No. 10-1075

In the Supreme Court of the United States

WESLEY TRENT SNIPES, 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 OPPOSITION

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QUESTIONS PRESENTED

1. Whether Article III or the Sixth Amendment required the district court to conduct, at petitioner's request, an evidentiary hearing to determine whether venue was proper before submitting the issue to the jury.

2. Whether the Fifth and Sixth Amendments required the government to prove the facts establishing venue beyond a reasonable doubt.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 611 F.3d 855. The orders of the district court denying petitioner's motions for a change of venue (Pet. App. 35-59, 60-74) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2010. A petition for rehearing was denied on September 29, 2010 (Pet. App. 78-79). On December 22, 2010, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including February 11, 2011. On February 1, Justice Thomas further extended the time within which to file a petition for a writ of certiorari to and including February 26, 2011. The petition for a writ of certiorari was filed on Febru-

ary 28, 2011 (a Monday). 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 Middle District of Florida, petitioner was convicted on three counts of willfully failing to file personal federal income tax returns for 1999, 2000, and 2001, in violation of 26 U.S.C. 7203. The district court sentenced petitioner to three consecutive one-year prison terms, to be followed by one year of supervised release. Pet. App. 11-12. The court of appeals affirmed. *Id.* at 1-34.

1. Around the year 2000, petitioner became involved in an organization called American Rights Litigators (ARL), which was formed to encourage resistance to the tax collection efforts of the Internal Revenue Service (IRS). Pet. App. 2. ARL's principal argument was that domestic earnings of individual Americans do not qualify as taxable income, because the earnings do not come from a source listed in 26 U.S.C. 861. Pet. App. 2. Consistent with the argument promoted by ARL, petitioner failed to file personal income tax returns from 1999 through 2004, despite earning more than $37 million in gross income during those years as a movie actor and producer. *Id.* at 2-3.

In correspondence with the IRS, petitioner advanced several additional justifications for his failure to file personal income tax returns. Petitioner asserted that he was a "non-resident alien to the United States," that "a taxpayer is defined by law as one who operates a distilled spirit Plant," and that the Internal Revenue Code's taxing authority "is limited to the District of Columbia and insular possessions of the United States,

exclusive of the 50 States of the Union." Pet. App. 3. Petitioner also claimed that as a "fiduciary of God, who is a 'nontaxpayer,'" he was a "foreign diplomat" who was not obliged to pay taxes. *Ibid.*

In addition to not filing current year returns, petitioner filed amended returns for prior years, claiming that he was entitled to millions of dollars in refunds under the same theories. Pet. App. 3-4 & n.3. Petitioner also sent four official IRS Payment Vouchers (Form 1040-ES) to the Department of Treasury, together with fraudulent Bills of Exchange, in which he purported to draw upon a fictitious personal account. *Id.* at 4 n.3.

2. On October 12, 2006, a federal grand jury sitting in the Middle District of Florida returned a superseding indictment charging petitioner with conspiracy to defraud the United States by impeding the IRS in its collection of income taxes, in violation of 18 U.S.C. 371; filing a false claim for a tax refund, in violation of 18 U.S.C. 2 and 287; and six counts of willfully failing to file individual federal income tax returns for calendar years 1999 through 2004, in violation of 26 U.S.C. 7203. Pet. App. 5. The indictment alleged that venue for the six failure-to-file counts lied in the Middle District of Florida because petitioner was "a resident of Windermere in Orange County, Florida." *Id.* at 49.

a. At the time of arraignment, a magistrate judge set a pretrial motion deadline of January 12, 2007, and the magistrate judge later extended the deadline, at petitioner's request, until June 4, 2007. Pet. App. 5-6. On that date, petitioner filed several pretrial motions, including a motion to transfer venue to the Southern District of New York pursuant to 18 U.S.C. 3237(b) and Federal Rule of Criminal Procedure 21(b). Pet. App. 6.

Under Section 3237(b), if the government brings Section 7203 failure-to-file charges against a taxpayer in a district other than the district where the taxpayer resides, the taxpayer may elect to instead be tried "in the district in which he was residing at the time the alleged offense was committed," provided he files a motion stating his election "within twenty days after arraignment." Because petitioner's motion was filed outside the 20-day statutory period, the district court denied petitioner's motion for elective transfer as untimely. Pet. App. 47-48. The district court further noted that the indictment alleged that petitioner was a legal resident of Windermere, Florida, and that the location of petitioner's legal residence was therefore a "disputed issue[] of fact [that] must be submitted to the jury under a preponderance of the evidence standard of proof." *Id.* at 49.

The district court also denied petitioner's motion to transfer venue to the Southern District of New York under Federal Rule of Criminal Procedure 21(b). Pet. App. 51-59. The court concluded that any hardship to petitioner of being tried in the Middle District of Florida was insufficient to outweigh the hardship a transfer of venue would place on petitioner's co-defendants and on many Florida-based witnesses. *Id.* at 54.

b. Several months later, petitioner retained new counsel and filed another motion challenging venue, this time asserting that the government had chosen the trial location for racially discriminatory reasons. Pet. App. 6. Petitioner again attempted to elect venue in the Southern District of New York under 18 U.S.C. 3237(b), arguing that the ineffective assistance of his prior counsel constituted "good cause" for disregarding the statutory 20-day deadline, and he again requested a transfer of venue under Rule 21(b). Pet. App. 6-7. The court denied

petitioner's motion, explaining that petitioner had failed to demonstrate a constitutionally relevant racial disparity in the Ocala Division's jury venire, *id.* at 66-67, that petitioner had not raised any new arguments demonstrating that his elective transfer request was timely, *id.* at 68-69, and that petitioner had identified no compelling reasons for transfer under Rule 21(b), especially given that petitioner's place of residence was "a fact question very much in dispute," *id.* at 67 n.4. The court also explained that petitioner had identified no legal authority to support his request that venue be determined in advance of trial, instead of by the jury. *Id.* at 65 n.2.

c. Petitioner filed a notice of appeal, contending that the district court's venue rulings were subject to interlocutory review under the collateral order doctrine. Pet. App. 75-77. The court of appeals dismissed the appeal, explaining that an order pertaining to venue was not subject to interlocutory review as a collateral order because it was effectively reviewable after entry of judgment. *Ibid.*

3. At trial, the government presented evidence showing that petitioner's legal residence was in Windermere, Florida. The evidence showed that petitioner was born in Florida and has maintained a Florida driver's license since 1978. Gov't C.A. Br. 25. The evidence also showed that petitioner purchased a home in Windermere in 1992 and used that address to renew his driver's license in 1997, and again in 2004. *Ibid.* The government presented further evidence showing that petitioner had represented in contracts that he signed in 1996, 2001, and 2003 for his appearances in the *Blade* movies that his "current place of residence is Windermere, Florida," and that based upon those representations, "the movie makers agreed to pay petitioner travel-related expenses

(such as first-class airfare, a weekly allowance of $2000, and monthly hotel reimbursement of up to $10,000) if his services were needed more than 75 miles from Windermere." *Ibid.* Finally, the government presented several documents that petitioner filed with the Comptroller of Orange County, Florida, in March 2003, in which petitioner averred that he was a citizen of Florida, that he had maintained his "de jure domicile" in Orange County since 1977, and that he intended Windermere to be his "permanent," "predominant," and "principal" home even if he buys additional houses elsewhere. *Id.* at 26.

After the United States presented its case-in-chief, petitioner moved for judgment of acquittal on the 1999 failure-to-file count on the ground that the statute of limitations had expired, and he also moved for judgment of acquittal on the false claim charge. Pet. App. 8 & n.4. Petitioner did not, however, seek a judgment of acquittal on the ground that the government had failed to prove venue. The court denied petitioner's motion, and petitioner rested without presenting any evidence. *Id.* at 8. At the close of trial, the district court denied petitioner's renewed motion for judgment of acquittal. *Ibid.*

b. The district court instructed the jury that the Sixth Amendment protects a defendant's right to a trial in the State and district in which the crime was committed and that for the failure-to-file counts, venue was proper in the district of petitioner's "legal residence," which the parties agreed should be defined as "the permanent fixed place of abode which one intends to be his residence and return to it, despite absences or temporary residence elsewhere." Pet. App. 8; Gov't C.A. Br. 47. The court also instructed the jury that if the government failed to prove that petitioner's legal residence was within the Middle District of Florida by a preponderance of

the evidence, the jury must acquit petitioner of the failure-to-file counts. Pet. App. 8-9; Gov't C.A. Br. 47.

The jury convicted petitioner of failure to file personal income tax returns for the years 1999, 2000, and 2001, and acquitted petitioner on the remaining counts. Pet. App. 10. The district court sentenced petitioner to three consecutive one-year prison terms, to be followed by one year of supervised release. *Id.* at 11-12.

4. The court of appeals affirmed. Pet. App. 1-34. The court rejected petitioner's argument that the district court could extend the 20-day statutory time limit set forth in Section 3237(b) for elective transfer of venue by extending the time for filing pretrial motions pursuant to Federal Rule of Criminal Procedure 12(c). Pet. App. 12-15. The court explained that the 20-day statutory filing deadline is "unambiguous and unqualified," *id.* at 14, and that Rule 12(c), which "merely affords the district court the discretion to set pretrial deadlines," did not supersede Congress's clear statutory directive, *id.* at 14-15.

The court further rejected petitioner's argument that the district court had abused its discretion by refusing to waive the 20-day statutory deadline based on the "excusable neglect" of his attorney, explaining that "[c]ounsel's misunderstanding of the law cannot constitute excusable neglect." Pet. App. 15 (citing *Corwin* v. *Walt Disney Co.*, 475 F.3d 1239, 1255 (11th Cir. 2007) (citation omitted)). The court also noted that in any event, petitioner's first request for the district court to extend the pretrial motion deadline was filed after the 20-day statutory deadline for elective transfer of venue had already expired. *Ibid.*

The court of appeals also rejected petitioner's argument that he was entitled to a pretrial evidentiary hear-

ing to determine venue. Pet. App. 16-20. The court explained that "[a]s with resolving other elements contained in a charge, a jury must decide whether the venue was proper," *id.* at 17, and that indeed "it would not have been proper for the district court to find the appropriate venue in a pretrial evidentiary hearing * * * [because] a court may not dismiss an indictment * * * on a determination of facts that should have been developed at trial," *id.* at 18. The court further rejected petitioner's argument that under *Simmons* v. *United States*, 390 U.S. 377 (1968), he should have been afforded a pretrial hearing on venue so that he would not be forced to testify at his trial about his residence. Pet. App. 18. The court explained that in *Simmons*, this Court held that a defendant's testimony in a Fourth Amendment pretrial suppression hearing could not be admitted at trial consistent with the Fifth Amendment privilege against self-incrimination because it was "intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 18-19 (quoting *Simmons*, 390 U.S. at 394). The court of appeals explained, however, that "*Simmons* has never been extended beyond its context" and that "[u]nlike the Fourth Amendment right, protected by the exclusionary rule, the Sixth Amendment right to have venue proven as an element of the offense is safeguarded by integrating it into the trial." *Id.* at 19-20.

The court of appeals further rejected petitioner's argument that the government had presented insufficient evidence to prove that petitioner's legal residence was within the Middle District of Florida. Pet. App. 20 n.7. Reviewing petitioner's sufficiency claim for plain error, the court concluded that the government had provided ample evidence from which the jury could con-

clude by a preponderance of the evidence that petitioner was a resident of Windermere, Florida. *Ibid.*[1]

ARGUMENT

1. Petitioner contends (Pet. 11-27) that Article III, § 2, Cl. 3, and the Sixth Amendment require the district court to conduct, at the defendant's request, a pretrial evidentiary hearing on venue before submitting the issue to the jury. The court of appeals correctly rejected this argument, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

a. Article III of the Constitution requires that the trial of crimes "be held in the State where the said Crimes shall have been committed," U.S. Const. Art. III, § 2, Cl. 3, and the Sixth Amendment entitles the defendant to a jury of "the State and district wherein the crime shall have been committed," U.S. Const. Amend. VI; see also Fed. R. Crim. P. 18. For a crime charging the omission of a legally required act, such as the failure-to-file charges brought against petitioner under 26 U.S.C. 7203, the crime is committed in the place where the act was required to be performed. See, *e.g.*, *Travis* v. *United States*, 364 U.S. 631, 636 (1961); *Johnston* v. *United States*, 351 U.S. 215, 220 (1956). During the relevant time period, the Internal Revenue

[1] The court of appeals did not address petitioner's argument (Pet. 27-36) that the facts establishing venue must be proved beyond a reasonable doubt. Recognizing that established circuit precedent required application of the preponderance standard, petitioner had simply stated in a footnote in his opening brief to the court of appeals that he "raises and preserves" the standard of proof issue "for review at another level." Pet. C.A. Br. 29 n.22. Petitioner presented arguments in support of his position for the first time in his petition for en banc review, which the court denied without opinion. Pet. App. 78-79.

Code required personal tax returns to be filed in the internal revenue district of the taxpayer's legal residence or at an IRS service center for that internal revenue district. 26 U.S.C. 6091(b)(1)(A)(i) and (ii). Accordingly, venue for failure-to-file charges lies both in the judicial district of a defendant's legal residence and in the judicial district of the IRS service center servicing that district. See *United States* v. *Pry*, 625 F.2d 689, 691 (5th Cir. 1980), cert. denied, 450 U.S. 925 (1981); *United States* v. *Calhoun*, 566 F.2d 969, 973 (5th Cir. 1978).

Petitioner asserts that he was entitled to a jury determination of the propriety of venue in the Middle District of Florida, but at the same time he contends that his jury was "constitutionally incompetent" to make a venue determination. Pet. 15-16. Accordingly, he maintains, he was therefore *also* entitled to a pretrial evidentiary hearing on that issue. Pet. 16, 26 ("The fundamental basis for petitioner's argument is that a defendant cannot be required to entrust the question of venue, as a factual matter, to the very jury from which he claims the Constitution protects him from being judged."). Petitioner has identified no court adopting that view, and nothing in this Court's cases indicates that such a pretrial proceeding is required to determine venue.

In support of his position, petitioner states that this Court has recognized in other contexts that "[s]ometimes, * * * a question must be decided twice" to adequately protect the constitutional right at issue. Pet. 19 (citing *United States* v. *Broce*, 488 U.S. 563, 571 (1989); *Jackson* v. *Denno*, 378 U.S. 368 (1964)). The issues raised in the cases petitioner cites are not analogous to a venue determination. In *Broce*, the Court held that, by pleading guilty to two conspiracies, the defendants had

waived their right to have a "trial-type proceeding" before trial for a court to evaluate their argument that they were being tried twice for the same conspiracy in violation of the Double Jeopardy Clause. 488 U.S. at 571. A defendant may be entitled to a pretrial hearing on his Double Jeopardy claim, given that the right not to be tried twice would be defeated even if he were acquitted. The right to be tried in a proper venue, however, is fully protected by a jury determination that venue was improper. Indeed, the district court instructed petitioner's jury that it must "acquit" petitioner on the failure-to-file counts if the government failed to prove facts establishing petitioner's residence in the Middle District of Florida by a preponderance of the evidence. Pet. App. 8-9.[2]

Petitioner's reliance on *Jackson* v. *Denno*, 378 U.S. 368 (1964) and 18 U.S.C. 3501(a) is likewise misplaced. Those authorities stand for the proposition that if a court determines in a pretrial proceeding that a confession was voluntary and therefore need not be suppressed, the defendant may still attack the confession at trial. See *Denno*, 378 U.S. at 390-391. In the suppression context, where the remedy for violation of a constitutional right is to withhold probative evidence from the jury at trial, a pretrial evidentiary hearing is clearly necessary to protect the constitutional right at issue. Again, the defendant's right to be tried in the district

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[2] A ruling that venue is improper is not an "acquittal" in the double-jeopardy sense because it does not represent a determination "in the defendant's favor * * * of some or all of the factual elements of the offense charged." *United States* v. *Scott*, 437 U.S. 82, 111 (1978) (brackets omitted). Accordingly, a jury's determination that venue is improper does not bar reprosecution in another district. See pp. 16-17, *infra*.

where his crime was committed can be fully vindicated if the jury determines that the charges were brought in an improper venue. See Pet App. 19-20 ("Unlike the Fourth Amendment right, protected by the exclusionary rule, the Sixth Amendment right to have venue proven as an element of the offense is safeguarded by integrating it into the trial.").

Petitioner further contends (Pet. 18-19) that "language of this Court's most recent venue decision" in *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 279 (1999), supports his position. In *Rodriguez-Moreno*, the defendant had been charged with a violation of 18 U.S.C. 924(c)(1) in the District of New Jersey, where he had taken a kidnapping victim before later driving to Maryland and threatening the victim with a firearm. 526 U.S. at 276-277. The defendant argued that venue was proper only in the District of Maryland because that was the only district in which the government had proved he had used a firearm, and he moved to dismiss the Section 924(c)(1) count on that basis. *Id.* at 277. Although the district court denied the motion and the jury convicted petitioner, the Third Circuit agreed that venue was improper and reversed the conviction. *Id.* at 277-78. In reversing the Third Circuit's decision, this Court stated that to determine whether venue is proper, "a court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts." *Id.* at 279. That language accurately describes a district court's role in evaluating a motion to dismiss based on the allegations set forth in the indictment, or a court of appeals' role in evaluating whether venue was improper as a matter of law on appeal. The statement in no way indicates that the district court must conduct an evidentiary hear-

ing to determine whether venue is proper before submitting that issue to the jury.

Finally, petitioner contends (Pet. 20, 25-26) that under *Simmons* v. *United States*, 390 U.S. 377 (1968), in which the Court held that a defendant's testimony in a Fourth Amendment pretrial suppression hearing could not be admitted at trial consistent with the Fifth Amendment privilege against self-incrimination because it was "intolerable that one constitutional right should have to be surrendered in order to assert another," *id.* at 394, petitioner should have been afforded a pretrial hearing on venue so that he could have testified about his place of residence without being forced to testify at trial. But *Simmons* is a Fourth Amendment case that "has never been extended beyond its context." Pet. App. 19. Unlike in *Simmons*, where the unique function of the exclusionary rule warranted a pretrial evidentiary hearing, the constitutional protection of venue can be adequately "safeguarded by integrating it into the trial." *Id.* at 19-20.[3]

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[3] In any event, the record does not suggest that petitioner was prejudiced by not having a pretrial hearing at which he could testify with *Simmons*' protection. If petitioner had testified at a pretrial hearing, he would have been subjected to sharp cross-examination. For example, petitioner would have been questioned about a civil rights action that he filed challenging a New York court's exercise of jurisdiction over him in a paternity suit, arguing that he "had insufficient ties with the State of New York to meet Fourteenth Amendment due process standards' and asserting that '[a]t no time' between February 2001 and January 2005 was he 'a resident of, or domiciled in, . . . the State of New York." Gov't C.A. Br. 49 n.11. Petitioner would also have had to explain articles published in architecture and design magazines that included detailed descriptions of Snipes' involvement in the design and decoration of his home in Windermere. See Jesse Kornbluth, *Architectural Digest Visits Wesley Snipes, A Lakeside Residence in Florida for*

b. Although petitioner does not contend that the question of whether the district court could extend the 20-day statutory deadline set forth in 18 U.S.C. 3237(b) for elective transfer of venue is independently cert-worthy, he argues (Pet. 20-23) that the court of appeals should have avoided the constitutional venue question by concluding that his motion for elective transfer was timely filed. Petitioner's constitutional avoidance argument does not help him. The court of appeals correctly concluded that the language of Section 3237(b) is mandatory and that Rule 12(c) did not supersede Congress's statutory directive that elective venue transfers must be made within 20 days of arraignment. Pet. App. 14-15.[4] In any event, Section 3237(b) ensures that if the government brings failure-to-file charges in a district other than the district where petitioner resides, such as the judicial district where the IRS service center servicing that district is located, see 26 U.S.C. 6091(b)(1)(A)(i) and (ii), the taxpayer may elect to transfer venue to the district of his legal residence. Even if petitioner had made

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the Star of White Men Can't Jump and Passenger 57, Architectural Digest, Apr. 1997, at 142; Lynn Norment, *Black Woman Designs, Cecil Hayes combines African and Asian influences in actor's sunny getaway*, *Ebony*, Nov. 1997, at 194. Thus, even if the district court were permitted to make factual findings about petitioner's legal residence in a pretrial hearing, it is highly improbable that the district court would have determined that venue was improper in this case.

[4] Petitioner asserts that the Eighth Circuit has held that the 20-day statutory deadline is subject to extension at the district court's discretion. See Pet. 22 (citing *United States* v. *Humphreys*, 982 F.2d 254, 260 (1992), cert. denied, 510 U.S. 814 (1993)). That holding cannot fairly be implied from the court's conclusion in that case that the district court had committed no error in denying the defendant's Section 3237(b) election as untimely because "[a]n untimely motion may be denied at the lower court's discretion." *Ibid.*

his election within 20 days after his arraignment, the government had already brought the charges in the district of petitioner's legal residence, and petitioner therefore could not have simply elected venue in the Southern District of New York.

2. Petitioner further contends (Pet. 27-36) that the government should be required to prove the facts establishing venue beyond a reasonable doubt, rather than by a preponderance of the evidence. The courts of appeals have uniformly rejected this argument, and nothing in this Court's decisions indicates that further review is warranted.

a. As petitioner acknowledges (Pet. 29), every court of appeals has held that the government is required to prove facts establishing venue in a criminal case by a preponderance of the evidence. See *United States* v. *Salinas*, 373 F.3d 161, 163 (1st Cir. 2004); *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. *Robinson*, 275 F.3d 371, 378 (4th Cir. 2001), cert. denied, 535 U.S. 1006 (2002); *United States* v. *Strain*, 396 F.3d 689, 692 & n.3 (5th Cir. 2005); *United States* v. *Crozier*, 259 F.3d 503, 519 (6th Cir. 2001), cert. denied, 534 U.S. 1149 (2002); *United States* v. *Muhammad*, 502 F.3d 646, 652 (7th Cir. 2007), cert. denied, 552 U.S. 1144 (2008); *United States* v. *Johnson*, 462 F.3d 815, 819 (8th Cir. 2006), cert. denied, 549 U.S. 1298 (2007); *United States* v. *Pace*, 314 F.3d 344, 349 (9th Cir. 2002); *United States* v. *Cryar*, 232 F.3d 1318, 1323 (10th Cir. 2000), cert. denied, 532 U.S. 951 (2001); *United States* v. *Stickle*, 454 F.3d 1265, 1271-1272 (11th Cir. 2006); *United States* v. *Morgan*, 393 F.3d 192, 195 (D.C. Cir. 2004).

This Court, moreover, has repeatedly denied petitions for a writ of certiorari seeking review of this issue on the basis of arguments virtually identical to those petitioner advances. See, *e.g.*, *Elgindy* v. *United* States, 130 S. Ct. 83 (2009) (No. 08-10328); *Rommy* v. *United States*, 552 U.S. 1260 (2008) (No. 07-1031); *Robles* v. *United States*, 541 U.S. 1044 (2004) (No. 03-1438). There is no justification for a different result here.

b. Contrary to petitioner's contention that this uniform rule "has never been examined seriously on its merits" (Pet. 31), the courts of appeals have repeatedly explained that venue need only be proved by a preponderance of the evidence because it does not constitute an element of a criminal offense, see, *e.g.*, *Rommy*, 506 F.3d at 119; *Muhammad*, *supra*; *United States* v. *Lanoue*, 137 F.3d 656, 661 (1st Cir. 1998); *United States* v. *Griley*, 814 F.2d 967, 973 (4th Cir. 1987), or, in the language some courts have employed, a "substantive" or "essential" element of the offense, see, *e.g.*, *Stickle*, 454 F.3d at 1271-1272; *Perez*, 280 F.3d at 330; *United States* v. *Kaytso*, 868 F.2d 1020, 1021 (9th Cir. 1988).

That reasoning is sound. "[U]nlike the substantive facts which bear on guilt or innocence in the case[,] [v]enue is wholly neutral; it is a question of procedure, more than anything else, and it does not either prove or disprove the guilt of the accused." *Wilkett* v. *United States*, 655 F.2d 1007, 1011-1012 (10th Cir. 1981), cert. denied, 454 U.S. 1142 (1982); accord *Perez*, 280 F.3d at 330; *Kaytso*, 868 F.2d at 1021; cf. *United States* v. *Maldonado-Rivera*, 922 F.2d 934, 969 (2d Cir. 1990) ("[V]enue provisions deal not with whether prosecution of a given charge is permissible but only with that prosecution's permissible location."), cert. denied, 501 U.S. 1233 (1991). Thus, a dismissal of the indictment for im-

proper venue does not, on double jeopardy grounds, bar a retrial on the charges in the proper venue. See, *e.g.*, *Kaytso*, 868 F.2d at 1021; *United States* v. *Hernandez*, 189 F.3d 785, 792 & n.5 (9th Cir. 1999), cert. denied, 529 U.S. 1028 (2000); *Wilkett*, 655 F.2d at 1011-1012.

Venue is fundamentally different from the substantive elements of an offense in additional respects. Unlike substantive elements, venue need not even be proved in every case. The issue of proper venue can be waived if not timely raised, see, *e.g.*, *United States* v. *Knox*, 540 F.3d 708, 716 (7th Cir. 2008), cert. denied, 129 S. Ct. 1525 (2009); *Perez*, 280 F.3d at 328; *United States* v. *Dabbs*, 134 F.3d 1071, 1078 (11th Cir. 1998), including where the defendant fails to move to dismiss the case for improper venue before trial based on a defect that is apparent from the face of the indictment, see, *e.g.*, *United States* v. *Khan*, 821 F.2d 90, 93 (2d Cir. 1987). Courts have also noted that "the standard for finding a waiver of venue rights is much more relaxed than the rigorous standard for finding waivers of the right to trial by jury, the right to confront one's accusers or the privilege against compulsory self incrimination." *United States* v. *Winship*, 724 F.2d 1116, 1124 (5th Cir. 1984); accord *United States* v. *Miller*, 111 F.3d 747, 750 (10th Cir. 1997). Moreover, a defendant is not entitled to an instruction on venue except where the evidence at trial places that question sufficiently "in issue" that resolution by the jury is necessary. See *Perez*, 280 F.3d at 333-335 (so holding and discussing standards across circuits for when venue is "in issue"); see also *United States* v. *Massa*, 686 F.2d 526, 530 (7th Cir. 1982) ("[W]here venue is not in issue, no court has ever held that a venue instruction must be given."). By contrast, the jury must always be instructed to find the substan-

tive elements of the offense (although an omitted instruction on an element is reviewed for harmless error). See *Neder* v. *United States*, 527 U.S. 1, 8-11 (1999).

c. Petitioner cites *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995), and *In re Winship*, 397 U.S. 358, 364 (1970), for the proposition that the government must prove every fact necessary to constitute the crime with which a defendant is charged beyond a reasonable doubt. Pet. 27, 31, 32, 34. But because the propriety of venue has no bearing on guilt or innocence, it does not implicate the requirement under the Fifth and Sixth Amendments that a criminal conviction "rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Gaudin*, 515 U.S. at 510; see also *In re Winship*, 397 U.S. at 364. Petitioner's reliance on *Gaudin* and *In re Winship* is accordingly misplaced.

Petitioner further suggests that this Court's recent sentencing decisions have some bearing on the standard of proof for venue. See Pet. 27-28 (citing, *e.g.*, *United States* v. *Booker*, 543 U.S. 220 (2005); *Cunningham* v. *California*, 549 U.S. 270 (2007); *Harris* v. *United States*, 536 U.S. 545 (2002)); see also Pet. C.A. Br. 29 n.22 (stating that petitioner was preserving the burden of proof issue "for review at another level" and citing *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000)). Those decisions addressed the application of the Sixth Amendment to any fact (other than a prior conviction) that "increases the penalty for a crime beyond the prescribed statutory maximum." *Apprendi*, 530 U.S. at 490. Facts establishing venue do not belong in that category because, just as they do not relate to the issue of guilt or innocence of the charged offense, they also do not affect the maximum penalties the defendant faces if convicted. For

that reason, the *Apprendi* line of cases does not require that venue be treated as an element of the offense.

d. Finally, this case would be a poor vehicle in which to consider the proper standard of proof for venue determinations because petitioner did not properly preserve his claim. Petitioner did not object to the district court's instruction to the jury that the government must prove the facts establishing venue by a preponderance of the evidence, nor did he move for judgment of acquittal on the ground that the evidence establishing venue was insufficient. As a result, petitioner's claim would be reviewable only for plain error under Federal Rule of Criminal Procedure 52(b). See *United States* v. *Marcus*, 130 S. Ct. 2159, 2164 (2010); *United States* v. *Olano*, 507 U.S. 725 (1993).

To establish plain error, a defendant must show that there was "an 'error' that is 'plain' and that 'affect[s] substantial rights.'" *Olano*, 507 U.S. at 732. Even if a defendant makes such a showing, a reviewing court should correct the error only if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Ibid.* (citations omitted). Especially given that the courts of appeals unanimously apply a preponderance of the evidence standard to facts establishing venue, petitioner cannot establish that any error occurred, much less any error that was plain. Additionally, the evidence showing that petitioner was a legal resident of Windermere, Florida, during the relevant time was overwhelming. See pp. 5-6, 13-14 n.3, *infra*. Petitioner therefore cannot demonstrate that application of the preponderance of the evidence standard to the jury's venue determination affected his substantial rights or seriously undermined the fairness or integrity of his trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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