No. 18-8773

IN THE SUPREME COURT OF THE UNITED STATES

EMMANUELY GERMAIN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's omission of a jury instruction specifically identifying the presentation element of the crime of presenting a visa application that contained a material false fact, 18 U.S.C. 1546(a), required the court of appeals to set aside petitioner's convictions on plain-error review.

2. Whether a criminal defendant may raise a challenge to venue for the first time on appeal.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-12) is not published in the Federal Reporter but is reprinted at 759 Fed. Appx. 866.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 2019. The petition for a writ of certiorari was filed on April 4, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of conspiring to defraud the United States, in violation of 18 U.S.C. 371, and three counts of presenting or causing to be presented an immigration application containing a materially false statement, in violation of 18 U.S.C. 1546(a). Pet. App. 25. The district court sentenced him to 18 months of imprisonment, to be followed by two years of supervised release. Id. at 26-27. The court of appeals affirmed. Id. at 1-12.

1. Petitioner and his father operated International Easy Labor, Inc., a company that submitted visa applications on behalf of foreign workers seeking to perform seasonal labor in the United States. See Gov't C.A. Br. 3. From 2013 to 2015, petitioner and his father submitted visa applications containing false representations. See id. at 3, 13-16. For example, in 2015, petitioner submitted applications seeking visas for 120 new workers and extensions for 12 previous workers at a farm in Georgia, even though he knew that the farm had been struck by a deep freeze and had ceased operations. See id. at 3, 7-9. Petitioner also collected unauthorized fees from the workers, but falsely stated on the applications that he received no such fees. See id. at 3, 6, 8.

In January 2017, a grand jury in the Southern District of Florida indicted petitioner on one count of conspiring to defraud the United States, in violation of 18 U.S.C. 371, and three counts of presenting or causing to be presented an immigration application containing a materially false statement, in violation of 18 U.S.C. 1546(a). Pet. App. 13-21. The indictment charged that petitioner committed his offenses "in Miami-Dade County, in the Southern District of Florida," id. at 16, 19, 20, and petitioner proceeded to trial in that district, see id. at 13. Petitioner did not challenge venue at any point during the trial. Id. at 6. At the close of the prosecution's case, he moved for a judgment of acquittal solely on the ground that the government did not prove the knowledge element of the offenses. See Gov't C.A. Supp. App. 143-144.

At the close of trial, the district court provided the jury with the following instructions regarding the Section 1546(a) counts:

> It is a federal crime for anyone to knowingly present or cause to be presented to United States Citizenship and Immigration Services an application required by the immigration laws and regulations prescribed thereunder which contains a false statement with respect to a material fact.
>
> The defendant can be found guilty of this crime only if all of the following facts are proved beyond a reasonable doubt:
>
> First, the defendant made or subscribed as true a false statement; Second, the defendant acted with knowledge that the statement was untrue; Third, the statement was material to the activities or decisions of the United States Citizenship and Immigration Services; Fourth, the statement was made under penalty of perjury, and Fifth, the statement

> was made on an application or other document required by immigration laws or regulations.

Gov't C.A. Supp. Appx. 162-163. Petitioner did not object to those instructions. See id. at 11-12.

The jury found petitioner guilty on all four counts. Pet. App. 25. The district court sentenced petitioner to 18 months of imprisonment. Id. at 26-27.

2. The court of appeals affirmed. Pet. App. 1-12. As relevant here, petitioner contended that the district court had erred by not identifying presentation of the visa application to the federal government as one of the elements of the Section 1546 counts. Id. at 11-12. Because petitioner had failed to raise such an objection in the district court, the court of appeals reviewed petitioner's claim for plain error. Id. at 11. The court of appeals noted that, "[u]nder plain error review, 'failure to instruct the jury on an essential element of the offense charged does not constitute reversible error if the failure to instruct is harmless'" -- that is, if "'it is clear * * * that a rational jury would have found the defendant guilty absent the error.'" Id. at 12 (brackets and citation omitted). The court observed that a person violates Section 1546(a) if he knowingly "makes" or "'subscribes as true'" a materially false statement in a visa application, or knowingly "'presents'" a visa application containing a materially false statement. Id. at 3 (quoting 18

U.S.C. 1546(a)). The court explained that, "'where a statute defines two or more ways in which an offense may be committed,'" "proof of any one of those acts charged conjunctively could support a conviction." Id. at 12 (citation omitted). The court then stated that the district court's failure to instruct the jury regarding the "presentation" element "was not plainly erroneous because the government presented sufficient evidence to convict [petitioner] even without the addition of the presentation instruction as an alternative means of conviction." Ibid.

Petitioner also contended that the government had deprived him of his constitutional right to be tried in the venue where he committed the offense. Pet. App. 5. But the court of appeals explained that, under circuit precedent, a criminal defendant who seeks to challenge venue must "raise an objection at trial or at the close of evidence," and may not raise the issue for the first time on appeal. Ibid. The court found that petitioner had "fail[ed] to object to the venue during trial or after the presentation of evidence," and it accordingly declined to entertain petitioner's challenge for the first time on appeal. Id. at 6.

ARGUMENT

Petitioner contends (Pet. 4-5) that the district court committed plain error by omitting a jury instruction specifically

identifying the presentation element of the offense of presenting a visa application containing a materially false statement. That factbound contention lacks merit, and the result below does not conflict with any decision of this Court or another court of appeals. Petitioner also contends (Pet. 5-9) that the court of appeals was required to review his venue challenge, even though he had failed to raise that challenge in the district court. The court of appeals correctly declined to entertain a venue challenge raised for the first time on appeal; its resolution of that issue again does not conflict with any decision of this Court or another court of appeals; and this case would in all events be a poor vehicle for considering the issue, on which this Court has previously denied review. The petition for a writ of certiorari in this case should likewise be denied.

1. Petitioner's first contention (Pet. 4-5) concerns his convictions for violating Section 1546(a). Under Section 1546(a), a person commits a crime if he knowingly makes a materially false statement in a visa application, knowingly subscribes that a materially false statement in a visa application is true, or knowingly presents a visa application containing a materially false statement. 18 U.S.C. 1546(a). The indictment in this case charged petitioner with knowingly "present[ing] and caus[ing] to be presented" a visa application containing a materially false statement. Pet. App. 19-20. At trial, the district court

instructed the jury that the prosecution was required to prove beyond a reasonable doubt that he "made or subscribed as true a false statement" in the application, Gov't C.A. Supp. App. 162-163. The court of appeals correctly rejected petitioner's claim that the jury instructions amounted to plain error.

To obtain relief on plain-error review, a defendant must demonstrate that (1) the district court committed an "error"; (2) the error was "clear" or "obvious"; (3) the error affected the defendant's "substantial rights"; and (4) the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732-736 (1993) (citations omitted); see Fed. R. Crim. P. 52(b). To show that an error affected substantial rights, a defendant ordinarily "must make a specific showing of prejudice." Olano, 507 U.S. at 735. And to show that an error seriously affected the fairness, integrity, or public reputation of judicial proceedings, a defendant must ordinarily show, at a minimum, that the error "affect[ed] the jury's verdict." United States v. Marcus, 560 U.S. 258, 265-266 (2010). Petitioner cannot satisfy these plain-error requirements here.

To begin with, this Court has explained that "'a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge,'" and that the overall charge must in turn be viewed "as part of the

whole trial." United States v. Park, 421 U.S. 658, 674 (1975) (citation omitted). "Often isolated statements taken from the charge, seemingly prejudicial on their face, are not so when considered in the context of the entire record of the trial." Id. at 674-675 (citation and emphasis omitted). And here, although the district court directed the jury to determine whether petitioner "made or subscribed as true" a false statement in a visa application, rather than whether petitioner presented a visa application that contained a false statement, the crime was elsewhere framed in terms of presentment.

Directly before the instruction on which petitioner's argument focuses, the district court described the crime at issue as "knowingly present[ing] or caus[ing] to be presented * * * an application required by the immigration laws * * * which contains a false statement with respect to a material fact." Gov't C.A. Supp. App. 162. In addition, the indictment charged that petitioner "did knowingly present and cause to be presented" an application containing a materially false statement. Pet. App. 19-20. The court read the indictment aloud for the jury, sent a copy of the indictment to the jury room, instructed the jury that it had the "duty to decide whether the government has proved beyond a reasonable doubt the specific facts necessary to find the defendant guilty of the crimes charged in the * * * indictment," and cautioned the jury that "the defendant is on trial only for

those specific offenses alleged in the * * * indictment." Gov't C.A. Br. 39 (brackets and citation somitted).

Furthermore, the failure to submit an element of the crime to the jury does not constitute plain error where the omitted element is supported by "'overwhelming'" evidence and is "essentially uncontroverted at trial." Johnson v. United States, 520 U.S. 461, 469-470 (1997) (citation omitted). The omission of an "uncontroverted" element does not cause prejudice (the third element of the plain-error test), see Neder v. United States, 527 U.S. 1, 18-19 (1999), and it also does not seriously affect "the fairness, integrity or public reputation of judicial proceedings" (the fourth element), see Johnson, 520 U.S. at 470. In this case, the government presented overwhelming evidence that petitioner presented the visa applications to U.S. Citizenship and Immigration Services (USCIS). In particular, the government introduced documentary evidence that petitioner mailed the applications to USCIS, and a government employee testified that USCIS received the fraudulent applications. Gov't C.A. Br. 19; Gov't C.A. Supp. App. 94, 99, 101, 103. And petitioner did not controvert that element at trial. Thus, the court of appeals correctly declined to disturb petitioner's convictions on plain-error review.

Petitioner contends that the court of appeals' opinion erroneously focused on whether the evidence showed that petitioner

had made false statements, rather than on whether the evidence showed that he had presented an application containing false statements. Pet. App. 5. Petitioner also observes that, instead of stating that the evidence supporting conviction was "overwhelming," the court stated that the evidence was "sufficient." Pet. 5; see Pet. App. 12. "This Court, however, reviews judgments, not statements in opinions." Black v. Cutter Labs., 351 U.S. 292, 297 (1956). Even assuming that the statements to which petitioner points were mistaken, the court of appeals' judgment affirming petitioner's conviction was correct.

In all events, further review is unwarranted because petitioner seeks only factbound error correction. Petitioner identifies no conflict between the decision below and the decision of any other court of appeals. Petitioner observes that "one circuit judge," Judge Lipez, has urged this Court to resolve an "'inconsistency in the way courts have reviewed for harmlessness the failure to instruct on an element of a crime.'" Pet. 4-5 (quoting United States v. Pizarro, 772 F.3d 284, 303 (1st Cir. 2014) (Lipez, J., concurring)). Judge Lipez stated that "courts have taken inconsistent positions" on whether the omission of an element is harmless only when it is both "'uncontested'" and "'supported by overwhelming evidence,'" or whether overwhelming evidentiary support alone is enough. Pizarro, 772 F.3d at 304. But this case would not implicate any conflict on that issue. The

presentation element was both uncontested and supported by overwhelming evidence, and the omission of that element would not amount to plain error under any circuit's approach. No further review is warranted

2. Further review is also not warranted as to petitioner's contention (Pet. 5-9) that a criminal defendant may raise a challenge to venue for the first time on appeal. This Court recently denied certiorari in a case that presented the same question, see De Jesumaria v. United States, 138 S. Ct. 68 (2017) (No. 16-8764), and it should do likewise here.

a. The Jury Trial Clause of Article III provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." U.S. Const. Art. III, § 2, Cl. 3. And the Sixth Amendment guarantees the accused the right to a trial "by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." U.S. Const. Amend. VI.

Courts have repeatedly explained that venue does not constitute an element of a criminal offense -- or, in the language that some courts have used, a "substantive" or "essential" element of the offense. See, e.g., United States v. Lanoue, 137 F.3d 656,

661 (1st Cir. 1998); United States v. Rommy, 506 F.3d 108, 119 (2d Cir. 2007), cert. denied, 552 U.S. 1260 (2008); United States v. Perez, 280 F.3d 318, 329-330 (3d Cir.), cert. denied, 537 U.S. 859 (2002); United States v. Griley, 814 F.2d 967, 973 (4th Cir. 1987); United States v. Muhammad, 502 F.3d 646, 652 (7th Cir. 2007), cert. denied, 552 U.S. 1144 (2008); United States v. Kaytso, 868 F.2d 1020, 1021 (9th Cir. 1989); United States v. Stickle, 454 F.3d 1265, 1271-1272 (11th Cir. 2006). "[U]nlike the substantive facts which bear on guilt or innocence in the case," venue "is wholly neutral; it is a question of procedure * * * , and it does not either prove or disprove the guilt of the accused." Wilkett v. United States, 655 F.2d 1007, 1011 (10th Cir. 1981), cert. denied, 454 U.S. 1142 (1982).

As a result, the government need not affirmatively present evidence of venue in every case. Rather, venue becomes a jury question only if it is "in issue." United States v. Haire, 371 F.3d 833, 840 (D.C. Cir. 2004), vacated on other grounds, 543 U.S. 1109 (2005); see, e.g., Perez, 280 F.3d at 333-336. And venue is "in issue" only if the defendant objects to venue before the jury's verdict and makes a timely request for a jury instruction on the question. See, e.g., United States v. Cordero, 668 F.2d 32, 44 (1st Cir. 1982) (Breyer, J.); United States v. Grammatikos, 633 F.2d 1013, 1022 (2d Cir. 1980); United States v. Auernheimer, 748 F.3d 525, 532 (3d Cir. 2014); United States v. Carbajal, 290 F.3d

277, 288-289 (5th Cir.), cert. denied, 537 U.S. 934 (2002); United States v. Nwoye, 663 F.3d 460, 466 (D.C. Cir. 2011); 2 Charles Alan Wright et al., Federal Practice and Procedure § 306 (4th ed. 2009 & Supp. 2017).

If a defendant fails to put venue at issue during the trial, he may not challenge venue for the first time after trial or on appeal. See, e.g., Perez, 280 F.3d at 335-336; United States v. Greer, 440 F.3d 1267, 1271 (11th Cir. 2006); Cordero, 668 F.2d at 44; Nwoye, 663 F.3d at 466; Grammatikos, 633 F.2d at 1022. If the rule were otherwise, defendants would be able to "secure victories through surprise or manipulation." Cordero, 668 F.2d at 44. Because the government need not present evidence on venue to the jury unless the defendant first puts the question in issue, the government "will not necessarily seek to prove" venue in the district court. Ibid. Allowing a defendant to lie in wait during the trial and then, upon conviction, insist on appeal that the evidence on venue was insufficient would sandbag prosecutions and waste judicial resources.

b. In this case, petitioner never challenged venue at trial. Accordingly, the court of appeals properly declined to consider petitioner's venue challenge when petitioner raised it for the first time on appeal. See Pet. App. 5-6.

Petitioner contends (Pet. 8) that the failure to challenge venue at trial "merely forfeits" rather than "waives" the issue,

and suggests that a court of appeals could grant plain-error relief. That argument cannot be squared with this Court's decision in Musacchio v. United States, 136 S. Ct. 709 (2016). In Musacchio, the Court held that a defendant "cannot successfully raise" "a statute-of-limitations defense" -- which, like venue, "becomes part of a case only if the defendant puts the defense in issue" -- "for the first time on appeal." Id. at 718. The Court explained that it makes no difference whether the failure to raise the defense at trial "amounts to waiver (which some courts have held to preclude all appellate review of the defense) or forfeiture (which some courts have held to allow at least plain-error review)." Id. at 718 n.3. Even under the forfeiture approach, "[w]hen a defendant does not press the defense," the government does not need to introduce evidence regarding that defense, and "there is no error for an appellate court to correct -- and certainly no plain error." Id. at 718. Accordingly here, because venue becomes part of a case "only if the defendant puts the defense in issue," a defendant "cannot successfully raise" such a defense "for the first time on appeal," regardless of whether the failure to raise the defense is labeled a waiver or a forfeiture. Ibid.

Petitioner also contends (Pet. 7) that Article III's Jury Trial Clause, unlike the Sixth Amendment, concerns "the structure" of the federal courts, and that, as a result, "the accused, or

even litigants collectively, may [not] relieve the federal government of venue limitations under Article III." This Court, however, has held that Article III's Jury Trial Clause "was meant to confer a right upon the accused which he may forego at his election." Patton v. United States, 281 U.S. 276, 297 (1930); see Adams v. United States ex rel. McCann, 317 U.S. 269, 277-278 (1942). In any event, "structural constitutional claims * * * have no special entitlement to review," and there is "no support in principle or in precedent or in policy" for the "sweeping proposition" that the ordinary rules of issue preservation are inapplicable to "structural constitutional [claims]." Freytag v. Commissioner, 501 U.S. 868, 893-895 (1991) (Scalia, J., concurring in part and concurring in the judgment); see also Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1949 (2015) (addressing waiver and possible forfeiture of Article III claim).

c. Petitioner does not contend that the courts of appeals are divided about the general question whether a defendant must put venue in issue at trial in order to raise it on appeal. He does, however, contend (Pet. 8) that they are divided regarding the precise steps that a defendant must take to put venue in issue. But this case does not implicate any such conflict.

Petitioner relies principally on United States v. Zidell, 323 F.3d 412 (6th Cir.), cert. denied, 540 U.S. 824 (2003), and United States v. Kelly, 535 F.3d 1229 (10th Cir. 2008), cert. denied, 555

U.S. 1203 (2009). But the decision below does not conflict with either of those decisions. In those cases, the Sixth and Tenth Circuits determined that a defendant puts venue in issue by making a general motion for judgment of acquittal, but not by making a motion for judgment of acquittal on specific grounds that do not include improper venue. See Zidell, 323 F.3d at 420-421 (explaining that "a general challenge to the Government's proofs * * * suffices to preserve the issue of venue, and * * * a more specific * * * motion operates to waive all grounds not specified"); Kelly, 535 F.3d at 1234-1235 ("'When a defendant challenges in district court the sufficiency of the evidence on specific grounds, "all grounds not specified in the motion are waived."' * * * On the other hand, if a defendant files a general motion for acquittal that does not identify a specific point of attack, the defendant is deemed to be challenging the sufficiency of * * * venue.") (citation omitted). In this case, petitioner moved for judgment of acquittal on the specific ground that "the government has not proven * * * a requisite element dealing with knowledge." Gov't C.A. Supp. App. 143. Thus, the Sixth and Tenth Circuits would not view petitioner's venue challenge to have been properly raised or preserved.

More generally, a writ of certiorari would not be warranted to address a disagreement among the courts of appeals regarding the precise procedural steps that a criminal defendant must take

to put venue in issue. "The courts of appeals have wide discretion to adopt and apply 'procedural rules governing the management of litigation.'" Joseph v. United States, 135 S. Ct. 705, 705 (2014) (statement of Kagan, J., respecting the denial of certiorari) (quoting Thomas v. Arn, 474 U.S. 140, 146 (1985)). And this Court "do[es] not often review the circuit courts' procedural rules." Id. at 707.

d. In all events, this case would be a poor vehicle for addressing the question presented, because venue was proper in the Southern District of Florida, and resolution of the procedural question thus would not affect the outcome of this case. The government's evidence showed that petitioner committed each of his offenses, at least in part, in the Southern District of Florida: petitioner lived there, operated his company from there, prepared the fraudulent visa applications there, mailed those applications to USCIS from there, and solicited at least some unauthorized payments there. Gov't C.A. Br. 18-19 & n.3. And even assuming that the district court committed some error, petitioner cannot satisfy the plain-error standard, because he has not shown that prosecuting him in the Southern District of Florida was obviously erroneous, that it affected his substantial rights, or that it seriously affected the fairness of the judicial proceedings against him.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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