverse Collateral Consequences Of A Conviction Are Not "Salient" On Collateral Review.

In its decision below, the Sixth Circuit found that the potential "adverse collateral consequences" of an unreviewed conviction "are most salient on direct appeal, not on a collateral challenge." App. 14a. And it determined that potential adverse collateral consequences therefore do not provide a "compelling reason" to review a conviction challenged on collateral review. *Id.*

That decision, however, is contrary to this Court's longstanding recognition that a conviction has adverse collateral consequences "that cannot be ignored." *Ball*, 470 U.S. at 865. Those consequences, moreover, are the same whether the conviction is challenged on direct appeal or collateral review. After all, an invalid conviction left undisturbed on collateral review has the same likelihood of affecting a defendant's "sentence under a recidivist statute for a future offense" or being "used to impeach the defendant's credibility" as one left in place on direct appeal. *Id.* And therefore the circuit courts have recognized that adverse collateral consequences must be considered in deciding whether to apply the concurrent-sentence doctrine to convictions challenged on collateral review.

In *United States v. Kirk*, for example, the Eighth Circuit noted the need to consider the "risk of adverse consequences caused by an invalid but unreversed conviction" challenged under § 2255. 723 F.2d 1379, 1382 (8th Cir. 1983). Similarly, the Tenth Circuit has declined to apply the concurrent-sentence

doctrine to a conviction challenged under § 2255 in light of the conviction's potential impact on "sentences for later crimes." *Newman v. United States*, 817 F.2d 635, 637 (10th Cir. 1987), *abrogated on other grounds*. And in reviewing convictions challenged under § 2254, the Fifth and Seventh Circuits have recognized that adverse collateral consequences may preclude application of the concurrent-sentence doctrine. *Williams v. Maggio*, 714 F.2d 554, 555 (5th Cir. 1983); *Cheeks*, 571 F.3d at 690.

Before the panel's decision below, the Sixth Circuit also had refused to apply the concurrent-sentence doctrine on collateral review because of "adverse consequences which might arise if [the] conviction and sentence . . . are not set aside." *Gentry v. United States*, 533 F.2d 998, 1000-01 (6th Cir. 1976); *see also Pillette v. Berghuis*, 408 F. App'x 873, 886 n.8 (6th Cir. 2010) (refusing to apply the concurrent-sentence doctrine given the respondent's failure to "demonstrate a lack of collateral consequences attaching to [the petitioner]'s convictions"). The panel's contrary conclusion below should be reversed.

D. The Sixth Circuit's Refusal To Vacate Invalid Convictions Challenged Under § 2255 Is Contrary To The Plain Text Of § 2255.

As previously noted, the Sixth Circuit accepted the government's concession "that 'Buffin has satisfied the requirements for collateral relief' as to the promotional money laundering counts at issue," App. 9a, and held that "Buffin's convictions for promotion money laundering are invalid," App. 14a.

Nonetheless, the court refused to vacate the invalid convictions, relying on its "discretion of inaction." *Id.*

The panel's conclusion ignores the plain text of § 2255(b). In reviewing a motion under § 2255, "[i]f the court finds . . . that the sentence imposed was not authorized by law or otherwise open to collateral attack, . . . the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b). The statute's command that a "court *shall* vacate and set the judgment aside" leaves no room for a court to exercise discretion to decline to vacate invalid convictions. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007) (concluding "the statutory language," providing that the EPA "shall approve" a transfer application upon satisfaction of nine conditions "is mandatory . . . ; if the nine specified criteria are satisfied, the EPA does not have the discretion to deny a transfer application"); *Lexe-con Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion.").

Accordingly, once the panel determined that Buffin's convictions for promotion money laundering were invalid—*i.e.*, "not authorized by law"—§ 2255(b) *required* the panel to vacate those convictions and take one of the four actions set forth in the statute. *See United States v. Barron*, 172 F.3d 1153, 1157 (9th Cir. 1999) (noting that, once a court determines a petitioner is entitled to relief, § 2255(b) "instructs the court that it '*shall* vacate and set the judgment

aside' and do one of four things: 'discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.'" (emphasis added) (quoting 28 U.S.C. § 2255(b))). The panel had no discretion to take some other action. The Sixth Circuit's decision refusing to vacate Buffin's invalid convictions must be reversed.

CONCLUSION

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

Respectfully submitted,

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