No. _____

In the

Supreme Court of the United States

Deborah Petty,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Was venue proper in the Northern District of Texas when the crimes were actually committed in Nevada and Florida?

PARTIES TO THE PROCEEDING

Petitioner is Deborah Petty, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit:

- *United States v. Petty*, 834 F. App'x 107 (5th Cir. 2021)
- *United States v. Petty*, 810 F. App'x 293 (5th Cir. 2020)
- *United States v. Petty*, No. 3:14-CR-00498-M-1 (April 10, 2019)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Deborah Petty seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinions of the Court of Appeals are reported at *United States v. Petty*, 834 F. App'x 107 (5th Cir. 2021) and *United States v. Petty*, 810 F. App'x 293 (5th Cir. 2020). The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit entered judgment on January 26, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES AND GUIDELINES PROVISIONS

Article III limits the location of trials to "the State where the said Crimes shall have been committed." U.S. Const. Art. III, § 2 cl. 3.

The Sixth Amendment grants a criminal defendant a right to be tried "by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. Amend VI.

The Federal Rules of Criminal Procedure likewise limit prosecutions to "a district in which the offense was committed." Fed. R. Crim. P. 18.

STATEMENT OF THE CASE

I. Facts and Proceedings Below

Taking the government's allegations as true, Deborah Petty, Appellant, stole at least seven patient identities during her employment at Western Regional Center for Brain and Spine Surgery (Western Brain and Spine), in Las Vegas, from November 28, 2011 to June 29, 2012. (ROA.154,3560). She then used the stolen identities to commit food stamp fraud in Florida between February 23, 2012 and August 26, 2013. (ROA.154,285). Ms. Petty then moved to Texas in March 2014 to live with her daughter. (ROA.155). When Ms. Petty moved out of her daughter's residence, she left behind a box that contained documents with the stolen identities. (ROA.999-1000). The daughter reviewed the documents and contacted local authorities, which triggered a fraud investigation. (ROA.999-1000).

On December 16, 2014, the government filed an indictment alleging two counts: (1) Wrongful Disclosure of Individually Identifiable Health Information, in violation of 42 U.S.C. § 1320d-6; and (2) Aggravated Identity Theft, in violation of § 1028A(a)(1). (ROA.19-20). The timespan for the offenses, as alleged in the indictment, was "[f]rom on or about November, 2011, through on or about July, 2014." (ROA.19). On October 19, 2016, the government filed a superseding indictment, alleging three counts: (1) Wrongful Disclosure of Individually Identifiable Health Information, in violation of 42 U.S.C. § 1320d-6; (2) Aggravated Identity Theft, in violation of § 1028A(a)(1); and (3) Aiding and Abetting Food Stamp Benefit Fraud, in violation of 7 U.S.C. § 2024(b). (ROA.125-27). As to Count 1 (wrongful disclosure), the temporal

scope of the alleged offense was November 2011 to July 2014 (ROA.125); as to Count 2 (aggravated identity theft), the temporal scope of the alleged offense was "[o]n or about June 2012" (ROA.126); as to Count 3 (food stamp fraud), the temporal scope of the alleged offense was February 1, 2012 to December 31, 2012 (ROA.127). On January 10, 2017, the government filed a second superseding indictment, alleging eight counts: (1-7) Identity Theft, in violation of 18 U.S.C. § 1028(a)(7); and (8) Aggravated Identity Theft, in violation of 18 U.S.C. § 1028A(a)(1). (ROA.156-57). The temporal scope of both alleged offenses was March 2014 to May 2014. (ROA.156-57).

On January 18, 2017, defense counsel filed a motion to dismiss the second superseding indictment for improper venue. (ROA.183-93). In the motion, the defense argued that venue was improper because, although Ms. Petty continued to possess the stolen identities, she no longer had an intent to defraud, as demonstrated by a tenuous temporal and spatial connection to the underlying fraud that had occurred many months earlier. (ROA.185-88). The district court then ordered the government to respond. (ROA.195). In its response, (ROA.284-95), the government explained that it intended to prove, at trial, that Ms. Petty "engaged in a long-running and continuing scheme to steal identities and utilize those identities to perpetrate food stamp fraud." (ROA.284). The government then promised that it "will establish venue by a preponderance of the evidence that Petty committed the essential elements in this district." (ROA.287). On January 20, 2017, the district court denied the defendant's motion to dismiss without prejudice and advised that "Defendant may

reassert her Motion to Dismiss at the close of the government's case-in-chief and/or other appropriate time during the trial." (ROA.321).

At trial, the government called the seven Nevada victims, all of whom had their identities stolen in Nevada, which were used to defraud the Florida food stamp program. While the government also insinuated that Ms. Petty stole identities in Texas, they neither charged Ms. Petty with these offenses nor presented any Texas victims. (ROA.156-57). At the end of its case in chief, the government rested. (ROA.723). The defense then moved for acquittal, under Rule 29, arguing that the government had not established, by a preponderance of the evidence, that venue was appropriate in the Northern District of Texas. (ROA.725). Specifically, the defense alleged that the government had not shown any act in connection with Ms. Petty's possession of documents in the Northern District of Texas. (ROA.725). In response, the district court commented: "I have been listening hard for what the Government was going to prove to link this up, and I didn't hear much at all." (ROA.725). In response, the government emphasized Ms. Petty's possession of the documents in the Northern District and stated its belief that Ms. Petty would have continued to defraud food stamp programs if she were not caught. (ROA.726-27). The district court remained concerned with the absence of evidence of intent to commit fraud in Texas:

> So your -- I mean, your argument would be that if a defendant committed a fraud of this type in one state and then reformed, decided to get out of the crime business, moved to Texas, got a moving van, packed up everything that she owned, put it in a storage unit and didn't ever look at it again, that you could go to the jury on venue in Texas? Because that's possession.

(ROA.730). The court then concluded as follows:

> At this moment, I am very much inclined to send the case to the jury. I'm almost equally inclined to take it away from the Government if you win.
>
> I am -- I think this is a stretch. And I was concerned about this issue when it was first raised, whether you could get there on venue. And you-all indicated to me that had you a theory on which you were going to be able to get there. And, frankly, I think it's as thin as it can be.
>
> But because there's not very much law on this and the venue instruction is not -- there's not much in the circuit on this at all -- the circuit instruction relates to a different charge than this one -- I'm probably going to let it go to the jury so we have a finding, but I'm very concerned about whether this gets you there.

(ROA.731). With that, the court allowed the venue question to go to the jury while, at the same time, taking the issue under advisement. (ROA.732). The district court commented, however, "I'm putting you-all on notice that if the jury convicts Ms. Petty, I'm going to seriously consider acquitting her notwithstanding the verdict based on the pending question." (ROA.742). After closing arguments, the jury returned a verdict of guilty on all counts. (ROA.351-53). The jury also found that venue was proper. (ROA.351-53). In a post-judgment ruling, the district court upheld the jury's finding. (ROA.387-96).

At sentencing, the district court imposed a sentence of 42 months imprisonment, followed by two years of supervised release. (ROA.438-39). On appeal, the Fifth Circuit affirmed the conviction but vacated the district court's restitution and forfeiture award and remanded. *United States v. Petty*, 810 F. App'x 293, 297 (5th Cir. 2020).

REASON FOR GRANTING THIS PETITION

The government went to great lengths at trial to prove that Ms. Petty committed identity theft in Nevada in 2011 and 2012 and food stamp fraud in Florida in 2012 and 2013. There is one problem: she was being prosecuted in the Northern District of Texas, a place she never lived until March 2014. By then, although she still possessed documents related to her criminal past, she had ceased her fraudulent activity. And although the government insinuated that she continued to commit food stamp fraud in Texas, it never charged her with such crimes. This case is an example of the type of out-of-venue prosecution prohibited by the Sixth Amendment and Federal Rule of Criminal Procedure 18.

I. The evidence at trial was insufficient to establish venue for identity theft or aggravated identity theft in the Northern District of Texas.

This argument is currently foreclosed by the law-of-the-case doctrine—based on the original appeal—and is made here solely to preserve it for further review. *United States v. Petty*, 810 F. App'x 293 (5th Cir. 2020); *see also United States v. Demmitt*, 563 F. App'x 300, 300 (5th Cir. 2014).

The government was able to prove, at trial, that Deborah Petty committed identity theft. It did not, however, prove any instance of either identity theft or aggravated identity theft that occurred in the Northern District of Texas. As such, this Court should vacate Ms. Petty's conviction. *See United States v. Auernheimer*, 748 F.3d 525, 541 (3d Cir. 2014).

A. The evidence does not support venue in the Northern District of Texas for identity theft.

The venue requirement in federal criminal cases is on sound authority. Article III limits the location of trials to "the State where the said Crimes shall have been committed." U.S. Const. Art. III, § 2 cl. 3. The Sixth Amendment grants a criminal defendant a right to be tried "by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. Amend VI. The Federal Rules of Criminal Procedure likewise limit prosecutions to "a district in which the offense was committed." Fed. R. Crim. P. 18. In order to assess the proper venue for a trial, courts must determine the *locus delicti* of the charged offense "from the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999) (quoting *United States v. Cabrales*, 524 U.S. 1, 6-7 (1998)). This is a two-step process: (1) identify the conduct constituting the offense; and then (2) discern the location of the commission of the criminal acts. *Id*.

The federal identity theft statute, located at 18 U.S.C. § 1028(a)(7), contains four substantive elements: (1) knowing transfer, possession, or use; (2) without lawful authority; (3) a means of identification of another person; and (4) with the intent to commit, or to aid or abet, or in connection with, any unlawful activity. 18 U.S.C. § 1028(a)(7); *United States v. Ricard*, 922 F.3d 639 (5th Cir. 2019).

Counts 1 through 7 of the government's Second Superseding Indictment charged Ms. Petty with identity theft of seven specific people, identified by their initials: T.B., C.M., J.G., C.L., L.N., K.O., and R.J. (ROA.156). Each testified at trial. Each testifying witness stated that they provided patient information to the Western

Center for Brain and Spine, in Las Vegas, that they did not know Deborah Petty, and that they never applied for food stamps in Florida. Each later testified that they did not live in Texas at the time of either the identity theft or the subsequent food stamp fraud. Based on the government's evidence at trial, Ms. Petty stole these seven identities during her employment at Western Regional Center for Brain and Spine Surgery (Western Brain and Spine), in Las Vegas, from November 28, 2011 to June 29, 2012. (ROA.285). She then used the stolen identities to commit food stamp fraud in Florida between February 23, 2012 and August 26, 2013. (ROA.285). Ms. Petty did not move to Texas, however, until March 2014. (ROA.286).

The following facts are undisputed and uncontroverted:

1. The identities of the seven individuals identified in Counts 1 through 7 of the Second Superseding Indictment were stolen no later than June 29, 2012, which was Ms. Petty's last day of employment with Western Brain and Spine. (ROA.3560).

2. Western Brain and Spine is located in Las Vegas, Nevada. (ROA.3560).

3. The food stamp fraud, as to these seven individuals, occurred no later than December 2012. (ROA.1290-96).

4. The target of the food stamp fraud was the State of Florida. (ROA.154-55).

5. Ms. Petty moved to Texas, to live with her daughter, no earlier than March 2014. (ROA.156,3560).

6. When Ms. Petty moved out of her daughter's residence, she left behind a box that contained documents with stolen identities. (ROA.3560).

7. The government did not charge, in Counts 1 through 7, any identity theft that originated in Texas, any identity theft of a Texas resident, or any food stamp fraud that targeted the State of Texas. (ROA.153-57).

The government's theory of the case, as to venue, was that Ms. Petty continued to possess these identities, in a box, after she moved to Texas, and therefore violated the federal identity theft statute in the Northern District of Texas. (ROA.155 at ¶ 13). But this was an afterthought in the government's case. The trial transcript illustrates that the government—despite artfully superseding its indictment, twice, to avoid a venue challenge—put on a case about identity theft in the state of Nevada and food stamp fraud in the state of Florida. Then, it argued that because Ms. Petty still possessed the documents at a later date, in another place, she also committed identity theft there, even when it had become clear that Ms. Petty—temporally and spatially—no longer had designs on those seven victims. In fact, the testimony at trial showed that the food stamp cards attributed to the victims were no longer usable without re-authentication or reapplication, and that Ms. Petty never sought to do so. (ROA.659-61). And while the government argued to the jury that Ms. Petty continued to steal identities in the Northern District of Texas and continued to commit food stamp fraud here (*E.g.*, ROA.796), the government never charged Ms. Petty as to any such victims. (ROA.156-57).

At issue then is whether the crime of identity theft continues so long as the accused continues to possess the means of identification or if it terminates when the facts demonstrate that the defendant no longer possesses an intent to defraud. The Fifth Circuit has held, albeit in other circumstances, that possession is generally a continuing offense. *E.g., United States v. Davis*, 666 F.2d 195, 199 (5th Cir. 1982) (possession with intent to distribute drugs is a continuing offense). But possession

alone is not dispositive. The Supreme Court has held that a continuing offense can be interrupted when the facts demonstrate that a crime is no longer being committed. In *United States v. Midstate Horticultural Co.*, the Supreme Court considered whether a defendant company violated the Elkins Act—which prohibits obtaining transportation at less than a lawful rate—in every jurisdiction the illegal transportation passed through even when the defendant, at times, paid a lawful rate. 306 U.S. 161, 162-63 (1939). The Supreme Court adopted the following definition of continuing offense:

> A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy. Where such an act or series of acts runs through several jurisdictions, the offense is committed and cognizable in each.

Id. at 166 (quoting *Armour Packing Co. v. United States*, 153 F. 1, 5-6 (8th Cir. 1907)). The facts of *Midstate*, however, showed that a lawful rate was paid for transportation through the jurisdiction of conviction, the Eastern District of Pennsylvania. *Id*. Thus, the continuing offense was interrupted by lawful activity, rendering Pennsylvania transportation "not infected by relation to any unlawful agreement, purpose, or intent at the time it occurred." *Id*.

Likewise here. While Ms. Petty possessed the means of identification (proof of the crime) when she moved to Texas in March of 2014, she never used them here and had not used them for some time. (*See* ROA.1291-97). This inactivity, coupled with her abandonment of the "box of fraud" when she moved out of her daughter's house (ROA.3560), demonstrate that she no longer possessed an intent to defraud in the

Northern District of Texas, which is an essential element of an offense under 18 U.S.C. § 1028(a)(7).

The Third Circuit considered venue in a similar context in *United States v. Auernheimer*, 748 F.3d 525 (3d Cir. 2014). There, the defendant was charged in New Jersey with committing identity fraud in violation of 18 U.S.C. § 1028(a)(7). He was alleged to have used means of identification to violate the Computer Fraud and Abuse Act. The Third Circuit noted that neither defendant was "ever in New Jersey while allegedly committing the crime" and that the computer servers were also located elsewhere. 748 F.3d at 531. Nevertheless, the government alleged that venue was appropriate because the fraud involved the disclosure of email addresses belonging to New Jersey residents. *Id*.

The court began by noting that venue is only proper in the place where "essential conduct elements" took place. *Id*. at 533. "Circumstantial elements," those things which are essential elements of the crime but are simply facts that existed at the time the crime was committed, do not provide a basis for venue. *Id*. (citing *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999)). In determining whether venue was appropriate in New Jersey, the Third Circuit determined that the "two essential conduct elements under § 1028(a)(7) are transfer, possession, or use, and doing so in connection with a federal crime or state felony. *Id*. at 535 (citing *Rodriguez–Moreno*, 526 U.S. at 280 (noting that "during and in relation to any crime of violence" was an essential conduct element of a firearms statute)). First, the *Auernheimer* court addressed the second element and noted that no "essential conduct element" of the

Computer Fraud and Abuse Act occurred in New Jersey. *Id.* at 534-35. Accordingly, the element of "during and in relation to a crime" did not suffice to sustain venue in New Jersey. *Id.*

Next, the court addressed the government's position that Auernheimer's transfer, possession, or use occurred in New Jersey. Although the defendant used personal identifiers, there was no evidence that he used them in New Jersey. *Id.* at 535-36. In addition, the government's argument that he transferred the information with the intent to violate a New Jersey statute was insufficient when there was no allegation or evidence that he transferred the information to someone in New Jersey or that a violation of New Jersey law occurred in New Jersey. *Id.* Because no essential conduct of identity theft was committed in New Jersey, the Third Circuit concluded that venue was improper there. *Id.* at 536.

As in *Auernheimer*, Ms. Petty is not alleged to have committed any of the essential conduct elements of food stamp fraud in the Northern District of Texas. (*See* ROA.156-57). Accordingly, the issue here is whether Ms. Petty transferred, possessed, or used a means of identification in the Northern District of Texas. There is no allegation that Ms. Petty "transferred" or "used" any means of identification in this district. The primary allegation is that Ms. Petty brought to Texas the personal identifiers previously used to commit food stamp fraud in Florida. (ROA.155 at ¶ 13).

Mere possession of the means of identification in this district, some seven months after the completion of the fraud underlying the charge cannot suffice to sustain venue in the Northern District of Texas. Rather, there must be some true

connection to the underlying fraud. *See* Fed. R. Crim. Pro. R. 18 ("[T]he government must prosecute an offense in a district *where the offense was committed*."). Imagine a bank robber who obtained architectural plans for a bank in Florida while working in Nevada. The Florida bank is robbed and the robbery is unsolved for months. Later, during an unrelated search of the robber's new home in Texas, the architectural plans are discovered and they contain the detailed plans of the robbery, in the defendant's handwriting. Clearly, evidence of the crime was obtained in Texas but no one would assert that venue for the Florida bank robbery is proper here. Similarly, although evidence of the crime of identity theft was found in this district, its location here is insufficient to sustain venue. Rather, venue is appropriate in Nevada, where the identifiers were stolen and from where they are alleged to have been sent to Florida. Venue is also appropriate in Florida, where the food stamp benefit fraud took place. For these reasons, this Court should vacate the convictions due to improper venue.

B. The evidence also does not support venue in the Northern District of Texas for aggravated identity theft.

Venue is also not proper with respect to Count Eight of the Second Superseding Indictment, which charges Aggravated Identity Theft, in violation of 18 U.S.C. § 1028A. That statute states:

> Whoever, during and in relation to any felony violation . . . , knowingly transfers,possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

18 U.S.C. § 1028A.

Similar to identity theft, the second prong of Aggravated Identity Theft requires that the transfer, possession, or use of a means of identification be "during and in relation to" another crime. Notably, "during and in relation to" implies even more of a temporal relationship than does "in connection with." The identical language is used in 18 U.S.C. § 924(c). In considering the application of "during and in relation to" to venue, the Supreme Court noted that venue was appropriate in any place where the crime of violence or drug trafficking crime took place, even if the possession of the firearm was only in one of several places. *United States v. Rodriguez-Moreno*, 526 U.S. 275, 281 (1999). At issue in *Rodriguez-Moreno* was the possession of a firearm in one state during the course of a kidnaping which continued over several states. *Id*. So long as the underlying offenses continued in multiple venues, the defendant could appropriately be charged with gun possession in any of those districts. *Id*.

The Second Superseding Indictment alleges that Ms. Petty's possession of the identifiers of R.J. was during and in relation to the crime of Fraud and Related Activity in Connection with Access Devices, in violation of 18 U.S.C. § 1029(a)(3). In turn, that statute penalizes an individual who "knowingly and with intent to defraud possesses fifteen or more devices which are counterfeit or unauthorized access devices." 18 U.S.C. § 1029(a)(3).

As described above, the government alleges that Ms. Petty used personal identifiers, including those of R.J., to obtain Florida food stamp benefits from February 2012 to August 2013. (ROA.154-55). Those benefits were provided via an

electronic debit card, or access device. (ROA.154). Those access devices could only be used in Florida. (ROA.659-61). The government's evidence shows that many of those access devices were used in Florida during the dates alleged in the indictment. (ROA.1291-96). Importantly, no access devices alleged to have been fraudulently obtained by Ms. Petty were used after August 2013. (ROA.1291-96). When the evidence of the crime was found in the Northern District of Texas, it included several Florida electronic benefit cards. None were active and there is no evidence that Ms. Petty had the intent or the ability to use them.

For venue to lie in the Northern District of Texas for violating 18 U.S.C. § 1029(a)(3), the government must prove that Ms. Petty possessed fifteen or more access devices "with intent to defraud" while in this district. The government did not show that, at the time Ms. Petty possessed the access devices in Texas, she had either the intent or the ability to use them to defraud. (ROA.659-61). The access devices were in a pile of papers, which was evidence of the commission of Nevada-Florida crimes only.

If Ms. Petty did not violate 18 U.S.C. § 1029(a)(3) in this district, then venue is not appropriate for Count Eight. Accordingly, Ms. Petty asks this Court to vacate her conviction on Count 8.

CONCLUSION

This Court should grant the Petition and proceed with briefing on the merits and oral argument.

Respectfully submitted,

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