No. 21-8129

IN THE
Supreme Court of the United States

RADU MICLAUS,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The government spills substantial ink on the merits of the question Mr. Miclaus asks this Court to resolve, but freely acknowledges that the Sixth Circuit created a circuit split. Resp. Br. at 17. Recognizing the strength of this split, the government proceeds to discredit this petition with specious vehicle arguments, but these attacks do not hold water. The issue presented here is simple: Mr. Miclaus, on top of a mandatory two-year sentence, received a two-level enhancement that he would not have received had he been prosecuted in any other circuit because of the Sixth Circuit's divergent interpretation of the law.

ARGUMENT

I. THIS CASE PRESENTS A PROPER VEHICLE TO RESOLVE THE SPLIT.

The government argues that the petition's "interlocutory posture" makes review improper, as the Sixth Circuit remanded for re-sentencing based on the district court's misapplication of other enhancements. Resp. Br. at 11. But the district court is not "set to impose a fresh sentence," because the district court granted Mr. Miclaus's motion to vacate the re-sentencing date until this litigation is complete. *Id.* at 12; Def. Mot. Vacate Re-Sentencing, No. 1:16-cr-00224-PAG-3 (N.D. Ohio Dec. 15, 2021), ECF No. 274.

Regardless, the re-sentencing will not "affect the consideration of the issues presented" because the misapplied enhancements that justified remand do not implicate the "transfer" versus "trafficking" split created by the Sixth Circuit's decision. Resp. Br. at 12; Pet. App. 56a (citing U.S.S.G. § 2B1.1(b)(4); U.S.S.G. § 2B1.1(b)(19)(A)(ii)). So denying this petition would

not "promote[] judicial efficiency" as the government claims. Resp. Br. at 12. The final judgment rule aims to avoid "delays" which impede the "effective and fair administration of the criminal law." *DiBella* v. *United States*, 369 U.S. 121, 126 (1962). Waiting for re-sentencing, as the government urges, would frustrate those aims. Resp. Br. at 11. This Court's review can provide the district court with clarity on the enhancement's application, avoiding the potential for additional rounds of appeal and another re-sentencing.

The Sixth Circuit reviewed de novo whether § 2B1.1(b)(11)(B)(i) can apply to a § 1028A conviction. Pet. App. 23a–25a. The Sixth Circuit first held that Application Note 2 did not preclude the § 2B1.1(b)(11)(B)(i) enhancement because the ordinary meaning of trafficking includes "marketing and sales" activity apart from transfer. *Id.* at 26a. Only then, after making its ruling, did the court discuss the plain error standard to determine whether the enhancement applied to Mr. Miclaus. *Id.* That discussion is functionally dicta. The question herein presented was pressed and passed upon by the Sixth Circuit in rejecting Mr. Miclaus's appeal. *Id.* at 21a–27a. The court's unique interpretation of § 2B1.1(b)(11)(B)(i)'s interaction with Application Note 2 required that it deny the appeal, regardless of the standard of review applied. *Id.* at 26a.[1]

The Sixth Circuit considered a fully-developed record because the district court ruled on an objection to

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[1] It is not necessary for this Court to address whether application of the trafficking enhancement qualifies as plain error under the substantive standard. If this Court finds that a § 2B1.1(b)(11)(B)(i) enhancement cannot apply in addition to the mandatory two-year sentence for aggravated identity theft, the Sixth Circuit can determine on remand whether the error was plain.

the trafficking enhancement at sentencing. Mr. Nicolescu, Mr. Miclaus's co-defendant, raised an objection to the application of § 2B1.1(b)(11)(B)(i), which the district court rejected. Pet. App. 69a. The district court sentenced Mr. Miclaus immediately after Mr. Nicolescu and noted that she "incorporate[d] all of the statements [she] made regarding codefendant Nicolescu's sentencing, [her] rationale for his sentence." *Id.* at 88a. Although Mr. Miclaus did not separately object to the enhancement at sentencing, he did not have to do so—the district court had already incorporated by reference all of the rulings on objections made by co-defendant's counsel and found that the enhancement was applicable to Mr. Miclaus.

Mr. Miclaus's petition does not seriously implicate the justification for the plain error standard. Appellate courts review claims for plain error to ensure "fairness to the court and to the parties" and serve the public interest by "bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact." *United States* v. *Atkinson*, 297 U.S. 157, 159 (1936). But the Sixth Circuit ruled on a complete record and denying this petition despite a clear and entrenched split would serve that public interest poorly, leaving an important issue of law unsettled and geographically conflicted—with very real consequences for defendants like Mr. Miclaus. See *Gee* v. *Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 408 (2018) (mem.) (Thomas, J., dissenting from denial of certiorari) ("One of this Court's primary functions is to resolve 'important matter[s]' on which the courts of appeals are 'in conflict.'" (alterations in original) (quoting Sup. Ct. Rule 10(a)).

II. THE SIXTH CIRCUIT'S ERRONEOUS DECISION CREATES A CLEAR SPLIT ON AN IMPORTANT AND RECURRING ISSUE.

A. The Sixth Circuit's Decision Creates an Important and Recurring Split.

The Sixth Circuit, rejecting the reasoning of five other circuits, the author of the majority opinion below, and the government's prior position, "charts a new course among [the] circuits." Pet. App. 24a; see Pet. at 8–10; Pet. App. 29a; Resp. Br. at 17 n. 2. This "new course" creates a five-to-one circuit split, generates disparate outcomes for federal criminal defendants, and undermines the uniformity that the Sentencing Guidelines are intended to achieve. Try as it may, the government's premature briefing on the merits cannot distract from the havoc this glaring split will wreak on the federal system if it goes unreviewed.

Approximately 80 defendants each year face charges under 18 U.S.C. § 1028A and Title 18 for fraud offenses in the Sixth Circuit. Pet. at 11. And these defendants, if convicted, now face a Guidelines range two levels above all other similarly situated defendants in the country, for no other reason than the district of their sentencing.

The government responds with a red herring and argues that the advisory nature of the Guidelines post-*Booker* permits this type of inconsistency across the circuits. Resp. Br. at 19. But that ignores that the Guidelines calculation is required to be done prior to sentencing, must be done accurately, and has an impact. See *Rita* v. *United States*, 551 U.S. 338, 354 (2007) ("Congress sought to diminish unwarranted sentencing disparity. It sought a Guidelines system that would bring about greater fairness in sentencing

through increased uniformity."). District courts in different circuits, addressing the same criminal conduct at issue here, will start their sentencing inquiry at two completely different Guidelines ranges. This divergence frustrates congressional intent and demands clarification that only this Court can provide. See *Peugh* v. *United States*, 569 U.S. 530, 531 (2013) (describing "the Guidelines as a benchmark" for appellate review of the reasonableness of a sentence).

B. The Decision Below is Wrong.

This petition presents a clear and deep circuit split. Perhaps for that reason, the government's brief fast-forwards past the certiorari stage and spends a considerable number of pages arguing the merits. Resp. Br. at 12–17. But here, too, the government comes up short. Not only did the decision below create a harmful split in the law, but the flawed reasoning employed by the Sixth Circuit does not align with the plain meaning of the text.

The government argues that the application of the trafficking enhancement does not offend Application Note 2 because the trafficking enhancement punishes "culpable conduct in addition to the item's mere transfer." Resp. Br. at 13. But as the other courts to address this issue correctly identified, while every unlawful transfer may not qualify as trafficking, trafficking necessitates an unlawful transfer. Pet. at 8–10. Notably, Judge White, author of the Sixth Circuit decision, dissented from the application of the enhancement because the court "impermissibly punished [Miclaus] a second time for the inextricable element of 'transferring'" the stolen information. Pet. App. 29a.

"Transfer" covers the same primary conduct described by "traffic," precluding application of the enhancement to an individual who received a two-year

minimum under § 1028A based on the language of Application Note 2. As the government correctly notes, courts must look to the ordinary meaning of the text in the absence of a statutory definition. Resp. Br. at 13. But the ordinary meanings of "traffic" and "transfer" have undeniable overlap. Looking first at the term "traffic," dictionary definitions commonly highlight the conveyance of a good or thing from one person to another. See *Shorter Oxford English Dictionary* (6th ed. 2007) ("carry or trade, buy and sell"); *Black's Law Dictionary* (11th ed. 2019) ("passing or exchange of goods or commodities from one person to another for an equivalent in goods or money"). Definitions of "transfer" cover a wider range of activities, but every definition accounts for that same conveyance of goods that is characteristic of "traffic." See *Shorter Oxford English Dictionary* (6th ed. 2007) ("to move, take, or convey from one place, person . . . to another"); *Black's Law Dictionary* (11th ed. 2019) ("to change over the possession or control of . . . to sell or give").

The government acknowledges this overlap between traffic and transfer, stating that the "trafficking enhancement properly applies where a defendant is guilty *not merely of transferring* a means of identification . . . but also culpable of 'marketing or sales activity.'" Resp. Br. at 15 (emphasis added). Application Note 2 directs courts to not apply enhancements that cover the "*transfer* . . . of a means of identification" because a § 1028A conviction already penalizes this conduct. U.S.S.G. § 2B1.6 App. Note 2 (emphasis added). The government's definition of trafficking, requiring "marketing or sales activity" in addition to a transfer, still includes the key element of transferring, which bars application of § 2B1.1(b)(11)(B) to Mr. Miclaus under the language of Application Note 2.

The government's tunnel-visioned focus on the merits of the Sixth Circuit decision is particularly confounding because the government itself previously adopted Mr. Miclaus's position by conceding plain error on this issue in *Doss* and *Giannone*. Resp. Br. at 17 n.2. There, the government acknowledged that the "overlap in definitions" between trafficking and transfer "erases [any] apparent distinction," precluding application of the trafficking enhancement under Application Note 2. Gov't Br. at 50–51, *United States* v. *Giannone*, No. 07-4844 (4th Cir. June 4, 2009), ECF No. 116. The government described Mr. Miclaus's position as "sound" because "trafficking of access devices generally involves their transfer or use." Gov't Br. at 9, *United States* v. *Doss*, No. 13-0001 (7th Cir. Aug. 29, 2013), ECF No. 22. And because an error in the calculation of the Guidelines range "affects the integrity of the proceedings" the government conceded plain error in both cases. *Id.* at 11.

Application of the production enhancement to individuals convicted under § 1028A does not create an internal inconsistency, as the government claims. Resp. Br. at 15–16. The Guidelines define "production" to include "manufacture, design, alteration, authentication, duplication, or assembly." U.S.S.G. § 2B1.1, App. Note 10(A). This definition clarifies that "production" and "transfer" cover different conduct. To qualify as production, a person does "something *to* the device," whereas for transfer, a person does "something *with* the device." *United States* v. *Taylor*, 818 F.3d 671, 676 (11th Cir. 2016). The government is correct then that production "would often involve the defendant's possession or use of the device," but it would not always involve its transfer, or conveyance from one person to

another. Resp. Br. at 16; see also *Black's Law Dictionary* (11th ed. 2019) ("to change over the possession or control of").

III. THE COURT SHOULD EXERCISE ITS JURISDICTION TO RESOLVE THE SPLIT.

The Court should exercise its proper jurisdiction to hear this case and resolve a clear circuit split with important consequences for criminal defendants. The government seeks to diminish the reviewability of this split, arguing that the Sentencing Commission can address the issue. Resp. Br. at 18.

There is now contradictory law among the circuits, creating a significant disparity in federal sentencing law and the Sentencing Commission does not appear interested in addressing it anytime soon. The Commission released its notice of proposed 2022–2023 priorities and addressing the applicability of U.S.S.G. § 2B1.1(b)(11)(B) to a conviction under 18 U.S.C. § 1028A is noticeably absent from the list. Federal Register Notice of Proposed 2022–2023 Priorities, U.S. Sentencing Comm'n, http://bit.ly/3OnjvAx (last visited Nov. 21, 2022).

The government's reliance on *Braxton* v. *United States* is misguided because the Commission is not poised to settle this issue. Resp. Br. at 18. In *Braxton*, the Court declined to resolve a split in the interpretation of the Guidelines because "the Commission ha[d] already undertaken a proceeding," a request for public comment, to eliminate the split. 500 U.S. 344, 348–349 (1991). But there is no evidence that the Commission will address this disparity in the near future, compelling Mr. Miclaus's request for this Court to exercise its power of review and correct the course of the Sixth Circuit.

This question concerns an important issue of law that properly falls within this Court's supervisory power. This Court has intervened in the past when a conflicting interpretation on the applicability of a guideline provision renders an incorrect result. See *Salinas* v. *United States*, 126 S. Ct. 1675, 1675 (2006) (vacating a Fifth Circuit judgment holding that a prior conviction for simple possession qualified as a "controlled substances offense" under U.S.S.G. § 4B1.1(a)). Nor has this Court shied away from correcting interpretations of the Guidelines when they implicate constitutional concerns, as Mr. Miclaus's impermissible double-counting claim does here. See *Peugh*, 569 U.S. at 549–550 (holding that application of an amended heightened Guidelines range at sentencing, as compared to the Guidelines range at the time of the crime, violates the Ex Post Facto Clause).

The government argues that the advisory nature of the Guidelines after *Booker* renders this case improper for review. Resp. Br. at 19. But a district court's exercise of discretion under the 18 U.S.C. § 3553(a) factors does not render the initial Guidelines range immaterial at sentencing. This Court has repeatedly emphasized that a correct Guidelines range calculation is a required element of a sentencing determination. See *Gall* v. *United States*, 552 U.S. 38, 50 (2007) (describing failure to properly calculate the Guidelines range as a "significant procedural error"); *Molina-Martinez* v. *United States*, 578 U.S. 189, 200 (2016) ("[A] defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome."); *Peugh*, 569 U.S. at 541 ("The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are

anchored by the Guidelines and that they remain a meaningful benchmark.").

Notably, the government's argument on this point is contradicted by the decision below. Even though the district court exercised discretion and went below the Guidelines range after subtracting five levels from the initial calculation, the Sixth Circuit remanded the case for re-sentencing because it held that the district court misapplied two other enhancements, noting "we cannot conclude that the errors were harmless." Pet. App. 27a–28a.

CONCLUSION

For these reasons and the reasons stated in the petition, this Court should grant the petition.

Respectfully submitted,

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