No. _____

In the

Supreme Court of the United States

DAKOTA STEWART,
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

In a prosecution for failing to update sex offender registration under 18 U.S.C. § 2250(a), does venue lie in the district where the offender resided prior to his interstate travel?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption.

DIRECTLY RELATED PROCEEDINGS

1. United States v. Dakota Stewart, No. 3:18-CR-153 (N.D. Tex.)

2. United States v. Dakota Stewart, No. 19-11249 (5th Cir.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully asks for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was not selected for publication. It is available at 843 Federal Appendix 600 and is re-printed in the Appendix to this Petition.

JURISDICTION

The Fifth Circuit issued its judgment on February 5, 2021. On March 19, 2020, this Court extended the deadline to file certiorari to 150 days from the judgment. The Court was closed on July 5, 2021, making the petition due today. This Court has jurisdiction to review the Fifth Circuit's final decision under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2 of the United States Constitution provides, in pertinent part:

> 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.

The Sixth Amendment to the Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

Title 18, § 3237(a) of the United States Code provides:

> (a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one

district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

Title 18, §2250(a) of the U.S. Code provides:

(a) In general.--Whoever--

(1) is required to register under the Sex Offender Registration and Notification Act;

(2) (A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

Title 34, § 20913(c) of the U.S. Code provides:

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

STATEMENT

After a federal grand jury indicted Petitioner for violating 18 U.S.C. § 2250(a), he put the Government to its burden of proof at trial. Viewed in the light most favorable to the Government, the evidence established that Dakota Stewart had a federal obligation to register as a sex offender arising from a conviction in Texas state court in 2009. App., *infra*, 1a. Texas law requires all "penal institutions" to prepare registration paperwork before releasing sex offenders into the community. 5th Cir. R. 449; *see* Tex. Code Crim. P. art. 62.053 (West eff. Sept. 1, 2017 through Aug. 31, 2019). As required by Texas law, the prison collected the address where Mr. Stewart intended to live upon release (with his Aunt in Mansfield, Texas, which is in the Northern District of Texas); warned Mr. Stewart of his registration obligations; and forwarded both the address information and the warning form to the Mansfield Police Department. 5th Cir. R. 423–424.

In June of 2014, Mansfield Police Officer Mark Malcom met with Mr. Stewart and went over that form, including the warnings about keeping registration current under Texas law. 5th Cir. R. 426–434. Mr. Stewart's aunt would later testify that he did move in with her after release, but moved away after "a few months." 5th Cir. R. 472. He was fed up with police hassling him and said he would start going by the name "Rasputin." 5th Cir. R. 475–477. He left Mansfield, and did not update his registration paperwork. When Mansfield Police Officer Chauncey London came looking for him, his aunt reported that he had left to join the Merchant Marines. 5th Cir. R. 459.

But that disappearance is not the one that triggered this federal prosecution. After he disappeared from Mansfield, Dallas Police officers found the man they would later identify as Dakota Stewart in March of 2015. 5th Cir. R. 480–481. They arrested him and convicted him of the Texas offense of "attempted failure to register as a sex offender." 5th Cir. R. 595. He was incarcerated at the Dallas County Jail until January 26, 2017. 5th Cir. R. 450. Unlike the earlier incarceration, there is no evidence that the Dallas County Jail complied with its obligation to prepare the pre-release notification paperwork before his release. And the Government presented no evidence at trial that Mr. Stewart had ever traveled across state lines before these events.

At this point in the story—lamentably, for the Government—the trial record goes silent. We do not know where the man they called Dakota Stewart went when he left the Dallas County Jail. No one bothered to update his registration paperwork at the jail, possibly because the judgment of conviction for his most recent offense asserted that the "Sex Offender Registration Requirements do not apply to the Defendant." 5th Cir. R. 595. He next appeared in Colorado, in the "February, maybe early March time frame." 5th Cir. R. 488.

Around May or June of 2017, this man—who was calling himself Demitri Rasputin—moved, along with his girlfriend into an extremely isolated and rural part of Colorado. They first lived with, and then next to, Allen Bunger, who testified at trial. 5th Cir. R. 488–490. There were several things that seemed unusual about Bunger's new neighbor. For instance, the man did not have a driver's license; he

claimed to be both 57 years old (he looked much younger) and born "after Chernobyl" (he looked much older). 5th Cir. R. 491. "Demitri" once filled out a job application with Bunger's computer using an entirely different name: Yuri Efimovich Renkov. 5th Cir. R. 492–493, 601. Demitri and his girlfriend lived in a pop-up camper, and they covered the tent portion with "limbs off pine trees." 5th Cir. R. 496, 523, 604.

The Government would later contend—and the jury presumably found—that this "Demitri" and Dakota Stewart were the same person. But rural Colorado is a very mind-your-own-business kind of place, and—unlike some of the more unsavory neighbors—Demitri and his girlfriend did not cause any problems for Bunger or anyone else. Bunger did notice that when the Sheriff was in the neighborhood, Demitri and his girlfriend made themselves scarce. 5th Cir. 497.

Unbeknownst to the couple, their idyllic isolation would soon be interrupted. Back in Texas, two different police agencies were trying to track down Dakota Stewart. In Dallas, a city detective named Steve Brown learned about the county's earlier decision to release Dakota Stewart without updating his registration paperwork. 5th Cir. R. 450. In Mansfield, an officer named Chauncey London learned the same information, and it made him angry. 5th Cir. R. 462. They searched state and national sex offender records, but found no subsequent registration information in Texas or anywhere else. 5th Cir. R. 450–451. Brown sought, and obtained, an arrest warrant for Dakota Stewart. 5th Cir. R. 451.

By March 2018, the feds were involved. The Deputy U.S. Marshal for Colorado learned about the Texas warrant, and developed a lead that Dakota Stewart might

be living in Colorado. 5th Cir. R. 518. He tracked down Petitioner and his girlfriend to their isolated home in Colorado and arrested him. 5th Cir. R. 519–528.

A federal grand jury returned an indictment that alleged venue in the Northern District of Texas:

> Beginning on or about June 30, 2017, and continuing through March 6, 2018, in the Dallas Division of the Northern District of Texas and elsewhere, the defendant, Dakota Stewart, a per-son required to register under the Sex Offender Registration and Notification Act, traveled in interstate and foreign com-merce and knowingly failed to register as a sex off ender and update a registration, as required by the Sex Offender Registra-tion and Notification Act.
>
> In violation of 18 U.S.C. § 2250.

5th Cir. R. 535.

Petitioner did not move to dismiss the indictment for improper venue prior to trial, for two reasons. First, the indictment itself alleged venue in the Northern District of Texas, and thus was facially sufficient. Second, given the evidence that Dakota Stewart did not comply with his federal registration obligations within the Northern District of Texas, the Government *might have* presented evidence at trial tending to show that he traveled across state lines at some earlier point.

But the Government had no such evidence. Of the ten witnesses who testified at trial, none of them had any personal knowledge of what happened during the critical time period after Dakota Stewart was booked into the Dallas County Jail in 2015 but before Petitioner arrived in Colorado some time in 2017.

At the close of the Government's evidence, Petitioner moved for a judgment of acquittal. 5th Cir. R. 535. When the court denied that motion, the defense requested

a "standard" venue instruction, arguing that the Government's evidence put venue in issue. 5th Cir. R. 536. The Defense noted the circuit split over where proper venue lies in a SORNA prosecution, noting that the Fifth Circuit had not yet addressed the issue. 5th Cir. R. 536–537. Some circuits hold that venue is only proper in a "completing" jurisdiction—the place where an offender fails to register after moving in interstate commerce—while others hold that "it can be in either the beginning or completing jurisdiction as far as the crossing state lines." 5th Cir. R. 536. The Defense also noted that, even under the more expansive concept of venue, there was no evidence that "any part of this crime took place in the Northern District of Texas," because there is no evidence of where the Appellant was when he crossed state lines. 5th Cir. R. 537. The Defense wanted "to ensure that that's preserved for appeal." 5th Cir. R. 537. The jury returned a guilty verdict.

On appeal, Petitioner renewed his challenge to the sufficiency of the trial evidence on the element of venue. He argued that the *locus delicti* of the crime defined in § 2250(a) is "the place where the offender fails to register (or to update registration) after traveling." 5th Cir. Initial Br. 14–18. On this record, that could only be the District of Colorado. He argued in the alternative that the Government failed to prove that any part of the offense took place in the Northern District of Texas. 5th Cir. Initial Br. 18–19.

The Fifth Circuit affirmed. The court first decided that Petitioner "forfeited" this challenge, which subjected his claim to the plain-error standard of review. App., *infra*, 4–7. Acknowledging the circuit split over venue in a § 2250(a) prosecution, the

Fifth Circuit held that any error was not "plain." App., *infra*, 7a. This timely petition follows.

REASONS TO GRANT THE PETITION

I. THE CIRCUITS ARE DIVIDED OVER THE QUESTION PRESENTED.

For a defendant to commit the crime defined at 18 U.S.C. § 2250(a), three things must happen "in sequence": (1) "a person becomes subject to SORNA's registration requirements"; (2) the person "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country"; and then (3) the person "knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act." *Carr v. United States*, 560 U.S. 438, 446–448 (2010).

The Circuits are divided over which of these events constitutes the *beginning* of the crime. No one contends that event (1) gives rise to venue for a subsequent failure to register. In other words, no circuit has held that venue for a federal SORNA violation lies in the district *where the defendant became subject to* SORNA. Most circuits have held that venue arises at step two, and thus venue lies "where the interstate journey begins." *United States v. Holcombe*, 883 F.3d 12, 15–16 (2d Cir. 2018), *cert. denied*, 140 S. Ct. 820 (2020). The Seventh Circuit has held otherwise—the offense does not begin until a defendant fails to register or update his registration after traveling. *See United States v. Haslage*, 853 F.3d 331, 335 (7th Cir. 2017).

The Seventh Circuit's view makes the most sense: federal authorities could neither arrest nor prosecute Dakota Stewart when he crossed into Colorado. He had not yet violated 18 U.S.C. § 2250(a). He was under a federal obligation to update his registration "*not later than 3 business days* after each change of name, residence,

employment, or student status." 34 U.S.C. § 20913(c) (emphasis added). But his violation did not give rise to criminal liability until three days *after* he crossed the border. His crime had not yet begun.

A. The lower courts recognize and acknowledge the conflict.

In *Haslage*, the Seventh Circuit held that § 2250(a) only criminalizes "the failure to register *after* traveling." 853 F.3d at 334. On that view, a defendant does not commit any part of a SORNA violation in the departure state. *Id.* The First, Second, Fourth, Eighth, Tenth, and Eleventh Circuits all disagree. These courts have all held that venue *is* proper in the departure district. *See United States v. Seward*, 967 F.3d 57, 65 (1st Cir. 2020), *cert. denied*, 20-1116, 2021 WL 1951813 (U.S. May 17, 2021); *United States v. Holcombe*, 883 F.3d 12, 15 (2d Cir. 2018), *cert. denied*, 140 S. Ct. 820 (2020); *United States v. Spivey*, 956 F.3d 212, 216–217 (4th Cir.), *cert. denied*, 141 S. Ct. 954 (2020); *United States v. Howell*, 552 F.3d 709, 718 (8th Cir. 2009); *United States v. Lewis*, 768 F.3d 1086, 1090 (10th Cir. 2014); and *United States v. Kopp*, 778 F.3d 986, 988 (11th Cir. 2015). These courts have decided that departure from the earlier residence (and/or the beginning of interstate travel) is a necessary element for proving § 2250(a), and that the offense therefore "begins" at the place of departure.

Many of these courts have openly acknowledged the conflict with *Haslage*. *See*, e.g., *Seward*, 967 F.3d at 59; *Spivey*, 956 F.3d at 217; *United States v. Lewallyn*, 737 F. App'x 471, 474 (11th Cir. 2018); *Holcombe*, 883 F.3d 12, 16 ("In agreeing with a majority of our sister circuits, we must respectfully disagree with the analysis in" *Haslage*.)

The Government itself recently acknowledged the "lopsided circuit conflict" on this question. U.S. Br. 6, *Seward v. United States*, No. 20-1116 (U.S. filed April 14, 2021). It is impossible to reconcile these two competing positions: either venue arises when (and where) the offender fails to comply with SORNA *after* crossing state lines; or venue arises even before he commits the crime at the moment he departs from his earlier residence (or at the moment he travels across state lines, if that is a separate event).

B. The Government also admits the existence of the conflict.

The Government recently admitted that "a lopsided circuit conflict exists on this issue." U.S. Br. 12, *Seward v. United States*, No. 20-1116 (U.S. filed April 14, 2021) ("Seward Opp.").

II. THE QUESTION PRESENTED WARRANTS THIS COURT'S ATTENTION.

Despite this entrenched and acknowledged circuit conflict, the Government has thus far avoided Supreme Court review by arguing that "the conflict has limited practical importance." Seward Opp. 6. That view runs directly contrary to values upon which the nation itself was built. The Government's own internal "guidance" to its prosecutors also recognizes that it is proper to prosecute this crime in the district of post-travel violation rather than the district where someone lived before they traveled. Thus, in a "lopsided" majority of circuits, the Government retains the power to prosecute someone for this offense in an unlawful (and less-than-ideal) forum.

A. The founding generation assigned critical weight to the right to be tried in the place where the crime was allegedly committed.

When listing their reasons for declaring independence, the founders of this nation included the British King's practice of "transporting us beyond the Seas to be tried for pretended offences." *The Declaration of Independence* (U.S. 1776). To ensure that never happened again, the federal Constitution enshrined the rights to trial "in the state where the said Crimes shall have been committed," U.S. Const., art. III, § 2, and to be tried by a jury drawn from "the State and district wherein the crime shall have been committed." U.S. Const., amend. VI.

The nation's foundational documents give no quarter to the Government's argument that trial in Texas is the same as trial in Colorado. Where, as here, criminal liability first attached in the district of Colorado, then trial must proceed in Colorado and the jury must be drawn from Colorado. When it failed to produce any evidence of post-travel SORNA violation in the Northern District of Texas, the Government failed to carry its burden of proof at trial.

B. The Government's "informal guidance" to its prosecutors demonstrates that prosecution is always appropriate in the district where the offender failed to comply after traveling.

Given that a "lopsided" majority of circuits has affirmed the Government's power to drag a defendant back to a district where he formerly resided to try him for a violation committed somewhere else, we might expect the Government to celebrate or at least defend its right to do so when defending those decisions in this Court.

But in February 2019, the Government assured this Court that it "has distributed to prosecutors informal guidance recommending that they" "bring[ ]

prosecutions in the destination district" "where possible." U.S. Br. 12, *Lewallyn v. United States*, No. 18-6533 (U.S. filed Feb. 1, 2019); *see also* Seward Opp. 12. This is at least a tacit recognition that it is appropriate to prosecute this crime in the place where the offender allegedly failed to register after traveling. Requiring prosecution in the district of post-travel violation will not hurt the Government at all. In fact, it at least claims a willingness to do that in all SORNA prosecutions.

There is thus no reason to continue allowing the unlawful practice that has prevailed in a "lopsided" majority of circuits. This Court should hold that venue is *only* appropriate in the state and district where an offender failed to comply with a SORNA obligation after traveling.

III. THIS CASE IS AN APPROPRIATE VEHICLE TO RESOLVE THE CIRCUIT SPLIT.

At trial, the Government presented the jury with a substantial amount of evidence that Dakota Stewart failed to comply with his federal registration obligations while living in Texas. But the Government failed to provide even a scintilla of evidence that these violations occurred *after* interstate travel. On this evidence, the jury could only find a post-travel violation in the State and District of Colorado.

Petitioner pressed this claim before the Fifth Circuit. That court refused to take a definitive position on the question presented because (in its view) Petitioner failed to adequately preserve his argument. Of course, he *did* tell the district court about the circuit split, and he *did* tell the district court he wanted to "ensure that that's preserved for appeal." App., *infra*, 3a. He also moved for a judgment of acquittal. *Ibid.* After granting the petition, this Court could (if it wished) hold that

this was adequate to preserve the issue for plenary appellate review. *Cf. Holguin Hernandez v. United States*, 140 S. Ct. 762, 766 (2020) (Objecting parties need not "use any particular language or even to wait until the court issues its ruling.").

But it would be more appropriate to follow this Court's usual practice and "leave it to the Court of Appeals to consider the effect" of any preservation problems after this Court resolves the circuit split on the underlying question. *Tapia v. United States*, 564 U.S. 319, 335 (2011). If the Seventh Circuit's view is correct, then the Government failed to submit evidence sufficient to prove venue in the Northern District of Texas. This Court's decision will resolve the uncertainty that exists because of the circuit split, and then the Fifth Circuit can decide what effect that should have on Petitioner's conviction.

CONCLUSION

Petitioner asks that this Court grant the petition and set the case for a decision on the merits.

Respectfully submitted,

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