IN THE

Supreme Court of Virginia

RECORD NO. 091945

MIHAI GHEORGHIU,

Appellant,

V.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

Jonathan Shapiro
Virginia State Bar No. 13952
LAW OFFICE OF JONATHAN SHAPIRO, P.C.
3955 Chain Bridge Road
Second Floor
Fairfax, VA 22030
(703) 352-0100
(703) 591-7268 (Fax)
js@greenspunlaw.com

J. Frederick Sinclair
Virginia State Bar 08073
J. FREDERICK SINCLAIR, P.C.
100 North Pitt Street
Suite 200
Alexandria, VA 22314
(703) 299-0600
(703) 299-0603 (Fax)
Fred@jfsinclairlaw.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

ASSIGNMENTS OF ERROR 4

QUESTIONS PRESENTED 4

STATEMENT OF FACTS 4

ARGUMENT:

I. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH VENUE IN ARLINGTON FOR THE IDENTITY THEFT ALLEGED IN INDICTMENT 05-1243. THE COURT OF APPEALS ERRED BOTH BY FINDING THAT IDENTITY THEFT IS A "CONTINUING CRIME", AND BY HOLDING THAT THERE WAS A STRONG PRESUMPTION THAT PART OF THE OFFENSE ACTUALLY OCCURRED IN ARLINGTON. . . . 10

II. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH VENUE IN ARLINGTON FOR THE CREDIT CARD FRAUD ALLEGED IN INDICTMENT 06-449. THE COURT OF APPEALS ERRED IN HOLDING THAT MERE POSSESSION OF THE CREDIT CARD WAS AN ACT "IN FURTHERANCE" OF THE CRIME. 22

III. THE EVIDENCE FAILED TO ESTABLISH VENUE FOR THE INDICTMENTS ALLEGING CREDIT CARD THEFT. THE COURT OF APPEALS ERRED IN HOLDING THE CLAIM BARRED UNDER RULE 5A:25, SINCE COUNSEL'S FAILURE TO OBJECT WAS BASED ON LONG-STANDING PRECEDENT SUBSEQUENTLY OVERRULED. 26

CONCLUSION 28

CERTIFICATE OF SERVICE 29

TABLE OF AUTHORITIES

Cases

Ashford v. Commonwealth, 47 Va. App. 676, 626 S.E.2d 464(2006). 23-24

Baker v. Commonwealth, 225 Va. 192, 300 S.E.2d 788, 789 (1983) 26

Cheatham v. Commonwealth, 215 Va. 286, 208 S.E.2d 760 (1974), overruled, *Meeks v. Commonwealth*, 274 Va. 798, 651 S.E.2d 637 (2007) 16, 26, 27

Gheorghiu v. Commonwealth, 54 Va. App. 645, 682 S.E. 2d 50 (2009). . . . . *passim*

Green v. Commonwealth, 32 Va. App. 438, 528 S.E.2d 187, 192 (2000) 12, 17

Hicks v. Commonwealth, 86 Va. 223, 9 S.E. 1024 (1889) 24

Hodge v. Commonwealth, 7 Va. App. 351, 374 S.E.2d 76(1988) 21

James v. Commonwealth, 275 Va. 510, 659 S.E.2d 311 (2008) 25

Meeks v. Commonwealth, 274 Va. 798, 651 S.E.2d 637 (2007) . . . . . *passim*

Morris v. Commonwealth, 51 Va. App. 459, 658 S.E.2d 708 (2008) 13

Parsons v. Commonwealth, 32 VA. App. 576, 529 S.E.2d 810(2000) 23

Strouther v. Commonwealth, 92 Va. 789, 22 S.E.2d 852, 852 (1895). 14

Statutes

Code of Virginia § 18.2-94 . . . . . *passim*

Code of Virginia § 18.2-186.3 . . . . . .*passim*

Code of Virginia § 18.2-192 . . . . . .*passim*

Code of Virginia § 18.2-193 . . . . . .*passim*

Code of Virginia § 18.2-195 . . . . . .*passim*

Rules

Rule 5:25, Rules of the Virginia
Supreme Court 27

IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 091945

MIHAI GHEORGHIU,

Appellant,

-vs-

COMMONWEALTH OF VIRGINIA,

Appellee.

APPELLANT'S BRIEF

STATEMENT OF THE CASE

This was a criminal case in which the appellant was indicted for multiple violations of Code of Virginia § 18.2-186.3 ("Identity Theft"), § 18.2-192 ("Credit Card Theft"), § 18.2-193 ("Credit Card Forgery"), § 18.2-195 ("Credit Card Fraud") and one violation of § 18.2-94 ("Possession of Burglarious Tools"). J.A. 1-87[1]. He pleaded not guilty to all Indictments and exercised his right to a trial by

---

[1]References to "J.A." are to the Joint Appendix.

jury.

Trial commenced on September 11, 2006, in the Circuit Court for Arlington County. At the close of the Commonwealth's case, the defense moved to strike many of the Indictments on various grounds. The trial court granted the motion to strike with respect to Indictments 05-1244, 1245, 1246 and 1249 which alleged violations of § 18.2-186.3 on the grounds that the Commonwealth failed to prove that the victims did not give their permission to Mihai Gheorghiu to use their identity. The motion to strike the remaining indictments was denied. On September 15, 2006, the jury returned verdicts of guilty on 53 Indictments under the statutes cited above, and not guilty on a single Indictment of credit card fraud. After a brief sentencing hearing, the jury returned sentences totaling 117 and one half years.

On February 28, 2007, the court denied a motion to set aside the verdicts, then suspended the sentences on each Indictment, and placed the appellant on various terms of probation, except the following Indictments, as to which the court

imposed consecutive sentences and probationary periods:

Statute	Indictment	Sentence
18.2-186.3	05-1241	12 months, 20 years probation
	05-1242	12 months, 20 years probation
	05-1243	12 months, 20 years probation
	05-1247	12 months, 20 years probation
	05-1248	12 months, 20 years probation
§18.2-195	06-449	five years
	06-451	five years
	06-452	five years

The total sentence thus imposed by the court was 117 ½ years, all suspended but for 20 years, with 1000 years of probation. J.A. 101-205.

Gheorghiu appealed to the Court of Appeals. In a two-to-one opinion dated August 25, 2009, a Panel of the Court of Appeals reversed the conviction in Indictment 06-440 (possession of burglarious tools), but affirmed the convictions and sentences on all other Indictments. Judge Humphreys dissented on the issue of whether venue had been proved for

Indictment 05-1243 (Identity Theft), and Indictment 06-449 (Credit Card Fraud). The Supreme Court granted an appeal and this brief was then timely filed.

ASSIGNMENTS OF ERROR

1. THE COURT OF APPEALS ERRED IN HOLDING THAT VENUE WAS PROVED FOR SEVERAL IDENTITY THEFT AND CREDIT CARD FRAUD INDICTMENTS.

2. THE COURT OF APPEALS ERRED IN REJECTING A CLAIM, NOT RAISED IN THE TRIAL COURT, THAT VENUE WAS NOT PROVEN FOR VARIOUS CREDIT CARD THEFT INDICTMENTS, GIVEN THAT DIRECTLY CONTROLLING AUTHORITY IN EFFECT AT THE TIME HAS NOW BEEN OVERRULED.

QUESTIONS PRESENTED

I. Did The Court of Appeals Err In Holding That Venue Had Been Proved For Indictment 05-1243 Alleging Identity Theft and For Indictment 06-449 Alleging Credit Card Fraud? Assignment of Error 1.

II. Did The Court Of Appeals Err In Rejecting A Claim That Venue Was Not Proven For Various Credit Card Theft Indictments, Based On Counsel's Failure To Object, When Directly Controlling Authority In Effect At The Time Has Now Been Overruled? Assignment of Error 2.

STATEMENT OF FACTS

Virginia has enacted a complex scheme of laws concerning credit card offenses. As noted by the Court of Appeals, Gheorghiu's is the first case in which a Virginia appellate court has addressed the

special venue provisions governing Identity Theft and Credit Card Fraud, See *Gheorghiu v. Commonwealth*, 54 Va. App. 645, 656, 682 S.E.2d 50,55, (2009), provisions which differ markedly from the general venue statute, Code of Virginia, Title 19.2-244. Those venue statutes were at issue in Gheorghiu's case.

On September 21, 2005, Mihai Gheorghiu and his cousin were stopped for speeding in Arlington County. Three brand new Apple laptop computers in their original boxes, as well as other recently purchased merchandise, were in the car. Gheorghiu was arrested because he had an outstanding warrant from another state. A number of credit cards were seized from the car, many of which, on later inspection, were found to have had altered numbers on their magnetic strips, that is, numbers which did not match the embossed numbers and name. On a computer seized from the car were lists of names of various people along with credit card numbers for those people. A device was found in the car which would allow someone to change the magnetic electronic number on the back of a credit card.

It was the Commonwealth's theory that Gheorghiu and his cousin were engaged in a scheme whereby they would obtain the credit card numbers of others and re-encode (or "re-mag") the backs of their own credit cards so that when they made purchases with those cards, someone else's account would be charged. Indeed, the Commonwealth's evidence showed that the three unopened laptops found in the car, as well as other merchandise, had been purchased in that manner on the day the defendant was stopped for speeding.

An Arlington County Police computer expert testified, explaining how a re-magging device works. He explained that it is used in conjunction with a computer and necessary software to create or to change the electronic number on the magnetic strip on the back of a credit card. J.A. 1391-1394. He examined the computer seized from the car and discovered that it contained the necessary software. J.A. 1394. The software had been installed in June of 2005. He found lists of various names along with numbers which appeared to be credit card numbers on the five CDs and the

thumb drive which had been seized from the car.

The expert also testified that the file creation dates for many of the lists of names and credit card numbers were dates earlier than the stop of the car in Arlington. J.A. 1454-1459. There was no evidence concerning when the numbers were loaded onto the credit cards from the computer. He testified as well that the computer was first turned on at 8 a.m. on the day of the arrest, at a time when the defendant was likely at the Red Roof Inn, which was in Alexandria, not Arlington County.

A number of owners of the various credit card numbers which had been used for the purchases testified. All said that they had no idea that their credit card numbers were being used by others. They testified that they did not know the defendant and had not given him permission to use their credit card numbers.

Indictment 05-1243

Indictment 05-1243 alleged that Gheorghiu committed Identity Theft in Arlington County, in violation of Code of Virginia, Section 18.2-186.3. The identity at issue was that of Iris Keltz. When

arrested in Arlington, Gheorghiu and his cousin possessed a credit card number belonging to Ms. Keltz, found on the laptop computer in their car. Ms. Keltz did not live in Arlington, nor was there evidence that the defendant used or attempted to use, or that he had accessed the credit card number in Arlington.

The evidence did show that someone attempted to use that credit card number earlier the same day in neighboring Alexandria. And, as characterized by the Court of Appeals, the evidence showed that throughout the day, attempts were made to use other stolen credit card numbers to purchase goods and services in Alexandria, Arlington and Fairfax County, some of which were successful. 54 Va. App. at 653, 682 S.E.2d at 54.[2] The detective and the Commonwealth's computer expert both testified, however, that they could not determine who had accessed the laptop computer with the stolen credit

[2] The Commonwealth claimed (a claim adopted by the Court of Appeals), that it was the defendant who made those attempts and purchases, but no evidence showed who had used the credit card numbers. Video surveillance cameras did capture the defendant's cousin making at least one of the purchases.

card numbers, who had re-magged them onto the credit cards, or where or when the laptop had been accessed in order to accomplish that (i.e., in Arlington or elsewhere, on the day of the arrest or otherwise).

The trial court and the Court of Appeals held that possession of the credit card number in Arlington, along with the other events of the day, was sufficient to establish venue there.

Indictment 06-449

Indictment 06-449 alleged that Gheorghiu committed Credit Card Fraud in Arlington County, a violation of Code of Virginia, Title 18.2-195(1)(a). The victim was Gerald Kent. As noted by the Court of Appeals, "[t]he credit card fraud offense occurred when Mr. Kent's credit card number was used to obtain a laptop computer at a Fairfax County computer store." 54 Va. App. at 666-7, 682 S.E.2d at 61. While no act concerning the crime occurred in Arlington County, the Commonwealth argued, and the trial court and the Court of Appeals held that the mere possession of Mr. Kent's credit card in Arlington after the Fairfax purchase

was sufficient to establish venue in Arlington.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH VENUE IN ARLINGTON FOR THE IDENTITY THEFT ALLEGED IN INDICTMENT 05-1243. THE COURT OF APPEALS ERRED BOTH BY FINDING THAT IDENTITY THEFT IS A "CONTINUING CRIME", AND BY HOLDING THAT THERE WAS A STRONG PRESUMPTION THAT PART OF THE OFFENSE ACTUALLY OCCURRED IN ARLINGTON.

Indictment 05-1243 alleged that the defendant did "obtain, record or access identifying information of Iris Keltz . . . or did obtain goods or services through the use of identifying information" in violation of Code of Virginia §18.2-186.3. As noted, no evidence showed that the defendant obtained, recorded or accessed Keltz' identifying information in Arlington, or that he obtained goods or services there. In his motion to strike on this Indictment, the defendant argued that the evidence showed only that the computer was accessed at the Red Roof Inn in Alexandria, and the only evidence of where this Keltz credit card was used was at a Target store in Alexandria.

In order to prove venue in Arlington County, the Commonwealth relied on §18.2-186.3(D)which states that "the crime shall be considered to have

been committed in any locality where the person whose identifying information was appropriated resides, or in which any part of the offense took place, regardless of whether the defendant was ever actually in such locality." Keltz did not live in Arlington. Therefore, the Commonwealth argued that the language "in which any part of the offense took place" applied and that the defendant's arrest in Arlington with the credit card number, and the activities of the defendant with respect to other credit cards while in Arlington, was sufficient to prove venue.

Two members of the Court of Appeals Panel agreed. The Panel first determined that Identity Theft is a "continuing offense". According to the Panel:

> Once an individual's identifying information is stolen, and the perpetrator possesses the victim's identifying information, the offense cannot conclude until the information is returned to the victim (in such a way that the perpetrator no longer retains it) or the perpetrator's fraudulent intent to use the identifying information no longer exists.

54 Va. App. at 660, 682 S.E.2d at 57.

The Panel then determined that the evidence was sufficient to prove a "strong presumption" that "any part" of the continuing offense occurred in Arlington. The "strong presumption" language is the required standard of proof for venue, as the Panel acknowledged. See *Green v. Commonwealth*, 32 Va. App. 438, 448, 528 S.E.2d 187, 192 (2000).

Identity Theft Is Not A Continuing Offense

Explicitly recognizing that it was staking out new ground, a majority of the Panel held that the crime of Identity Theft continues potentially forever. "[O]nce an individual's identifying information is stolen, the individual's identity remains stolen by the perpetrator as long as the perpetrator possesses that information with the intent to defraud the victim . . . ." 54 Va. App. at 658, 682 S.E.2d at 56. It thus concluded that Identity Theft was a "continuing offense", not limited to the initial accessing or obtaining or recording of the credit card number.

But the Panel's conclusion was not moored in Virginia's understanding of what constitutes a "continuing offense". That test looks not to

whether new, separate instances of the crime *might eventually* occur, but rather whether the crime in fact *continues* to occur with no particular new act by the defendant.[3] Thus, in *Morris v. Commonwealth*, 51 Va. App. 459, 658 S.E.2d 708 (2008), cited by the Panel, venue was properly established where the defendant knowingly and intentionally possessed drugs in one county as well as in the county to which she was transported, unconscious. Rejecting the claim that her unconsciousness rendered her incapable of possessing the drugs knowingly, the Court held that since she knowingly possessed the drugs in the first county, and because the law does not allow voluntary intoxication as a defense, she was deemed to have possessed the drugs knowingly and intentionally even in the second county - a continuation of her original state of mind.

Likewise, theft of property is a continuing

---

[3] In the Panel's view, "[I]f identity theft is a continuing offense such that parts of the offense can occur after the taking," then venue is proper in the jurisdiction to which the defendant has traveled after obtaining, accessing or recording or using the information. 54 Va. App. at 657, 682 S.E.2d at 56.

offense in every county in which the defendant may carry the stolen property. The rationale for this conclusion is that since asportation is an element of the crime of theft, a *new crime* is committed every time the thief moves the property away from its owner. *Strouther v. Commonwealth*, 92 Va. 789, 791, 22 S.E.2d 852, 852 (1895).

The Panel's very broad take on "continuing offenses" ignored a key component of the rationale supporting such offenses, namely, that the perpetrator actively continues to commit some element of the offense. Where there is no such action, there cannot be a continuing crime.

So, a new crime is not committed in every county a forger enters, even though he has the know-how and the ability to stop at the very next bank and cash yet another stolen check. Or, as Judge Humphreys noted in dissent, while a thief who steals a television in Arlington and moves it to Alexandria can be prosecuted in both places, if he travels to Fairfax after the theft but without the television, no prosecution is proper there even though he still intends to deprive the owner of the

television. 54 Va. App. at 685, 682 S.E.2d at 69-70 (Humphreys, J., dissenting)[4]

In order to find a continuing offense, the Panel was forced to create a new element for the crime of Identity Theft, one of *possession* of the stolen information. But as forcefully pointed out by Judge Humphreys in his dissent, the crime of Identity Theft does not have an element of possession. What it prohibits is obtaining, accessing, recording or using. Therefore:

> While possession is necessarily incident to obtaining, accessing, recording or using identifying information, the crime is not complete upon the mere possession of the information because the elements of this particular crime require activity by the perpetrator that is active

---

[4] As Judge Humphreys notes, "[a] thief can be prosecuted in every county in which he carries the stolen property because every time he moves the stolen goods to a different jurisdiction, he commits all the required elements of larceny - taking and asportation with the intent to permanently deprive the lawful owner thereof. [citation omitted] . That larceny is a continuing offense does not mean that venue lies wherever a thief travels. Rather, venue is only proper where the thief travels *and* commits larceny, i.e., wherever he commits a new taking by continued asportation of the stolen goods to the detriment of the owner's right to possession." 54 Va. App. at 683, 682 S.E.2d at 69 (Humphreys, J., dissenting) (emphasis in original).

> in nature rather than passive. Put another way, while possession of identifying information may be a consequence of, or a predicate to, several of the required elements, standing alone it is not sufficient to constitute anything.

54 Va. App. at 682, 682 S.E.2d at 57. Compare the situation here to that in *Meeks v. Commonwealth*, 274 Va. 798, 651 S.E.2d 637 (2007), reversing *Meeks v. Commonwealth*, 2006 Va. App. LEXIS 601 and overturning *Cheatham v. Commonwealth*, 215 Va. 286, 208 S.E.2d 760 (1974), in which this Court unanimously rejected the Commonwealth's argument that venue was proper in Alexandria where the defendant retained a credit card after stealing it elsewhere. There was no claim even raised in *Meeks* that the theft crime was a continuing one. But by finding that the evidence did not prove that the possession of the stolen card in Alexandria was an act "in furtherance" of the crime, the Court silently rejected that rationale.

Finally, the Panel's conclusion that Identity Theft is a continuing offense is belied by the fact that the Legislature saw fit to enact Section 18.2-186.3(D), the special venue statute. If the crime

were indeed a continuing one, there would have been no need for the expanded venue statue which allows prosecution in every locality where even a single part of the crime takes place, thus greatly expanding the traditional requirement in Virginia that venue is proper only where every element of the crime takes place. See *Green v. Commonwealth*, *supra*, 32 Va. App. at 448, 528 S.E.2d at 192. Compare, for example, the absence of an expanded venue statute for Larceny. None is needed.

Indeed, the real intent for the special venue statute seems more logically to have been an attempt by the Legislature to reach actors who hack into protected information remotely. Prosecution is proper in any locality, "in which any part of the offense took place, regardless of whether the defendant was ever actually in such locality." This language seems designed to address the very real problem of hackers in one jurisdiction using the Internet to reach information held in another. Thus, a hacker in New York might reach into a bank's records stored in Virginia, never enter Virginia, but be prosecuted here. Seen this way,

this prong of the special venue provision provides a natural and logical complement to the statute's other prong, which allows prosecution in any locality "in which the [victim] resides," another way to deal with the remote Internet thief.

No Part Of The Crime Occurred In Arlington County

Apart from the discussion of "continuing offenses", the Panel found that there was a strong presumption that "any part" of the Identity Theft crime occurred in Arlington, specifically, that the defendant possessed the victim's identifying information in Arlington with the intent to defraud. 54 Va. App. at 666, 682 S.E.2d at 60. Because a "part" of the offense occurred in Arlington, the panel concluded that venue was proper under the special venue statute, Code of Virginia, Title 18.2-186.3(D).

In fact, the Panel's rationale for this holding was simply a re-telling of its first rationale. The Panel concluded that since Identity Theft was a continuing offense, a "part" of it was being committed in any jurisdiction in which the defendant traveled while in possession of the

victim's identifying information. According to the Panel:

> [U]nlike credit card theft, which is completed in the locality where the card or number is unlawfully taken from its rightful owner or is received with knowledge that it has been taken and with the intent to use it, identity theft is a continuing offense, as discussed supra. The offense necessarily continues for as long as the perpetrator is in unlawful possession of the victim's identifying information with the intent to use the victim's identity in a fraudulent manner, and, therefore, possession of the identifying information with the intent to defraud must be considered a "part" of the offense.

54 Va. App. at 665, 682 S.E.2d at 60.

This was error, and a rationale soundly rejected by this Court in *Meeks*. *Meeks* dealt with another statute, the Credit Card Theft statute, but it applies with full force to the Identity Theft statute. *Meeks* rejected an attempt to read into the statute a word which was not there in order to find that the crime continued so long as the defendant "retained" the stolen credit card. But the statute did not prohibit "retaining", only "withholding". The parallel to Gheorghiu is

undeniable. The Panel had to expand Gheorghiu's crime to one including mere possession of stolen information, an act not covered by the statute.

Gheorghiu committed no "part" of the offense in Arlington. No evidence showed that he obtained, accessed, or recorded Ms. Keltz' identifying information there. As Judge Humphreys pointed out in his dissent, "the word 'part' as used in Code Sec. 18.2-186.3(D) is simply a synonym for the term 'element' and, in context, it seems obvious to me that the General Assembly intended for venue to lie in any jurisdiction where it could be established that an act constituting an element of the offense occurred." 54 Va. App. at 681, 682 S.E.2d at 54. While "possession is certainly incidental to the statutory elements, as it is with any number of offenses, possession is not itself an element of the offense. Had the General Assembly wished to punish the mere possession of someone else's identifying information, it certainly could have done so." *Id.* For this reason, the Panel's holding was erroneous.

The error identified by Judge Humphreys is made

demonstrably clear by another route. As discussed, the special venue statute at play here allows prosecution in any jurisdiction in which "a part" of the offense occurred. This is a much narrower basis for venue than the special venue statute in *Meeks*, which allowed prosecution in any jurisdiction in which an act "in furtherance" of the crime occurred. See Code of Virginia Section 18.2-198.1. "In furtherance" could include acts other than elements of the crime, for example, preparation for the crime, or acts subsequent to the crime which aided it in some way. The act itself need not be criminal. *Hodge v. Commonwealth*, 7 Va. App. 351, 356, 374 S.E.2d 76, 79 (1988). Nevertheless, in *Meeks* the possession of the stolen credit card after its theft in another jurisdiction was not enough for this Court to find that venue was proper. Nor is possession of the identifying information here sufficient, under the more restrictive "any part of the offense" language. The Panel's decision was error.

II. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH VENUE IN ARLINGTON FOR THE CREDIT CARD FRAUD ALLEGED IN INDICTMENT 06-449. THE COURT OF APPEALS ERRED IN HOLDING THAT MERE POSSESSION OF THE CREDIT CARD WAS AN ACT "IN FURTHERANCE" OF THE CRIME.

Indictment 06-449 alleged that the defendant "used for the purpose of obtaining goods . . . or other things valued at two hundred dollars or more a credit card number belonging to Gerald Kent. . ." in violation of Code of Virginia §18.2-195. The Commonwealth proved that the purchase of the Apple computer with a credit card belonging to Gerald Kent occurred in Tysons Corner Shopping Center in Fairfax County, not Arlington County.

As with the Identity Theft issue, the Panel recognized that no prior case interpreted the special venue statue here, Code of Virginia, Section 18.2-198.1, in relation to a completed credit card fraud offense. As relevant, that statute allowed prosecution in any locality where the defendant committed "any act in furtherance of the crime." Here, the Panel held that "[i]n order to 'use' Mr. Kent's credit card number in a fraudulent manner . . . it is axiomatic that he was

required to possess the credit card number." 54 Va. App. at 669, 682 S.E.2d at 61-2. Therefore, according to the panel, Gheorghiu's possession of the card in Arlington was "in furtherance" of the crime.

This was error. As Judge Humphreys makes clear in his dissent, the language used by the Legislature in this venue statute is well known in the Commonwealth's jurisprudence concerning attempts. 54 Va. App. at 686, 682 S.E.2d at 63. And, under the law of attempt, mere preparation to commit a crime is insufficient. An act only amounts to an attempt when it constitutes "some appreciable fragment of the crime committed". *Id.*, quoting *Parsons v. Commonwealth*, 32 Va. App. 576, 583, 529 S.E.2d 810, 813 (2000). "It must go beyond mere preparation and be done to produce the intended result." *Id.* "The distinction is that preparation 'consists in devising or arranging the means or measures necessary for the commission of the offense and [] the attempt is a direct movement towards the commission after preparations are made." *Id.*, quoting *Ashford v. Commonwealth*, 47 Va.

App. 676, 682, 626 S.E.2d 464, 467 (2006).

As to 06-449, Gheorghui did nothing more than possess the credit card in Arlington after the purchase of the computer in Fairfax, far different than what the law requires for an attempt. It is clear that merely possessing the credit card does not amount to an attempt under these definitions. See, for example, *Hicks v. Commonwealth*, 86 Va. 223,227 9 S.E. 1024, 1025 (1889). There, the defendant was charged with attempted murder for procuring a third person to put poison in the intended victim's coffee, and arranging for the poison to be delivered to her. This was held to be mere preparation:

> Thus, it has been often held, under statutes similar to our own, that the purchase of a gun with intent to commit murder, or the purchase of poison with the same intent, does not constitute an indictable offence, because the act done in either case is considered as only in the nature of a preliminary preparation, and as not advancing the conduct of the accused beyond the sphere of mere intent. To make the act an indictable attempt," says Wharton "it must be a *cause* as

> distinguished from a *condition*. And it must go so far that it would result in the crime unless frustrated by extraneous circumstances." 1 Whart. Crim. Law, sec. 181. [footnote omitted]

See also the more recent case of *James v. Commonwealth*, 275 Va. 510, 659 S.E.2d 311 (2008). There, the defendant was charged with, among other things, attempted robbery. Though he arranged with the victim by telephone to meet her, then met the victim, with a gun, and intended to rob her, she frustrated his plan by not getting into his truck. His actions, and his intent to rob her were, according to this Court, mere preparation and insufficient to sustain his conviction for attempted robbery.

Additionally, as noted by Judge Humphreys, in 2008 (after the trial here), the General Assembly expanded Section 18.2-198.1 to allow prosecutions where a credit card number is "possessed with the intent to" commit credit card fraud. As noted by Judge Humphreys, this is a clear indication that the General Assembly did not intend mere possession to be a sufficient basis for venue previously. To

allow Gheorghiu's conviction to stand on the Panel's rationale (which added, in essence, the element of possession to the crime), would violate the principal announced in *Baker v. Commonwealth*, 225 Va. 192, 195-5, 300 S.E.2d 788, 789 (1983), that an accused may not be convicted for a crimes whose elements are different than those in the indictment.

III. THE EVIDENCE FAILED TO ESTABLISH VENUE FOR THE INDICTMENTS ALLEGING CREDIT CARD THEFT. THE COURT OF APPEALS ERRED IN HOLDING THE CLAIM BARRED UNDER RULE 5A:25, SINCE COUNSEL'S FAILURE TO OBJECT WAS BASED ON LONG-STANDING PRECEDENT SUBSEQUENTLY OVERRULED.

Gheorghiu did not argue that the Commonwealth failed to prove venue in Indictments 05-1231 through 05-1240, 06-453 through 06-469 and 06-752 through 06-760 alleging credit card theft in violation of §18.2-192. The Commonwealth's theory was that the credit card numbers were withheld by Gheorghiu from the rightful owners while he was in Arlington County, and he had the intent to use the credit card numbers and to deprive the owners of their possession and use. At the time, C*heatham v. Commonwealth*, *supra*, directly supported such a

claim. However, *Meeks v. Commonwealth, supra,* overruled *Cheatham* and held that retention cannot be prosecuted as credit card theft and that the crime of credit card theft is completed in the county or city where the credit card or credit card number is unlawfully taken from its owner.

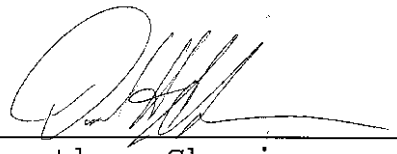
Since the Commonwealth only proved retention the convictions should be reversed. Though not preserved because *Meeks* had not yet been decided, the Court ought to address this error because there was good cause for failing to raise it - counsel's belief that Cheatham was good law. It must be clear from the record that counsel did object to the failure to prove venue whenever there was a good faith basis to do so, and it must also be clear that the trial court would simply had followed Cheatham had the issue been raised. Therefore, none of the reasons which support Virginia's contemporaneous objection rule were frustrated by the failure to object. This Court ought to reach this issue in order to achieve the ends of justice. See Rule 5:25, Rules of the Virginia Supreme Court.

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,
MIHAI GHEORGHIU
By Counsel

Counsel for the Appellant:



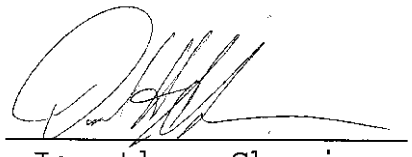
Jonathan Shapiro
Virginia Bar #13952
Law Office of Jonathan Shapiro, P.C.
3955 Chain Bridge Road
Fairfax, Virginia 22030
(703) 352-0100
FAX (703) 591-7268
js@greenspunlaw.com

J. Frederick Sinclair/ecs

J. Frederick Sinclair
Virginia Bar #08073
J. Frederick Sinclair, P.C.
100 North Pitt Street
Alexandria, Virginia 22314
(703) 299-0600
FAX (703)-299-0603
Fred@jfsinclairlaw.com

Certificate of Service

I hereby certify that fifteen copies were filed in the office of the Clerk of the Supreme Court of Virginia along with one electronic copy in PDF format by CD and three copies sent by mail to counsel for the appellee all on this 5th day of April, 2010, in accordance with Rule 5:26(d), Rules of the Virginia Supreme Court.



Jonathan Shapiro