No. 13-53

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**

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI


AMANDA R. PARKER
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001

CHAD A. READLER
*Counsel of Record*
JONES DAY
325 John H. McConnell Blvd.
Columbus, OH 43215
(614) 469-3939
careadler@jonesday.com

*Counsel for Petitioner*

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## REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Court should grant certiorari to review two important issues.

*First*, the Court should address whether the definition of "proceeds" in the pre-amendment version of § 1956(a)(1)—which remains applicable to thousands of defendants whose offense conduct occurred before the amendment's effective date—varies depending on the statute's application. The Sixth Circuit defined "proceeds" in § 1956(a)(1) as profits for purposes of § 1956(a)(1)(A)(i), but as receipts in the context of § 1956(a)(1)(B)(i), reasoning that *United States v. Santos*, 553 U.S. 507 (2008) precludes giving "proceeds" a uniform meaning. That reading of *Santos*, however, conflicts with this Court's holding in *Clark v. Martinez*, 543 U.S. 371 (2005) that the same statutory provision must have the same meaning in all contexts. That conflict warrants this Court's review. And by granting review, the Court has the opportunity to resolve the circuit split regarding the meaning of "proceeds."

*Second*, the Sixth Circuit's erroneous application of the concurrent-sentence doctrine merits review. The panel invoked the doctrine to decline to vacate convictions that the government conceded, and the panel determined, were invalid. In doing so, not only did the Sixth Circuit take the wrong side of two circuit splits, but it also ignored 28 U.S.C. § 2255's plain language and this Court's precedent.

The government does not dispute that the Sixth Circuit's application of the concurrent-sentence doctrine implicates two circuit splits. Nor does it disagree that, following *Santos*, the circuits are

divided regarding the meaning of "proceeds." Instead, in opposing review, the government attempts to minimize the importance of the issues presented and to defend the merits of the decision below. None of the government's arguments, however, is persuasive.

Accordingly, the Court should grant the petition for certiorari.

## I. THIS COURT SHOULD REVIEW THE SIXTH CIRCUIT'S HOLDING THAT THE MEANING OF "PROCEEDS" IN § 1956(a)(1) CHANGES WITH THE STATUTE'S APPLICATION.

### A. The Meaning of "Proceeds" In § 1956(a)(1) Remains An Important Question.

The government contends that review is unwarranted because, in light of Congress's amendment to § 1956 defining "proceeds," "[t]he meaning of 'proceeds' under the prior version of the statute that this Court construed in *Santos* is . . . no longer of ongoing importance." Opp. 12. But the government does not dispute that the pre-amendment version addressed in *Santos* remains applicable to thousands of defendants whose offense conduct occurred before the amendment's May 20, 2009 effective date, *see United States v. Rubashkin*, 655 F.3d 849, 864 n.3 (8th Cir. 2011), including countless individuals who have yet to be charged, *see* 18 U.S.C. § 3282 (providing for a five-year statute of limitations for non-capital offenses). And as a result, courts continue to confront challenges to money-laundering convictions based on *Santos*'s interpretation of "proceeds." Indeed, in just the last six months, numerous courts have addressed such challenges. *E.g.*, *United States v. Allick*, No. 11-

4305, 2013 WL 3894143, at *1-2 (3d Cir. July 30, 2013); *United States v. Grasso*, 724 F.3d 1077, 1090, 1094-95 (9th Cir. 2013); *United States v. Abdulwahab*, 715 F.3d 521, 529-31 (4th Cir. 2013); *United States v. Martinovich*, No. 4:12CR101, 2013 WL 4881019, at *10, 13-15 (E.D. Va. Sept. 11, 2013); *United States v. Nagle*, No. 1:09-cr-384-10, 2013 WL 3894841, at *73-75 (M.D. Pa. July 26, 2013); *Rudisill v. Martin*, No. 5:08-CV-272-DCB-MTP, 2013 WL 1871701, at *12, 14 (S.D. Miss. May 3, 2013).

Given the continued applicability of the pre-amendment version of § 1956(a)(1), this Court's review is appropriate despite the amendment. *See Watson v. Commissioner*, 345 U.S. 544, 547 (1953) (resolving a conflict regarding the meaning of a pre-amendment version of a statute because of its continued impact).

Unable to avoid review based on the statute's amendment, the government next claims that this case provides "no occasion for this Court to intervene" to clarify *Santos*. Opp. 16. According to the government, whether "proceeds" means receipts for purposes of Buffin's concealment-money-laundering convictions "does not implicate any circuit conflict." *Id.* at 11, 15. But the question presented here is not limited to whether "proceeds" means receipts under § 1956(a)(1)(B)(i). Rather, the issue is whether the Sixth Circuit erred in defining "proceeds" in § 1956(a)(1) differently depending on the statute's application. And that question implicates not only the Court's holding in *Santos*, but also the courts of appeals' divergent approaches to defining "proceeds" following that splintered decision.

### B. The Sixth Circuit Erred In Defining "Proceeds" In § 1956(a)(1) As Both Profits And Receipts, In Conflict With This Court's Precedent.

The panel's decision defining the same statutory provision differently depending on the statute's application is at odds with this Court's holding in *Martinez*, warranting the Court's intervention.

The government does not contest that a direct conflict with this Court's precedent justifies review. Instead, it attacks the merits of Buffin's position, claiming that "*Santos* cannot, as petitioner suggests, be read to mean that 'proceeds' must be defined as profits in all cases." Opp. 15 (citation omitted). But Buffin does not contend that *Santos* requires that "proceeds" mean profits. Buffin's position, rather, is that *Martinez* compels that result. Specifically, *Martinez* requires that the same statutory provision have the same meaning regardless of the statute's application. So when one of the statute's applications requires a limiting construction to, for example, avoid constitutional concerns, that limiting construction—"[t]he lowest common denominator, as it were"—"must govern" in all contexts. *Martinez*, 543 U.S. at 380.

Applying that rule to § 1956(a)(1), "proceeds" must mean profits. *Santos* held—even under the government's view of *Santos* as limited to its facts (a clear minority position in the courts of appeals, Pet. 13-17, and contrary to the government's position below, *see* App. 9a)—that "proceeds" means profits in the context of an illegal-gambling operation. *See United States v. Thornburgh*, 645 F.3d 1197, 1209 (10th Cir. 2011). *Santos*, then, gave "proceeds" in

§ 1956(a)(1) "a limiting construction" (profits) "called for by one of the statute's applications" (illegal gambling). *Martinez*, 543 U.S. at 380. And under *Martinez*, that limiting construction of "proceeds" as profits governs regardless of the factual context to which § 1956(a)(1) applies. *Id.* Accordingly, the Sixth Circuit erred in defining "proceeds" as receipts in the context of § 1956(a)(1)(B)(i). And while the government emphasizes the Sixth Circuit's finding that no merger problem exists, Opp. 12-13, [1] the absence of merger is irrelevant in light of *Martinez*.

Equally unavailing is the government's argument that "requir[ing] a profits definition in all cases would be inconsistent with *Santos*." *Id.* at 13. To start, it conflicts with the government's own interpretation of *Santos*. If *Santos* held merely that "proceeds" means profits for illegal-gambling operations, as the government contends, defining "proceeds" as profits in all cases is not inconsistent with *Santos*. In any event, the government's argument simply highlights the need for this Court's intervention. In maintaining that *Santos* precludes defining "proceeds" as profits in all cases, the government, like the circuit courts, Pet. 19-23, reads *Santos* in conflict with *Martinez*'s directive that a

[1] In making that argument, the government claims that the mail-fraud convictions were premised on "newsletter mailings and fraudulent checks mailed to investors." Opp. 13. But only the checks mailed to investors were charged as mail fraud. App. 70a-73a. And while the *mail-fraud-conspiracy* charges were based on newsletter mailings, mail fraud, not mail-fraud conspiracy, served as the § 1956 predicate offense. App. 101a.

statute's meaning cannot change with the statute's application. That conflict should be resolved by this Court.

## II. THE SIXTH CIRCUIT'S IMPROPER APPLICATION OF THE CONCURRENT-SENTENCE DOCTRINE MERITS REVIEW.

The government fails to address the numerous issues implicated by the panel's decision. The government does not dispute, for instance, that the decision below disregards § 2255's plain command that, where a court concludes that a conviction is unlawful, it "*shall* vacate and set the judgment aside." 28 U.S.C. § 2255(b) (emphasis added). Nor does it dispute that the Sixth Circuit's application of the concurrent-sentence doctrine not only conflicts with the Ninth Circuit's wholesale rejection of the doctrine, but also creates a circuit split by declining to vacate convictions the government conceded were invalid. These issues warrant the Court's review.

### A. The Validity and Applicability Of The Concurrent-Sentence Doctrine Are Important Questions.

The government argues that review is unwarranted because the "concurrent-sentence doctrine, in its original form, has little relevance today." Opp. 16. According to the government, because under *Ray v. United States*, 481 U.S. 736 (1987) (per curiam) the doctrine does not apply when the challenged conviction carries a special assessment, and 18 U.S.C. § 3013 requires district courts to impose such assessments for all convictions, the doctrine "'[a]s a practical matter . . . was abrogated for direct appeal.'" Opp. 17 (quoting *Ryan*

*v. United States*, 688 F.3d 845, 849 (7th Cir. 2012)) (alteration in original).

But the government's position ignores that special assessments often are remitted, as occurred here. Where "reasonable efforts to collect" an assessment "are not likely to be effective," "the court may . . . remit all or part of" the assessment upon petition of the government. 18 U.S.C. § 3573(1). A § 3573 petition is appropriate, for example, where the defendant requires court-appointed counsel. *See* U.S. Attorneys' Manual 3-12.520, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title3/12musa.htm (last visited Sept. 16, 2013). And given that court-appointed counsel "represent the vast majority of individuals who are prosecuted in . . . federal court[]," United States Courts, Appointment of Counsel, http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel.aspx (last visited Sept. 16, 2013), such petitions likely are not infrequent. The concurrent-sentence doctrine, then, remains relevant on direct appeal. *See, e.g.*, *United States v. Garcia-Flores*, 136 F. App'x 685, 688 (5th Cir. 2005) (per curiam) (applying the concurrent-sentence doctrine to decline review of convictions challenged on direct appeal where "the assessments imposed pursuant to 18 U.S.C. § 3031(a)(2)(A) were remitted").

In any event, direct appeal is only one context to which the concurrent-sentence doctrine potentially applies. Indeed, the government acknowledges that courts rely on the doctrine in other circumstances, including where a defendant "seek[s] post-conviction relief from a prison sentence only," Opp. 17, and where a defendant raises "only [a] challenge[] [to] his

sentence under 18 U.S.C. 3742(a)," *id.* at 17 n.*. Courts also apply the doctrine to avoid review of state-court convictions challenged under 28 U.S.C. § 2254. *E.g.*, *Cheeks v. Gaetz*, 571 F.3d 680, 689 (7th Cir. 2009); *Williams v. Maggio*, 714 F.2d 554, 555 (5th Cir. 1983) (per curiam); *see also Wilkens v. Lafler*, 487 F. App'x 983, 986-87 (6th Cir. 2012) (recognizing the doctrine's applicability to § 2254 proceedings, but declining to apply the doctrine because of potential collateral consequences).

Given that federal courts continue to rely on the concurrent-sentence doctrine, the limit of its application is an important question that warrants this Court's review. *See Ray*, 481 U.S. at 737.

### B. The Sixth Circuit Erred In Applying The Concurrent-Sentence Doctrine.

As the government acknowledges, Opp. 16, 17 & n.*, the concurrent-sentence doctrine permits a court only to avoid *review* of a challenged conviction. *See Benton v. Maryland*, 395 U.S. 784, 791 (1969); *Barnes v. United States*, 412 U.S. 837, 848 & n.16 (1973). The doctrine thus does not apply where, like here, the government concedes and the court determines that the challenged convictions are invalid. *E.g.*, *United States v. Hill*, 859 F.2d 325, 326 (4th Cir. 1988) ("The [concurrent-sentence] doctrine presupposes one conviction that is valid and one that has not been passed upon, not one valid and one invalid conviction."). Nor can the doctrine trump the plain language of § 2255. Under § 2255(b), once the panel determined that Buffin's promotion-money-laundering convictions were invalid, "th[e] court was obligated to set aside the judgment, which encompassed both convictions and sentences."

*United States v. Mendoza*, 118 F.3d 707, 709 (10th Cir. 1997). The panel erred in disregarding that obligation.

The government ignores these errors entirely. Instead, it emphasizes the "discretionary" nature of the doctrine. Opp. 18. The mandatory language of § 2255, however, leaves no room for discretion. Pet. 37. The government also claims that, because Buffin "must continue to serve his 180-month sentences for concealment money laundering, a court on collateral review may decline to disturb his concurrent 180-month sentences for promotion money laundering, even if they are invalid." Opp. 18. But that argument is flawed for the same reason that the decision below cannot stand—if a court concludes that sentences are invalid, § 2255 requires the court to vacate them. *See United States v. Barron*, 172 F.3d 1153, 1157 (9th Cir. 1999).

Even assuming that a court has discretion to leave in place invalid *sentences*, moreover, there was no occasion to exercise that discretion here. That is because Buffin challenges not just his sentences, but also his *convictions*. App. 16a. The government's contrary argument that Buffin "seek[s] post-conviction relief from a prison sentence only," Opp. 17, is wholly baseless. Indeed, it is contradicted by the government's own representation that Buffin seeks "to vacate his money-laundering *convictions*." *Id.* at 7 (emphasis added). And to the extent the government asserts that only sentences, not convictions, can be challenged under § 2255, its position is contrary to the well-established principle that § 2255 is the proper "avenue for postconviction

challenges to federal . . . convictions." *Mayle v. Felix*, 545 U.S. 644, 654 n.3 (2005).

Accordingly, the Sixth Circuit clearly erred in applying the concurrent-sentence doctrine to decline to vacate Buffin's invalid convictions, requiring reversal.

### C. Leaving Fifteen Invalid Convictions And Sentences In Place Has Real Consequences For Buffin.

In a final effort to avoid review, the government claims that Buffin "will experience no concrete effects" from the decision below. Opp. 18. According to the government, "[a]ffording him relief from the promotion convictions would not require that he be released at an earlier time or resentenced on his valid concealment convictions." *Id.* The government, however, is mistaken.

As this Court recently recognized, "a district court's original sentencing intent may be undermined by altering one portion of the calculus." *Pepper v. United States*, 131 S. Ct. 1229, 1251 (2011) (quotation marks and citation omitted). As a result, "an appellate court when reversing one part of a defendant's sentence 'may vacate the entire sentence so that, on remand, the trial court can reconfigure the sentencing plan.'" *Id.* (quoting *Greenlaw v. United States*, 554 U.S. 237, 253 (2008)). Here, then, had the panel vacated Buffin's fifteen promotion-money-laundering convictions and sentences, remand for resentencing would have been appropriate. *United States v. Faulkenberry*, 614 F.3d 573, 590 (6th Cir. 2010). That is true even though the panel upheld counts carrying concurrent

sentences. *See, e.g.*, *United States v. Dierker*, 417 F. App'x 515, 516, 525 (6th Cir. 2011).

The government also erroneously claims that, because Buffin has not "identif[ied] any collateral consequences that he will suffer if his money-laundering convictions are not vacated," the panel properly applied the doctrine. Opp. 18. To begin with, this Court has long "presume[d] that a wrongful criminal conviction has continuing collateral consequences." *Spencer v. Kemna*, 523 U.S. 1, 8 (1998). In view of that presumption, the circuit courts apply the concurrent-sentence doctrine only if it is clear that declining to review the challenged convictions would have no adverse collateral consequences for the defendant. *See United States v. Wade*, 266 F.2d 574, 578 (6th Cir. 2001); *Logan v. Lockhart*, 994 F.3d 1324, 1332 (8th Cir. 1993) ("This court . . . require[s] 'no possibility' of prejudicial collateral consequences."). Contrary to the government's attempt to place the burden on Buffin, moreover, *the government* must demonstrate a lack of collateral consequences—"the defendant should not have to make an affirmative showing of collateral consequences." *United States v. Vargas*, 615 F.2d 952, 960 (2d Cir. 1980).

The government cannot satisfy its burden. The government argues that any collateral consequences "are of no practical concern." Opp. 18. But as this Court has made clear, even "consequences that are remote and unlikely to occur" count. *Spencer*, 523 U.S. at 8; *see also Logan*, 994 F.3d at 1332 (finding that, because the governor might someday commute the petitioner's life sentence "to a term of years so that he [would] become eligible for parole, adverse

collateral consequences may result from failure to review" the petitioner's conviction). Here, for example, Buffin's fifteen felony convictions could result in a higher criminal-history category in any future sentencing calculation. *See* U.S. Sentencing Guidelines Manual § 4A1.2 cmt. n. 6 (2012); *id.* § 4A1.3(a)(2). It is also possible that Buffin's concealment-money-laundering and money-laundering-conspiracy convictions might later be found invalid. And in that event, his 180-month sentences on the promotion-money-laundering convictions would no longer run concurrently with any valid sentences. That possibility precludes application of the concurrent-sentence doctrine here. *See United States v. Wettstain*, 618 F.3d 577, 593 n.6 (6th Cir. 2010) (declining to apply the doctrine because "if another court were to vacate . . . [the] conviction on Count I, the unlawful sentences imposed on Counts II-IV would no longer be cured by the mandatory life sentence imposed on Count I").

Accordingly, the panel's reliance on the concurrent-sentence doctrine to refuse to vacate invalid convictions requires reversal.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

AMANDA R. PARKER
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001

CHAD A. READLER
*Counsel of Record*
JONES DAY
325 John H. McConnell Blvd.
Columbus, OH 43215
(614) 469-3939
careadler@jonesday.com

*Counsel for Petitioner*

September 25, 2013