NO: 18-8773

IN THE
SUPREME COURT OF THE UNITED STATES

EMMANUELY GERMAIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITIONER'S REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The government's Brief in Opposition to the Petition for a Writ Certiorari claims that a criminal defendant should not be able to raise a challenge to venue for the first time on appeal and that the court of appeals' decision that the district court's failure to instruct on the essential presentment elements of the 18 U.S.C. § 1546 offense is excused by a "factbound" finding of sufficiency of evidence as to the uncharged offense of signing a false document. BIO 6. The government's arguments are well off the mark, and they confirm that it is appropriate for this Court to grant review.

As to venue for the presentment charge, the government acknowledges that, under two provisions of the Constitution, a crime must be prosecuted in the venue in which it was committed. BIO 11 (citing U.S. Const. Art. III, § 2, Cl. 3; U.S. Const. Amend. VI). The government then asserts: "Courts have repeatedly explained that venue does not constitute an element of a criminal offense." *Id.* The government analogizes the question of proper venue to a statute-of-limitations defense, claiming that just as a defendant waives a statute-of-limitations defense when he fails to raise it at trial, he likewise cannot challenge venue on appeal if he did not do so at trial. BIO 12 ("the government need not affirmatively present evidence of venue in every case. Rather, venue becomes a jury question only if it is 'in issue'."). But this analogy to statutes of limitations is clearly mistaken.

A statute of limitations defense is an affirmative defense. *Smith v. United States*, 133 S.Ct. 714, 718 (2013) (defendant's argument that his withdrawal from a conspiracy triggered the statute of limitations was an "affirmative defense"). "While the Government must prove beyond a reasonable doubt every fact necessary to

constitute the crime with which the defendant is charged, proof of the nonexistence of all affirmative defenses has never been constitutionally required." *Id.* at 719 (citations and brackets omitted).

To support its analogy to the statute of limitations, the government relies on cases which hold that venue need only be proved by a preponderance of the evidence, rather than beyond a reasonable doubt. But, first, this Court has not yet addressed whether venue need be proven only by preponderance of the evidence, instead of beyond a reasonable doubt. Though it may be unnecessary for this Court to resolve this issue to decide the present case, this petition is a vehicle to address whether venue need only be proven by a preponderance of the evidence. The rule that proof of venue need only meet a preponderance standard rather than beyond a reasonable doubt is based on the view that venue is merely a "question of procedure." BIO 12 (quoting *United States v. Stickle*, 454 F.3d 1265, 1271–72 (11th Cir. 2006)). Yet this view clashes with this Court's statements that "[q]uestions of venue in criminal cases . . . are not merely matters of formal legal procedure." *United States v. Johnson*, 323 U.S. 273, 276 (1944) (abrogated by statute on other grounds). The venue requirement reflects "the constitutional concern for trial in the vicinage." *Id.*; *see also Travis v. United States*, 364 U.S. 631, 634 (1961) ("questions of venue are more than matters of mere procedure" because the venue requirement prevents the government from choosing "'a tribunal favorable to' it") (quoting *Johnson*, 323 U.S. at 275). In some jurisdictions, venue must be proven beyond a reasonable doubt. *See Owens v. McLaughlin*, 733 F.3d 320 (11th Cir. 2013) ("In Georgia, venue is an essential element

of the offense, so at Owen's trial, the state was required to prove [venue] beyond a reasonable doubt.").

Second, the cases holding that the government can prove venue by a preponderance of the evidence do not equate venue with an "affirmative defense" for which the government bears no burden. To the contrary, these cases hold that "[t]he Government has the burden of establishing venue." *United States v. Fells*, 78 F.3d 168, 170 (5th Cir. 1996); *accord United States v. Tzolov*, 642 F.3d 314, 318 (2d Cir. 2011) ("The government bears the burden of proving venue."); *United States v. Ebersole*, 411 F.3d 517, 524 (4th Cir. 2005) ("The prosecution bears the burden of proving venue by a preponderance of the evidence."); *United States v. Haire*, 371 F.3d 833, 838 (D.C. Cir. 2004) ("Certainly, the government had the burden of proving venue."), *vacated on other grounds,* 543 U.S. 1109 (2005); *United States v. Miller*, 111 F.3d 747, 749–50 (10th Cir. 1997) ("Venue in federal criminal cases is an element of the prosecution's case which must be proved by a preponderance of the evidence.") (citation omitted); *United States v. Sax*, 39 F.3d 1380, 1390 (7th Cir. 1995) (the government "met its burden" of proving venue by a preponderance of the evidence).

Venue "must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Anderson*, 328 U.S. 699, 703 (1946). Accordingly, better analogies to venue determinations than a statute of limitations defense are presented by cases which address whether the location of a crime subjects the accused to the court's jurisdiction. Typically, the government bears the burden of proof on such questions, even though these questions do not, as the

government puts it here, "prove or disprove the guilt of the accused." BIO 12 (citation omitted). *See*, *e.g.*, *United States v. Izydore*, 167 F.3d 213, 220 (5th Cir. 1999) (reversing wire fraud conviction because government failed to prove an "interstate nexus")' *United States v. Gabrion*, 517 F.3d 839, 871 (6th Cir. 2008) (government bore burden of proof on whether murder occurred on parcel of national forest over which the federal government had criminal jurisdiction); *United States v. Ayarza-Garcia*, 819 F.3d 1043, 1046 (11th Cir. 1987) (government bears burden of proof on whether a vessel was subject to the jurisdiction of the United States) (superseded by statute).

The government claims the present case would be "a poor vehicle" to address whether a defendant may challenge venue for the first time on appeal, because petitioner committed his offenses "at least in part" in the Southern District of Florida, claiming that petitioner "mailed" his applications from this venue, and "solicited at least some unauthorized payments from there." BIO 17. But this argument is meritless and contradicts the government's argument on Question One of the petition. First, the record does not support attributing to petitioner responsibility for the presentment offense at all, particularly where the mailings by an immigration attorney from a law office in North Miami, Florida were not connected to petitioner. Pet. C.A. Reply Br. at 5–6. Thus, as to Question One of the Petition, the government concedes that the court of appeals did not find evidence of presentment of the documents by petitioner to even be sufficient to sustain the conviction. BIO 9–10 (noting without dispute petitioner's contention 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 [and] that, instead of stating that the evidence supporting conviction was 'overwhelming,' the court stated that the evidence was 'sufficient.'") (quoting Pet. 5). The government's principal ground of opposition to granting review as to Question One—that the decision by the court of appeals to excuse the failure to instruct the jury on the charged presentment offense is excused by a factbound determination of the bare sufficiency of evidence that petitioner signed the relevant immigration documents and thus committed a related offense, *see* BIO 10–11—makes the government's reliance on purported evidence of presentment by petitioner particularly unwarranted

Second, in *United States v. Ramirez*, 420 F.3d 131, 141 (2d Cir. 2005), the Second Circuit held that, for "presenting" offenses under 18 U.S.C. § 1546, venue was proper in a district where documents are *presented*, not in a district where acts "preparatory" to this offense were committed. Germain C.A. Reply Br. at 6–7.

The Constitution requires prosecution of a criminal offense in the location where the crime was committed and jury instructions as to the essential offense elements. The Constitution's due process, jury trial, and venue requirements should be given force. The petition in this case presents an excellent vehicle for review of important questions regarding both venue and instructional error.

Respectfully submitted,

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