No. 125889

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Appellate Court of Illinois, Second Judicial District No. 2-17-0545
Plaintiff-Appellee,	)	
	)	There on Appeal from the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois No. 16 CF 497
v.	)	
DOMINIK K. BOCHENEK,	)	The Honorable John J. Kinsella, Judge Presiding.
Defendant-Appellant.	)	

BRIEF OF PLAINTIFF-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

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NATURE OF THE CASE

Defendant appeals from the judgment of the Illinois Appellate Court, Second District, holding that one of the statutory venue provisions for the crime of identity theft, 720 ILCS 5/1-6(t)(3) (2015), does not, on its face, violate article 1, section 8 of the Illinois Constitution and, accordingly, affirming defendant's conviction under 720 ILCS 5/16-30(a)(1) (eff. Jan. 1, 2013-July 26, 2015). *See People v. Bochenek*, 2020 IL App (2d) 170545.

No question is raised on the sufficiency of the pleadings.

ISSUE PRESENTED

Whether § 1-6(t)(3) of the Criminal Code, which provides that a defendant charged with identity theft may be tried, inter alia, in the county in which the victim resides, comports on its face with article 1, section 8 of the Illinois Constitution, which provides an accused with the right to "have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed." Ill. Const., art. 1, § 8.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612(b). This Court allowed leave to appeal on May 27, 2020. *People v. Bochenek*, 147 N.E.3d 698 (Ill. May 27, 2020) (Table).

STATUTES INVOLVED

720 ILCS 5/16-30(a)(1) (eff. Jan. 1, 2013-July 26, 2015)

§ 16-30. Identity theft; aggravated identity theft.

(a) A person commits identity theft when he or she knowingly:

(1) uses any personal identifying information or personal identification document of another person to fraudulently obtain credit, money, goods, services, or other property[.]

720 ILCS 5/16-36 (2015)

§ 16-36. Venue. In addition to any other venues provided for by statute or otherwise, venue for any criminal prosecution or civil recovery action under Sections 16-30 through 16-36 shall be proper in any county where the person described in the personal identification information or personal identification document in question resides or has his or her principal place of business. Where a criminal prosecution or civil recovery action under Sections 16-30 through 16-36 involves the personal identification information or personal identification documents of more than one person, venue shall be proper in any county where one or more of the persons described in the personal identification information or personal identification documents in question resides or has his or her principal place of business.

720 ILCS 5/1-6 (2015)

§ 1-6. Place of trial.

(a) Generally.

Criminal actions shall be tried in the county where the offense was committed, except as otherwise provided by law. The State is not required to prove during trial that the alleged offense occurred in any particular county in this State. When a defendant contests the place of trial under this Section, all proceedings regarding this issue shall be conducted under Section 114-1 of the Code of Criminal Procedure of 1963[.] All objections of improper place of trial are waived by a defendant unless made before trial.

* * *

(t) A person who commits the offense of identity theft or aggravated identity theft may be tried in any one of the following counties in which: (1) the offense

occurred; (2) the information used to commit the offense was illegally used; or (3) the victim resides.

If a person is charged with more than one violation of identity theft or aggravated identity theft and those violations may be tried in more than one county, any of those counties is a proper venue for all of the violations.

CONSTITUTIONAL PROVISION INVOLVED

Ill. Const., art. 1, § 8

In criminal prosecutions, the accused shall have the right to . . . a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed.

STATEMENT OF FACTS

Defendant's Indictments and Pre-Trial Motion to Dismiss

On April 26, 2016, defendant was charged by indictment in the Circuit Court of DuPage County with one count of identity theft in violation of 720 ILCS 5/16-30(a)(1) (eff. Jan. 1, 2013-July 26, 2015), and one count of unauthorized use of an unissued credit card in violation of 720 ILCS 5/17-36(ii) (2015). C29-31.[1] The charges arose from defendant's use of stolen credit cards belonging to DuPage County victim Anthony Fatigato on the morning of June 18, 2015. C29-30. The identity theft charge (Count 1) related to defendant's use of Fatigato's JPMorgan Chase Bank credit card. C29. The unissued credit card charge (Count 2) related to defendant's use of Fatigato's U.S. Bank credit card. C30.

[1] "C__," "R__," and "Def. Br. __" denote the common law record, the report of proceedings, and defendant-appellant's opening brief, respectively.

On May 17, 2017, one week before trial and more than a year after defendant was charged, defendant moved, pursuant to 725 ILCS 5/114-1(a)(7), (c), to dismiss the identity theft charge on the ground that 720 ILCS 5/1-6(t)(3) violates article 1, section 8 of the Illinois Constitution. C119-22; *see also* R52-56. Defendant conceded that the "statute provide[d] cause for venue to lie in DuPage County" but contended that it "conflict[ed] with the Illinois Constitution" where "[a]ll [of the] acts alleging [defendant's] use of the credit card occurred within Lake County." C121. The circuit court held a hearing on defendant's motion on May 23, 2017, and denied the constitutional challenge. *See* C128; R58-65.

Defendant's Jury Trial

The evidence at defendant's May 2017 trial showed that on the evening of June 17, 2015, Fatigato left his wallet on the front seat of his car, which was parked overnight in the driveway of his DuPage County home. R211-13. The following morning, Fatigato discovered that his wallet and credit cards had been taken from the car; his driver's license, social security card, and insurance card lay discarded on the passenger's seat. R213-14. Among the stolen cards were a JPMorgan Chase Bank credit card and a U.S. Bank credit card. *Id.*

Fatigato phoned both the police to report the break-in and stolen cards and his banks to let them know that his cards had been stolen. R214. He then used his online banking logins to identify several unauthorized charges

made during the early morning hours of June 18, 2015: a $13.13 charge to his U.S. Bank card at a Speedway gas station in Itasca (DuPage County), and a $143.70 charge to his Chase card at 12:58 a.m. at a Marathon gas station in Palatine (Lake County), Illinois. *See* R214-18 (credit card statements reflected unauthorized charges to Fatigato's cards); *see also* R226, 232, 234. Fatigato related the amounts and locations of the unauthorized transactions to police to aid in their investigation. R215; *see also* R238, 253-54.

A transaction journal recovered from the Speedway station reflected the $13.13 charge to Fatigato's U.S. Bank card on the morning of June 18, 2015, *see* R238-41; R302-08, 317-18, 332-33; Detective Tiffany Wayda of the DuPage County Sheriff's Office testified that surveillance video showed the perpetrator arriving at the Speedway station in a black car and making the unauthorized charge, R238-39.

Surveillance video from the Marathon station showed defendant arriving in a black Toyota, purchasing two cartons of cigarettes at the precise time of the unauthorized charge to Fatigato's Chase card, and signing a paper receipt before he departed. *See* R241-52, 254; *see also* R226-30. That receipt, showing $143.70 worth of cigarettes charged to Fatigato's Chase card, was admitted at trial, R231-35; R247; the signature was not Fatigato's, *see* R221.

Police learned from the car's license plate (visible on the surveillance video) that the black Toyota was registered to defendant's mother, Barbara

Bochenek. R248-49. The individual seen in the video was defendant. R251-52; *see also* R254. Fatigato neither knew defendant, nor authorized him to use either card. R218.

In addition to evidence of the charged offenses, the State presented other-crimes evidence of two similar offenses that defendant perpetrated on May 17, 2015, and June 17, 2015, respectively, for the purpose of showing defendant's intent, identity, lack of mistake, and *modus operandi* under Ill. Evid. R. 404(b). *See generally* R257-81, 288-300, 307-29, 334-46; C106-11, 116; R27-49. In each instance, defendant had broken into a car, stolen a credit card, and used that credit card to purchase cigarettes at the same Speedway gas station in Itasca where he bought cigarettes with Fatigato's card on June 18, 2015; the cardholders neither knew defendant nor authorized him to use their cards. *See id.*

Defendant testified at trial and admitted that he made the transactions, R360, 366-67, 369-71, but he claimed that his then-girlfriend had routinely given him credit cards (Fatigato's included) to make purchases and led him to believe that the cards were not stolen, but instead belonged to "rich family members" who had given her permission to use them. R355-56; *see generally* R352-74.

At the close of evidence, the circuit court directed a verdict in defendant's favor on Count 2, upon concluding that Fatigato's U.S. Bank card was not "unissued" as contemplated by the statute defining the charged

offense. C153; R410-16. The jury found defendant guilty of Count 1, identity theft, based on defendant's use of Fatigato's Chase card at the Marathon gas station in Lake County. C150, 154; R420-21. The circuit court sentenced defendant to a 30-day term of periodic imprisonment on work release and a 30-month term of probation. C165-66, 168-69; R449-50.

Defendant's Appeal

The appellate court affirmed on appeal, rejecting, inter alia, a challenge that 720 ILCS 5/1-6(t)(3) violates article 1, section 8 of the Illinois Constitution on its face. *See Bochenek*, 2020 IL App (2d) 170545, ¶¶ 26-40. Subsection (t), the court determined, "expressly enacts the constitutional requirement" of article 1, section 8 of the Illinois Constitution "by defining where the offense occurs" to include both where the "physical acts are accomplished" *and* where "the injury occur[s]." *Id.* ¶ 31. Noting that the Constitution's venue provision provides only a right to trial in "'the county in which the offense is alleged to have been committed,'" and not, as defendant's argument suggested, "where 'the defendant's conduct in committing the offense' occurred," *id.* ¶ 34 (quoting Ill. Const., art. 1, § 8), the court found that there was "no conflict with the constitution [where], by legislative definition[,] . . . the offense of identity theft occurs both where the physical acts occur as well as where the intangible identification information is located," *id.* ¶ 35. The appellate court likened the case to *State v. Mayze*, 280 Ga. 5 (2005), where the Supreme Court of Georgia upheld the

constitutionality of a similar identity theft venue statute under the Georgia Constitution. *Bochenek*, 2020 IL App (2d) 170545, ¶¶ 32-34.

The appellate court also relied upon *Watt v. People*, 126 Ill. 9 (1888), in which this Court noted that the Illinois Constitution vests the General Assembly with the power to determine "when offenses are to be deemed to be local, and when and within what limitations they are to be treated as transitory." *Id.* at 19. Because *Watt* "remains good law and a proper interpretation" of the venue provision of the Illinois Constitution, it was "expected and allowed and proper" for the General Assembly to "define[ ] identity theft as occurring both where the physical act occurred and where the identity reposes, namely with the victim"; "the Illinois Constitution supports th[at] legislative choice." *Bochenek*, 2020 IL App (2d) 170545, ¶¶ 37-38.

Finally, the appellate court found that defendant's facial challenge failed because there exist constitutionally valid applications of § 1-6(t)(3) — including the prosecution of an offender whose "physical acts associated with the identity theft" of an Illinois citizen "all occurred out of state." *Id.* ¶ 39. On this ground, as well, the court "reject[ed] defendant's facial challenge to the constitutionality of section 1-6(t)." *Id.* ¶ 40.

STANDARD OF REVIEW

This Court reviews de novo the question of whether a statute is facially constitutional. *People v. Rizzo*, 2016 IL 118599, ¶ 23.

ARGUMENT

"'Constitutional challenges carry the heavy burden of successfully rebutting the strong judicial presumption that statutes are constitutional.'" *Rizzo*, 2016 IL 118599, ¶ 23 (quoting *People v. Patterson*, 2014 IL 115102, ¶ 90). To overcome that presumption, "the party challenging the statute must clearly establish that it violates the constitution." *People v. Plank*, 2018 IL 122202, ¶ 10 (quotation omitted); *see also Rizzo*, 2016 IL 118599, ¶ 48 ("one who *challenges* the constitutionality" of a statute "has the burden of *clearly* establishing" its unconstitutionality (emphasis in original)). Courts should proceed with the "utmost caution before following an [ ] ill-defined path to a finding of unconstitutionality," *Rizzo*, 2016 IL 118599, ¶ 48, as the judiciary has a "duty to uphold the constitutionality of a statute whenever reasonably possible, resolving any doubts in favor of its validity," *Patterson*, 2014 IL 115102, ¶ 90.

"The burden on the challenger is particularly heavy when a facial constitutional challenge is presented," *Rizzo*, 2016 IL 118599, ¶ 24, for he must show that "there are no circumstances in which the statute could be validly applied," *People v. Davis*, 2014 IL 115595, ¶ 25. *See also In re M.A.*, 2015 IL 118049, ¶ 39; *People v. Mosley*, 2015 IL 115872, ¶¶ 49-50.

Defendant's facial challenge to § 1-6(t)(3) of the Criminal Code fails for three central reasons. First, even under defendant's reading of article 1, section 8 of the Illinois Constitution, circumstances exist in which the statute

is capable of valid application: inter alia, where the defendant is in the same county in which the victim resides when he commits the identity theft. This fact, alone, is fatal to defendant's facial challenge, and defendant has not raised an as-applied challenge to § 1-6(t)(3) (meritless as it would be) in either this Court or the appellate court below. *See People v. Thompson*, 2015 IL 118151, ¶¶ 36-37 (as-applied challenges subject to normal rules of forfeiture); *City of Chicago v. Alexander*, 2017 IL 120350, ¶¶ 71-72; Ill. Sup. Ct. R. 341(h)(7); *see generally* Def. Br. 5-15; Def. Pet. for Leave to App. 2-3, 7-16; Def. App. Ct. Br. 1, 10-16; Def. App. Ct. Reply Br. 1-7.

Second, defendant misunderstands the constitution's venue clause and fails to distinguish its procedural guarantee of a trial in the "county in which the offense is alleged to have been committed," Ill. Const., art. 1, § 8, from the General Assembly's authority to legislate substantive venue for all offenses within the Criminal Code. The former, this Court has held, is merely a procedural constraint requiring that the county where the charging instrument is filed match the county where the instrument alleges the offense was committed. Article 1, section 8 imposes no constraint on how criminal offenses, including the identity theft offense at issue here, may be statutorily defined.

Third, even if the constitution's venue clause could be interpreted as an outer limit on the available potential venues for a criminal offense, § 1-6(t)(3) does not conflict with constitutional language providing that trial must

occur where the "offense is alleged to have been committed"; rather, it reflects the General Assembly's application of its legislative authority to define criminal offenses. For identity theft, this means tailoring its definition to provide that the offense occurs simultaneously at both the physical location where the offender acts to execute the offense and the place where his victim is injured as a result of that act. For any or all of these three reasons, defendant cannot clearly establish § 1-6(t)(3)'s unconstitutionality, and this Court should reject his facial challenge.

Alternatively, this Court should decline to address defendant's facial constitutional challenge to § 1-6(t)(3) because, even if successful, it would not entitle him to relief from his identity theft conviction; section 16-36 of the Criminal Code, which defendant does not challenge here, independently authorized his prosecution in DuPage County.

I. Because 720 ILCS 5/1-6(t)(3) Is Capable of a Valid, Constitutional Application, Defendant's Facial Challenge Must Fail.

Assuming, *arguendo*, that the venue clause of article 1, section 8 of the Illinois Constitution is a constitutional check on the "place of trial" statute that requires prosecution in the county where the defendant physically commits an act, *but see infra* Secs. II & III, this Court may resolve and reject defendant's facial challenge to § 1-6(t)(3) on the ground that even under defendant's reading, circumstances exist in which it could be validly applied. *Mosley*, 2015 IL 115872, ¶¶ 49-50; *M.A.*, 2015 IL 118049, ¶ 39; *Davis*, 2014 IL

115595, ¶ 25. Most obviously, where a defendant unlawfully obtains, possesses, or uses the victim's personal identifying information or personal identification document in the county in which the victim resides, the defendant's trial in the county in which the "victim resides," 720 ILCS 5/1-6(t)(3), would not violate any ostensible right to be tried in the county in which the identity theft was committed, *see* Ill. Const., art. 1, § 8; 720 ILCS 5/16-30(a). Identity theft is not an exclusively inter-county offense, *see* 720 ILCS 5/16-30, and the application of § 1-6(t)(3) to an identity theft offense that occurs entirely intra-county would be constitutionally valid. *See also Bochenek*, 2020 IL App (2d) 170545, ¶ 39 (citing prosecution of foreign identity thieves in county where victim resides as another valid application of § 1-6(t)(3)). Defendant's facial challenge therefore fails. *E.g.*, *Mosley*, 2015 IL 115872, ¶¶ 49-50; *Davis*, 2014 IL 115595, ¶ 30.

II. Article 1, Section 8 of the Illinois Constitution Does Not Curtail Legislative Authority to Establish Appropriate Venues for Criminal Offenses; the General Assembly Is Vested with the Power to Do So "to Such Extent as It May See Proper."

As discussed, this Court may dispose of defendant's facial challenge because § 1-6(t)(3) is capable of a constitutionally valid application. But defendant's claim also fails because it rests on the misguided view that article 1, section 8 of the Illinois Constitution circumscribes the General Assembly's authority to legislate proper places of trial for criminal offenses. In fact, Illinois courts have long held the opposite to be true.

"Interpretation of a constitutional provision begins with the language of the provision." *People v. Purcell*, 201 Ill. 2d 542, 549 (2002); *People v. Clemons*, 2012 IL 107821, ¶ 29 ("[t]he best guide to interpreting the Illinois Constitution is the document's own plain language" (quotation omitted)). Here, the plain language of article 1, section 8 provides that "[i]n criminal prosecutions, the accused shall have the right to . . . a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed" — language that has remained essentially unchanged since the passage of the Illinois Constitution of 1870. *Compare* Ill. Const. 1970, art. 1, § 8, *with* Ill. Const. 1870, art. 2, § 9.

In *Watt v. People*, 126 Ill. 9 (1888), this Court construed the 1870 revision to the constitution's venue clause — from a right to trial in "the county or district wherein the offen[s]e shall have been committed . . . [as] previously ascertained by law," Ill. Const. 1848, art. 13, § 9, to a right to a trial in "the county or district in which the offen[s]e is *alleged* to have been committed," Ill. Const. 1870, art. 2, § 9 (emphasis added) — to uphold a "place of trial" statute that, like § 1-6, called for "the local jurisdiction of all offenses, not otherwise provided for by law, [to] be in the county where the offense was committed" and delineated additional venue(s) for various transitory offenses. *Watt*, 126 Ill. at 15, 18-19. The 1870 amendment demonstrated the framers' determination that the prior rule, which limited venue "absolutely to the county where the crime alleged was actually

committed," was "infirm[.]" *Id.* at 18. The Constitution of 1870 vested the General Assembly with the power to change the rule "at common law" that criminal offenses are "regarded as strictly local, and subject to prosecution only in the counties where they were committed." *Id.* at 18-19. The Court determined that the plain language of the revised constitutional venue clause merely imposed a procedural constraint on the charging instrument — "the only document in which the proper *allegations* as to the vicinage [i.e., location] of the crime are ordinarily made." *Id.* at 18 (emphasis added). Any other interpretation, the Court reasoned, would render the 1870 amendment "meaningless." *Id.*[2]

The Illinois Appellate Court has characterized the distinction articulated in *Watt* as one of "substantive" versus "procedural" venue. In *People v. Carroll*, 260 Ill. App. 3d 319 (1st Dist. 1992), for example, the court

[2] That *Watt* hinged on the addition of the word "alleged" to the venue clause of the Illinois Constitution of 1870 suggests that the appellate court's comparison below to *Mayze* may have been overstated. *See Bochenek*, 2020 IL App (2d) 170545, ¶¶ 32-34 (citing *Mayze*, 280 Ga. at 6-8). Indeed, the venue clause of the Georgia Constitution does not refer to the county where the crime is "alleged" to have been committed and is therefore more comparable to the now-obsolete venue clause of the Illinois Constitution of 1848. *Compare* Ga. Const., art. 6, § 2, ¶ VI ("all criminal cases shall be tried in the county where the crime was committed"), *with* Ill. Const. 1848, art. 13, § 9 (requiring trial in "the county or district wherein the offen[s]e shall have been committed . . . [as] previously ascertained by law"). That said, *Mayze*'s reasoning is persuasive authority that even if this Court were to deviate from *Watt* and hold that article 1, section 8 guarantees a defendant's trial where the offense occurred, the General Assembly did not violate the Illinois Constitution by defining identity theft as occurring, in part, where the victim resides. *See infra* Sec. III.

described substantive venue as an issue of proof: whether the State can show that "the defendant committed the offense in the county where he [i]s [being] tried." *Id.* at 327-28 (collecting cases); *cf. People v. Allen*, 413 Ill. 69, 76 (1952). By contrast, procedural venue, as enshrined in article 1, section 8 of the Illinois Constitution, "guarantees that the trial take place in the county where the *indictment* alleges that the offense was committed." *Carroll*, 260 Ill. App. 3d at 327 (emphasis added); *see also id.* at 334.

As the appellate court further explained in *People v. Gallegos*, 293 Ill. App. 3d 873 (3d Dist. 1997), substantive venue — where the State must provide some threshold of evidence that the defined offense occurred where the charging instrument states that it occurred — developed from the common law; it did not evolve from the Illinois Constitution. *Id.* at 877-78 (substantive venue is "neither a derivative right of the constitutional right to a jury trial nor an obligation that flows from judicial interpretation of the constitution"). Accordingly, "[t]he legislature [ ] has the inherent power to repeal[,] change[,] or do away with" any, or all, of it, *id.* at 878, including the traditional common law rule that criminal offenses are "strictly local," *Watt*, 126 Ill. at 18. Only procedural venue — where the county named in the charging instrument must match the county where the case is pending — is rooted in the Illinois Constitution's venue clause. *Gallegos*, 293 Ill. App. 3d at 876-77. Indeed, *Gallegos* found "no authority" supporting the defendant's suggestion (like defendant's here) that substantive venue is "a

constitutionally guaranteed extension of the right to trial by jury" under article 1, section 8. *Id.* at 878.

The General Assembly has at times deviated from the common law on certain aspects of substantive venue, which is now codified under § 1-6. An anticipated "failure of proof" by the State that an accused's offense in fact occurred where the charging instrument alleges that it occurred, for example, is no longer an issue for the trier of fact as it was under common law; it is adjudicated by way of a pre-trial motion and hearing process. *See* 720 ILCS 5/1-6(a) ("The State is not required to prove during trial that the alleged offense occurred in any particular county in this State. [Instead, w]hen a defendant contests the place of trial under this Section, all proceedings regarding this issue shall be conducted under Section 114-1 of the Code of Criminal Procedure," concerning motions to dismiss charges.); *see also* 725 ILCS 5/114-1(a)(7), (c), (d), (d-5); *People v. Digirolamo*, 179 Ill. 2d 24 (1997) (noting the legislative change to substantive venue). Similarly, the General Assembly has effectuated § 1-6(a)'s foundational principle that criminal actions are "tried in the county where the offense was committed, *except as otherwise provided by law*," 720 ILCS 5/1-6(a) (emphasis added), by gradually adding subsections to address novel factual scenarios or to define the contours of newly codified crimes, where the common law view of the crime's locality is outmoded or impracticable, *see generally* 720 ILCS 5/1-6(b)-(u).

The conceptual distinction articulated in *Watt* (and applied in cases like *Carroll* and *Gallegos*) endures. *See People v. Manley*, 196 Ill. App. 3d 153, 167-87 (4th Dist. 1990) (Steigmann, J., concurring in part and dissenting in part) ("[T]he majority opinion [in *Watt*] stands, and it has never been explicitly overruled."). The procedural right under the Illinois Constitution refers to the right to be tried in the place where a charging instrument alleges the offense to have been committed. The substantive right refers to the right to be tried where the offense, as defined under the Criminal Code, was in fact committed.

Defendant's cited cases, *McClellan* and *Hill*, do not suggest otherwise. *See* Def. Br. 6-7. *People v. McClellan*, 46 Ill. App. 3d 584 (4th Dist. 1977), held only that a defendant "has a constitutional right to trial in the county in which the offense is alleged to have been committed" and determined that there was "no defect" to a Champaign County indictment alleging that the offense occurred in Champaign County. *Id.* at 587. *People v. Hill*, 68 Ill. App. 2d 369 (1st Dist. 1966), similarly viewed the defendant's article 1, section 8 challenge as a pleading defect question: whether the charging instrument was defective because it lacked the "essential allegation[ ]" of the "county in which the crime took place." *Id.* at 373-74.

Nor may defendant rely on United States Supreme Court jurisprudence addressing the federal "vicinage"/"locus delecti" right under the Sixth Amendment to support his challenge predicated on an entirely different

state constitutional provision. *See Patterson*, 2014 IL 115102, ¶¶ 97, 103 ("A ruling on a specific flavor of constitutional claim may not justify a similar ruling brought pursuant to another constitutional provision."); *e.g.*, Def. Br. 6, 11-12. None of these cases concern article 1, section 8 of the Illinois Constitution, and they have no bearing on its meaning.[3] The same goes for cases concerning a civil venue statute's validity under the federal or state due process clauses. *E.g.*, Def. Br. 6, 8. Whatever those constitutional provisions provide, the constitutional principle that defendant relies upon here — article 1, section 8 of the Illinois Constitution — guarantees only that a defendant's trial occur in the county alleged in the charging instrument. *Watt*, 126 Ill. at 18.

That is exactly what occurred here: the charging instrument alleged that defendant committed the offenses "at and within DuPage County, Illinois," C29-30, and defendant was tried in DuPage County, *see generally* R194-422. Moreover, defendant concedes that "[n]o issue is raised challenging the charging instrument." Def. Br. 1. Accordingly, there was no article 1, section 8 violation. *E.g.*, *Carroll*, 260 Ill. App. 3d at 334 ("[T]he

[3] Indeed, the United States Constitution, like the Georgia Constitution discussed above, does not include the critical word "alleged," which makes it more comparable to the Illinois Constitution of 1848 than the Illinois Constitutions of 1870 and 1970, as interpreted by *Watt* and its progeny. *See* U.S. Const., amend. VI ("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, which district shall have been previously ascertained by law").

indictments alleged that the offenses occurred in Cook County, and the trials were had there. Accordingly, Cook County was the proper place of trial."); *McClellan*, 46 Ill. App. 3d at 587 (no constitutional venue defect in indictment that alleged offense to have been committed in Champaign County where trial occurred in Champaign County).

Thus, the appellate court correctly denied defendant's facial challenge to § 1-6(t)(3) on the ground that *Watt* "remains good law and a proper interpretation" of the Illinois Constitution's venue clause. *Bochenek*, 2020 IL App (2d) 170545, ¶ 37. *Watt* "deliberately examined and decided" this issue of constitutional interpretation over a century ago. *People v. Espinoza*, 2015 IL 118218, ¶ 26; *see also Clemons*, 2012 IL 107821, ¶ 9. Defendant has presented no meaningful argument for *Watt* to be overturned, let alone shown that there is "good cause" or a "compelling reason" "specially justif[ying]" this Court's departure from *stare decisis* here. *Espinoza*, 2015 IL 118218, ¶¶ 26, 30. Accordingly, the Court should reject defendant's claim that § 1-6(t)(3) violates article 1, section 8 of the Illinois Constitution.

III. Even If Article 1, Section 8 of the Illinois Constitution Confines Venue for Criminal Offenses to the Place Where the Offense Occurred, the General Assembly Is Empowered to Define Criminal Offenses and Thereby Establish Where Such Offenses Occur, and It Has Defined Identity Theft to Occur, in Part, in the County in which the Victim Resides.

Even if this Court were to deviate from *Watt* and hold that article 1, section 8 provides a substantive guarantee that a defendant will be tried where the offense occurred rather than a procedural guarantee that he will

be tried where the offense is "alleged" in the indictment to have occurred, *but see supra* Sec. II, the legislature remains empowered to define criminal offenses and, in so doing, to define *where* an offense occurs. Here, the legislature has defined the crime of identity theft to occur both where the identity thief is physically present when inflicting an injury on his victim and where the victim sustains the injury, thereby establishing the identity thief's constructive presence. *See* 720 ILCS 5/1-6(t); *see also* 720 ILCS 5/16-36 (2015). Therefore, the statute complies with any requirement that a defendant be tried where the offense occurred.

The Illinois General Assembly holds "the power to declare and define conduct constituting a crime." *People v. Clark*, 2019 IL 122891, ¶ 22 (quotation omitted); *People v. Gray*, 2017 IL 120958, ¶ 59. It exerts such power through both the specific statutes identifying particular criminal offenses and the generally applicable statutes within the Criminal Code. *E.g.*, 720 ILCS 5/1-2 (all "provisions of this Code shall be construed in accordance with the general purposes hereof, to . . . [d]efine adequately the act and mental state which constitute each offense").

In 1999, the General Assembly applied this power to establish the crime of identity theft. *See* Pub. Act 91-517, §§ 5/16G-1 through G-25 (eff. Aug. 13, 1999). As explained in the article's legislative declaration:

> [i]t is the public policy of this State that the substantial burden placed upon the economy of this State as a result of the rising incidence of financial identity theft and the negative effect of this crime on the People of this State and its victims is a matter

> of grave concern to the People of this State who have the right to be protected in their health, safety, and welfare from the effects of this crime . . . [especially] considering the onerous nature of the crime.

Id. at § 5/16G-5(a). The legislature left little doubt that its focus in criminalizing identity theft included the "laudable goal" of combating the effects of identity theft on its victims. *People v. Madrigal*, 241 Ill. 2d 463, 467, 479 (2011); *cf. People v. Bensen*, 2017 IL App (2d) 150085, ¶ 23 (legislature recognized both "the burden that misappropriating someone else's identity places on the economy" and the "numerous financial difficulties" that the "defendant's impersonation" directly causes to "the person whose identity the defendant assumed"); *see also People v. Montoya*, 373 Ill. App. 3d 78, 85 (2d Dist. 2007) ("the legislative declaration of the Identity Theft Law . . . focuses on the substantial burden placed upon the economy as a result of identity theft" and the "onerous nature of the crime" on its victim (quotation omitted)).

Soon thereafter, the General Assembly added the identity theft subsection to the Code's "place of trial" statute, formalizing its intent for identity theft to be defined by both the location where the thief physically obtains, possesses, or uses the victim's personal identifying information or personal identification documents *and* the location where the thief's conduct causes injury to his victim and thereby establishes the thief's constructive presence. Pub. Act 94-51, § 5/1-6(s) (eff. Jan. 1, 2006); *see also* Pub. Act 97-1150 (eff. Jan. 25, 2013) (affirming § 1-6's applicability to newly passed

Criminal Code of 2012); Pub. Act 97-1108 (eff. Jan. 1, 2013) (passing Criminal Code of 2012 to replace Criminal Code of 1961). And in 2011, the General Assembly passed a separate identity theft venue statute, 720 ILCS 5/16-36, expressly calling for the criminal prosecution of identity theft in "any county" where the victim "resides or has his or her principal place of business." *See* Pub. Act 97-597, §§ 5/16-0.1, 16-30, 16-36 (eff. Jan. 1, 2012) (redistributing former Article 16G provisions into newly adopted subdivisions of Article 16 on "Theft and Related Offenses"). Thus, the legislature has twice made clear its intent to define venue for identity theft *both* by the place where the thief physically acts *and* by the place where his victim suffers the consequence of that physical act. The General Assembly was well aware of the implications that these identity theft venue provisions would have on the overall contours of identity theft as a crime; indeed, "[i]t is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter," and "they should all be construed together." *People v. Davis*, 199 Ill. 2d 130, 137 (2002) (quotation and citation omitted).

This approach is not novel; the legislature routinely considers some combination of a defendant's physical conduct *and* the direct effects thereof when defining the contours of a crime and assigning it a locus (or multiple loci). As the Illinois Appellate Court noted over a century ago, "[a] crime is, in law, committed in the place where the doer's act takes effect, whether he is himself in such place or not; in this way, one may even perpetrate an offense

against a State or country upon whose soil he never set foot." *Johnson v. People*, 66 Ill. App. 103, 105 (2d Dist. 1896); *see also People v. Hennefent*, 315 Ill. App. 141, 145-46 (2d Dist. 1942) (same).

Indeed, many subsections of § 1-6 reflect this approach. Subsection (b), for example, establishes that where an assailant and victim are in different counties, an offense upon a victim's person occurs in both locations, notwithstanding the assailant's lack of physical presence in the victim's county at the moment when he affirmatively acts. *See* 720 ILCS 5/1-6(b). Similarly, pursuant to subsection (g), thefts occur in every county in which the offender exerts control over stolen property, notwithstanding that some thefts under the statute refer only to the initial, physical act of unlawfully obtaining stolen property without regard for additional acts of exerting possession or control of it. *See People v. Gilliam*, 172 Ill. 2d 484, 507-08 (1996) (citing 720 ILCS 5/16-1(a) (1992); 720 ILCS 5/1-6(g) (1992)). As this Court has reasoned, the dispositive issue is where the "essence of the crime" occurs, and not merely the defendant's physical location at the precise moment of the initiating physical act. *Id.*

Section 1-6(t) is merely a factual variant of this same approach. It reflects the legislature's determination that the "essence of the crime" of identity theft is not merely the thief's physical act of obtaining, possessing, or using another's personal identifying information or personal identification documents, but also the injury that the thief's act causes to victim. *See* 720

ILCS 5/1-6(t)(1)-(3). Indeed, given the nature of the crime, the victim rarely suffers injury in the thief's physical presence. In an increasingly digital world, identity thefts can (and often do) occur electronically and from afar. *See* United States Department of Justice, Bureau of Justice Statistics, *Victims of Identity Theft, 2016* (Jan. 2019), *available at* https://www.bjs.gov/content/pub/pdf/vit16.pdf (of estimated 26 million United States residents who were victims of identity theft in 2016, 94% knew nothing about the identity of the offender, only 26% knew how the identity theft occurred, and fewer than 2.9% traced the identity theft to a direct physical interaction with the thief, such as having an item with their personal identifying information stolen).

Nor is the Illinois General Assembly alone in its appraisal of identity theft as a crime occurring, in part, where the victim suffers its effects, rather than exclusively at the locus of the offender's physical act. A growing majority of States adheres to this same or a similar approach. *See, e.g.*, *Mayze*, 280 Ga. at 5-6 (collecting statutes); Cal. Penal Code § 786(b)(1) (2016); Colo. Rev. Stat. § 18-1-202(13) (2020); Kan. Stat. Ann. § 22-2619(b)(2) (2016); Miss. Code. Ann. § 97-45-11(b) (2020); N.Y. Crim. Proc. Law § 20.40(l) (2016); Tenn. Code Ann. § 39-14-150(j)(4) (2014); Tex. Code Crim. Proc. Ann. art. 13.29 (2005); Wis. Stat. § 971.19(11) (2018).

Moreover, a contrary interpretation would lead to an absurd result, as it would leave the State of Illinois without an available venue to try offenders

who, from the safety of their out-of-state computer screens, use the Internet to commit identity theft against Illinoisans, effectively immunizing them from prosecution despite the State's clear criminal jurisdiction to do so. *See People v. Deleon*, 2015 IL App (1st) 131308, ¶¶ 18-19 (citing *People v. Caruso*, 119 Ill. 2d 376 (1987)) ("Where an act is performed outside Illinois, but the actor intends to produce a negative effect in Illinois, Illinois possesses jurisdiction to prosecute the actor."); Ill. Const., art. 6, § 9; 720 ILCS 5/1-5(a)(1), (b); *see also People v. Williams*, 119 Ill. 2d 24, 28 (1987) (court is "obliged to construe statutes both to avoid absurd or unjust consequences and to affirm their constitutionality").

Defendant's claim that § 1-6(t)(3) violates article 1, section 8 due to its establishment of a venue beyond the defendant's physical location at the precise moment that he commits the *actus reus* of his crime calls Illinois's entire venue framework into question — a framework that this Court has approved for over 130 years. As discussed, the core tenet of § 1-6 is that "[c]riminal actions shall be tried in the county where the offense was committed, *except as otherwise provided by law*." 720 ILCS 5/1-6(a) (emphasis added). And this Court has repeatedly permitted the legislature to define certain offenses as occurring beyond the defendant's physical location at the moment of his criminal act, whether it is because the essence of the crime necessarily entails multiple locations or because the factual circumstances demand it. *E.g.*, *Gilliam*, 172 Ill. 2d at 506-08; *Watt*, 126 Ill. at

17 (murder committed on train could be tried in any county the train passed through, due to impossibility of ascertaining the specific county in which it was committed; statute permitting trial of transitory offenses in all counties where criminal act was potentially committed not unconstitutional). The same result is warranted here, where the essence of the crime of identity theft includes the injury that the victim sustains, and the factual circumstances — which increasingly occur online — demand it.

Given that defendant has improperly supported his article 1, section 8 claim with federal Sixth Amendment vicinage cases and cases applying federal and state due process analyses, *Patterson*, 2014 IL 115102, ¶¶ 97, 103, it bears mention that he has neither raised nor developed any independent, cohesive argument that § 1-6(t)(3) violates any of those constitutional provisions. Accordingly, such arguments are forfeited. Ill. Sup. Ct. R. 341(h)(7); *Bartlow v. Costigan*, 2014 IL 115152, ¶ 52; *e.g.*, *People v. Bona*, 2018 IL App (2d) 160581, ¶ 19.

That said, either type of challenge would also be meritless. For one thing, the federal vicinage right of the Sixth Amendment has not been incorporated to apply to the States. *See United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999) (collecting cases regarding federal Sixth Amendment vicinage/locus delecti right); *Duncan v. Louisiana*, 391 U.S. 145, 147-50 (1968) (not all rights guaranteed by Sixth Amendment are incorporated and applicable to the States); *Stevenson v. Lewis*, 384 F.3d 1069, 1071 (9th Cir.

2004) (collecting cases) (all federal appellate courts that have addressed vicinage have concluded that it is not incorporated to the States); *Zicarelli v. Dietz*, 633 F.2d 312, 325-26 (3d. Cir. 1980) (same); *see also Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020) (incorporating right to jury's unanimity but leaving open whether remaining unincorporated aspects of Sixth Amendment right to jury trial will ever be applied to the States).

For another, the Supreme Court has held that federal vicinage concerns "the locality of the offense, and not the personal presence of the offender." *Armour Packing Co. v. United States*, 209 U.S. 56, 76 (1908). In *Armour Packing*, the Court considered a statute prohibiting a shipper from obtaining a rate for the transportation of goods by rail lower than the published rate, as well as a corresponding venue statute permitting the shipper's prosecution in any State or district that the goods passed through in transit, irrespective of whether the shipper engaged in conduct there. *See id.* at 74-75. The Court upheld the venue provision, affirming Congress's authority to define the "essence of the offense, when it takes place, whether in one district or another, whether at the beginning, at the end, or in the middle of the journey, [as] equally and at all times committed," regardless of the shipper's physical presence committing an affirmative act. *Id.* at 74-75; *see also id.* at 77 ("modern facilities for transportation and intercommunication" should not prevent the government from effectively prosecuting modern offenses that may be "constantly committed through

[their] length and breadth"); *United States v. Cores*, 356 U.S. 405, 407-08 (1958) (Sixth Amendment vicinage right "is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place," but it does not preclude Congress from "creat[ing] a continuing offense, the locality of [which] extend[s] over the whole area through which force propelled by an offender operates" (citations and quotations omitted)); *United States v. Johnson*, 323 U.S. 273, 276 (1944) (same).

Here, as discussed, a reading of § 16-30, § 1-6(t), and § 16-36 reveals that the General Assembly intended that the "essence of the offense" of identity theft include both the location where the offender acts to steal the victim's identity and the location where the victim's identity reposes (the victim's residence). Therefore, there would be no vicinage problem under the Sixth Amendment. *See United States v. Reed*, 773 F.2d 477, 481-82 (2d Cir. 1985) ("[N]o single defined policy or mechanical test [ ] determine[s] constitutional venue. Rather, the test is best described as a substantial contacts rule," taking into account "the site of the defendant's acts, the elements and nature of the crime, the locus of the effect of the criminal conduct, and the suitability of each district for accurate factfinding," though the "place[ ] that suffer[s] the effects of a crime . . . [t]o some extent . . . overlaps with the definition and nature of the crime."); *United States v. Saavedra*, 223 F.3d 85, 93 (2d Cir. 2000) (where Congress has created multi-venue offense, "court should ask whether the criminal acts in question bear

'substantial contacts' with any given venue"; "substantial contacts rule offers guidance on how to determine whether the location of venue is constitutional, especially in those cases where the defendant's acts did not take place within the district selected as the venue for trial").

Nor can it be said that the General Assembly's view of the victim's residence as a location where the offense of identity theft occurs is so "arbitrary" or "unreasonable" as to deprive a defendant of due process. *Cf. Mapes v. Hulcher*, 363 Ill. 227, 230-31 (1936) ("[F]rom the earliest history of this state, and under three different Constitutions, the Legislature has always assumed and exercised the power of determining the venue of transitory actions. . . . It is conceivable that a law fixing venue might be so arbitrary or unreasonable as to deprive defendants of due process of law, but we can find no such fault with the present act."); *see also Wingert by Wingert v. Hradisky*, 2019 IL 123201, ¶ 27 n.4, ¶ 29 (federal and state due process will be treated as coextensive where there is no discernable reason to construe state due process clause differently than federal due process clause on specific issue) (citing *In re Marriage of Miller*, 227 Ill. 2d 185, 196 (2007)). Therefore, any due process argument would have also failed, had defendant properly made one.

IV. Notwithstanding the Merits of Defendant's Facial Challenge to 720 ILCS 5/1-6(t)(3), Any Ruling by This Court as to Its Constitutionality Would Be Advisory, as Defendant Has Not Further Challenged 720 ILCS 5/16-36, Which Provided an Independent Statutory Basis for His Prosecution for Identity Theft in DuPage County, Where His Victim Resided.

This Court has long held that "cases should be decided on nonconstitutional grounds whenever possible, reaching constitutional issues only as a last resort." *In re E.H.*, 224 Ill. 2d 172, 178 (2006) (collecting cases). Though courts "must meet and decide" constitutional questions that "become indispensably necessary to a case," "a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed" "if the case may be determined on other points." *Ultsch v. Ill. Mun. Ret. Fund*, 226 Ill. 2d 169, 176-77 (2007) (quotation omitted). Courts "should not compromise the stability of the legal system by declaring legislation unconstitutional when a particular case does not require it." *E.H.*, 224 Ill. 2d at 179 (quotation omitted). Here, defendant's case can be resolved on the nonconstitutional ground that his facial challenge to § 1-6(t)(3) will not entitle him to relief from his identity theft conviction.

This Court does "not render advisory opinions or decide issues that would not result in appropriate relief." *Fillmore v. Taylor*, 2019 IL 122626, ¶ 34; *Peach v. McGovern*, 2019 IL 123156, ¶ 64 ("Courts of review will [ ] ordinarily not consider issues that are not essential to the disposition of the causes before them or where the results are not affected regardless of how the issues are decided."). In this case, § 16-36 of the Criminal Code — a different

venue statute within the identity theft subdivision of the Code that defendant has not challenged — provided a distinct statutory basis for defendant's prosecution in DuPage County. Similar to § 1-6(t)(3), it provides that "[i]n addition to any other venues provided for by statute or otherwise, venue for any criminal prosecution or civil recovery action under Sections 16-30 through 16-36 shall be proper in any county where the person described in the personal identification information or personal identification document in question resides or has his or her principal place of business." 720 ILCS 5/16-36. Yet, defendant has raised no constitutional challenge to § 16-36 in his opening brief to this Court, *see generally* Def. Br. 1-2, 5-15; *see also* Def. Pet. for Leave to App. 2-3, 7-16; nor did he ever challenge it below, *see generally* Def. App. Ct. Br. 1, 10-16; Def. App. Ct. Reply Br. 1-7; C119-22.

Although defendant was not obliged to raise such claim in the lower courts in order to preserve it for review by this Court, *see People v. Thompson*, 2015 IL 118151, ¶¶ 32, 34-37, his failure to present any challenge to § 16-36 in his submissions to this Court forfeits the claim under Illinois Supreme Court Rule 341(h)(7). Indeed, a facial challenge to a statute's constitutionality is no exception to the rule that "[p]oints not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. Sup. Ct. R. 341(h)(7); *Bartlow*, 2014 IL 115152, ¶ 52; *e.g.*, *Bona*, 2018 IL App (2d) 160581, ¶ 19. Thus, a finding that § 1-6(t)(3) is unconstitutional would not provide defendant with any relief.

Accordingly, this Court should either decline to rule on the constitutionality of § 1-6(t)(3) because such ruling is not "indispensably necessary" to the disposition of this case, *Ultsch*, 226 Ill. 2d at 176-77; *E.H.*, 224 Ill. 2d at 179, or, if it does address § 1-6(t)(3)'s constitutionality, uphold defendant's conviction on the independent ground that § 16-36 provided a distinct statutory basis for his prosecution in DuPage County, which is not the subject of his constitutional challenge here.

CONCLUSION

For all of these reasons, this Court should affirm the appellate court's judgment.

November 18, 2020

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 32 pages.

/s/ *Evan B. Elsner*
EVAN B. ELSNER

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. The undersigned deposes and states that on November 18, 2020, the foregoing **Brief of Plaintiff-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and served upon the following e-mail addresses of record:

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Additionally, upon the brief's acceptance by the Court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

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