IN THE

Supreme Court of Virginia

RECORD NO. 091945

MIHAI GHEORGHIU,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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APPELLANT'S REPLY BRIEF

ARGUMENT

I. THE COMMONWEALTH MAKES NO ATTEMPT TO DEFEND THE PANEL'S SPLIT DECISION THAT IDENTITY THEFT IS A CONTINUING OFFENSE, OR TO SHOW WHAT "PART" OF THE OFFENSE OCCURRED IN ARLINGTON COUNTY.

The identify theft conviction in Indictment CR05-1243 concerned Gheorghiu's attempt to use the Keltz credit card in Alexandria, not Arlington. The split panel found that venue was proper in Arlington nevertheless.

The first battle in this case is whether or not

identity theft is a "continuing offense". If it is not, then venue was not proper in Arlington County.

Surprisingly, the Commonwealth offers no defense of the panel's holding that identity theft is such a offense. The Commonwealth simply reviews the facts, then asserts that Gheorghiu's crime "continued over the locality of Arlington County on September 20, 2005 through September 21, 2005." Appellee's Brief at 19-20.

Apart from the absence of any argument that identity theft is a continuing offense, not addressed at all was Gheorghiu's argument that nothing in Virginia law supports the expansion of the notion of a continuing offense to crimes where no act continues to be committed (for example, asportation). Nor did the Commonwealth attempt at all to address Gheorghiu's claim that the panel created a new element - possession - in order to find such a continuing act, or the argument that *Meeks v. Commonwealth*, 274 Va. 798, 651 S.E.2d 637 (2007), while not controlling because it dealt with a different offense, was nonetheless persuasive on the impropriety of manufacturing new elements to

find venue.

Finally, not addressed at all was the appellant's argument that the special venue statute was not necessary if in fact identity theft was a continuing offense. Gheorghiu submits that on each of these issues, Judge Humphreys got it right and his dissenting opinion is the correct view of the law.

Nevertheless, assuming that identity theft is indeed a continuing offense, it is still necessary for the Commonwealth to prove, under the special venue statute, that "any part" of the offense took place in Arlington County. As to this, the Commonwealth simply recounts the facts of the case, none of which establish that "any part" of the offense in Indictment CR05-1243 took place in Arlington.[1]

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[1] In making this argument, the Commonwealth goes to great lengths to paint each of Gheorghiu's actions in Northern Virginia as part of his "plan of attack" , Commonwealth's Brief at 22, each playing a ole in establishing venue in Arlington. Thus, the Commonwealth recounts his visit to Arlington the day before his arrest. Brief at 5. But Gheorghui used his own, valid, credit card there,

It is, however, abundantly clear, that *no* part of the offense concerning Iris Keltz's card took place in Arlington, other than the possession of her card, not a "part" of the offense as defined by the statute. It makes no difference at all that Gheorghiu passed through Arlington the day before the offense. Gheorghiu's attempted use of the Keltz card was in Alexandria, the next day. There was no proof at all, let alone "a strong presumption", *Green v. Commonwealth*, 32 Va. App. 438, 448, 528 S.E.2d 187, 192 (2000), that he ever accessed her identifying information in Arlington, either that day, or the previous day. The little proof there was indicated that any accessing took place in Alexandria.

The only way to show that some "part" of the

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surely not a fact which can count into the Commonwealth's venue claim.

The Commonwealth also points to Gheorghiu's statement to the police that "'he hadn't gone anywhere' except the mall in Arlington," as proof that every aspect of his two days involved credit card fraud and identity theft. *Id.* at 19. But Gheorghiu's statement was demonstrably false and argued to be so by the Commonwealth. It cannot be relied upon to prove venue.

offense took place in Arlington is under the flawed theory of "continuing offense", less-than weakly defended by the Commonwealth. Again, we believe that Judge Humphreys got it right when he argued that the word "part" in the special venue statute is a synonym for "element", something that Virginia law requires to be committed in order for a crime to be deemed a continuing one, with venue proper in any jurisdiction in which the element is committed.

Contrary to what the Commonwealth argues, Gheorghiu does acknowledge that the special venue statute has an intended effect. The new statute expands venue to cover acts of criminals outside the jurisdiction who reach into the jurisdiction electronically to access identifying information, thus stealing someone's identity. See Appellant's Brief at 20. What it does not do, however, is create venue where no part of the crime occurs in the jurisdiction, as is the case here.

Gheorghiu was punished, severely, for the crimes he committed. He should not be punished where his conduct did not meet the strict terms of the statute.

II. THERE WAS NO PROOF GIVING RISE TO A "STRONG PRESUMPTION" THAT GHEORGHIU TOOK ANY ACT "IN FURTHERANCE" OF THE CRIME OF CREDIT CARD FRAUD IN ARLIGTON COUNTY

Venue is proper for credit card theft in any jurisdiction where an act "in furtherance" of the crime takes place. As concerns Indictment 06-449, the Kent credit card, the evidence showed that Gheorghiu used Kent's card number to buy a computer in Fairfax County. He then used the card to purchase another computer later in Arlington, but that purchase was the subject of another indictment which is not at issue here. The Commonwealth nonetheless claimed that the mere possession of the credit card in Arlington was sufficient to establish venue there for the purchase made in Fairfax. According to the Commonwealth, "the defendant's possession of Kent's stolen credit card number in Arlington . . . was a direct act "toward his subsequent commission of the credit card offense in CR06-449." Commonwealth's Brief at 21.

First, the computer purchase in CR06-449 occurred before Gheorghiu's arrest in Arlington,

and so his possession of the Kent credit card information there can in no way be deemed "in furtherance" of the already completed crime. There was no proof establishing a "strong presumption" that Gheorghiu possessed the Kent credit card number in Arlington prior to the purchase in Fairfax which was the subject of CR06-449. Even characterizing Gheorghiu's car as a "re-encoding shop", nothing addressed the issue of when Gheorghiu possessed or accessed the Kent credit card number prior to his purchase in Fairfax.

But second, even assuming Gheorghiu possessed the number in Arlington prior to going to Fairfax, such possession was merely incidental to the subsequent crime. It was not what Virginia recognizes as something "in furtherance" of a crime, as addressed by Judge Humphreys. It was more akin to mere preparation. See Appellant's brief at 27-29. This was not addressed by the Commonwealth.

Nor did the Commonwealth address the issue of the amendment to the special venue statute for credit card fraud, made after Gheorghiu's acts. The statute was expanded to pull within its grasp

possession with the intent to commit credit card fraud. This is a loud, clear signal that under the statute as it existed, and at the time of Gheorghiu's acts, mere possession of Kent's credit card number in Arlington prior to the Fairfax purchase was insufficient to establish venue in Arlington.

III. THE FAILURE TO OBJECT CONCERNING VENUE FOR THE CREDIT CARD THEFT INDICTMENTS.

Counsel relies on the arguments in their opening brief concerning this issue.

CONCLUSION

For the foregoing reasons, this court should grant Gheorgiu's appeal and reverse the convictions complained of herein and strike the invalid sentences.

Respectfully Submitted,
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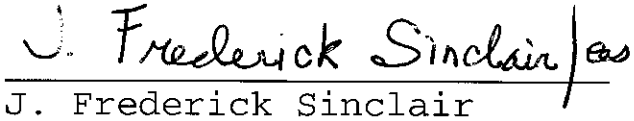

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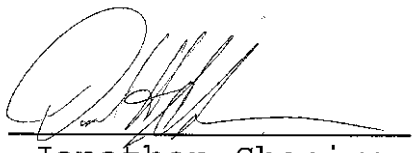
Certificate of Service

I hereby certify that counsel for the Appellee was served this 13th day of May, 2010, in accordance with Rule 5:26(d), Rules of the Virginia Supreme Court and that on the same day Rule 5:26(d) was complied with.



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