No. _____

In the Supreme Court of the United States

TIMOTHY J. SMITH,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the proper remedy for the government's failure to prove venue is an acquittal barring re-prosecution of the offense, as the Fifth and Eighth Circuits have held, or whether instead the government may re-try the defendant for the same offense in a different venue, as the Sixth, Ninth, Tenth, and Eleventh Circuits have held.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

United States v. Smith, No. 20-12667, United States Court of Appeals for the Eleventh Circuit, judgment entered January 12, 2022 (22 F.4th 1236), rehearing denied February 16, 2022.

United States v. Smith, No. 3:19cr32-MCR, United States District Court for the Northern District of Florida, motion for judgment of acquittal denied June 22, 2020 (469 F. Supp. 3d 1249), judgment entered July 9, 2020.

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-18a) is reported at 22 F.4th 1236 (11th Cir. 2022). The court's order denying panel rehearing (App. 39a) is not published. The opinion of the district court (App. 19a-38a) denying Mr. Smith's motion for judgment of acquittal is reported at 469 F. Supp. 3d 1249 (N.D. Fla. 2020).

JURISDICTION

The court of appeals entered its judgment on January 12, 2022 (App. 1a) and denied rehearing on February 16, 2022 (App. 39a). On May 10, 2022, Justice Thomas extended the time to file a petition for a writ of certiorari through June 16, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Article III, section 2, clause 3 of the United States Constitution provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

The Sixth Amendment to the United States Constitution provides in relevant part:

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

Federal Rule of Criminal Procedure 18 provides in relevant part:

> Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed.

INTRODUCTION

Criminal defendants have a right to be tried in a proper venue. Enumerated twice in the Constitution, that right was firmly established at the Founding and has been safeguarded by this Court for more than two centuries. But the courts of appeals are intractably divided over the appropriate remedy when a criminal defendant has been wrongly tried in an improper venue. The decision below exacerbates an acknowledged circuit conflict by holding that when the government fails to meet its burden of proving venue at trial, it is free to subject a defendant to a new trial in a different venue. That holding erodes venue protections that are deeply rooted in this Nation's history, and leaves the venue right dependent on the happenstance of where a defendant is tried. This Court's review on this issue of unquestionable importance is needed.

The Constitution safeguards a defendant's right to be tried in a proper venue, both in Article III and in the Sixth Amendment. *See* U.S. Const. art. III, § 2, cl. 3; U.S. Const. amend. VI. But this Court has spoken to the procedural contours of the venue right only *once*, holding in *United States v. Jackalow* that venue must be presented to and decided by the jury. 66 U.S. (1 Black) 484, 487-88 (1861). That single pronouncement, a century and a half ago, has proven woefully insufficient to guide the lower courts in implementing the Constitution's venue right—resulting in a sharp disagreement as to the appropriate remedy for a violation of that right. While the Fifth and Eighth Circuits require a judgment of acquittal when the government fails to meet its burden of establishing venue, the Sixth, Ninth, Tenth, and Eleventh Circuits (including in this

case) hold that a defendant can be re-tried for the same offense in other venues—indeed, that they can be serially re-tried in as many venues as the government wishes. And district courts are, if anything, even more fractured and confused.

This results in grave inequities in the application of a constitutional right of first-order importance. Great Britain's abuse of the venue rights of American colonists made venue "a matter of concern to the Nation's founders." *United States v. Cabrales*, 524 U.S. 1, 6 (1998). Federalists and Anti-Federalists alike recognized that the venue right was "vital to the security of the citizen," because it acted as a bulwark against government abuse and the hardship of being made to stand trial in a remote location. 3 Joseph Story, *Commentaries on the Constitution* § 1775 (1833). But today criminal defendants who suffer the same violation of this right receive markedly different remedies depending on which circuit they are tried in. While some defendants will go free, others will be re-tried (perhaps multiple times) and punished—which is ultimately no remedy at all. Such disparate results in the implementation of a core constitutional guarantee undermine the fair administration of criminal justice, and should not be permitted to persist. And this circuit conflict is particularly pernicious, because it creates incentives for the government to engage in forum-shopping.

In short, this case involves a clear and acknowledged circuit conflict on a vitally important question of constitutional law. It easily meets the Court's traditional criteria for certiorari, and the petition should be granted.

STATEMENT OF THE CASE

A. The Constitutional Right To Proper Venue

1. A criminal defendant's right to be tried in a proper venue is centuries older than this country. The venue right traces back to Magna Carta, which recognized that a criminal defendant is entitled to a jury of his peers drawn from the place where the defendant committed a crime. Magna Carta cls. XXXIX, XX (G.R.C. Davis trans., London British Museum 1963) (1215) (declaring that "[n]o freeman shall be seized or imprisoned . . . except by the lawful judgment of his peers" and that punishment would not be "imposed except by the assessment on oath of reputable men in the neighborhood").

Prior to the American Revolution, the British strayed from this long-standing principle by threatening to force American colonists to stand trial in England. In 1769, Parliament responded to unrest in Massachusetts by "decree[ing] that colonists charged with treason could be tried in England." *Cabrales*, 524 U.S. at 6 n.1. This was a direct response to the failed prosecutions of "rioters" resisting the imposition of customs duties, which were thwarted by grand jurors sympathetic to the colonists' cause. Drew L. Kershen, *Vicinage*, 29 Okla. L. Rev. 801, 805-06 (1976). Colonial governments swiftly and stridently objected to this measure as a deprivation of "the inestimable Privilege of being tried by a Jury from the Vicinage." William Wirt Blume, *Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 Mich. L. Rev. 59, 64-65 (1944) (quoting *Journals of the House of Burgesses, 1766-1769* at 214 (John Pendleton Kennedy ed., 1906)).

As a result of these abuses by the British, "[p]roper venue in criminal proceedings was a matter of concern to the Nation's founders." *Cabrales*, 524 U.S. at 6. The Founders cited the authorization of the "transportation of colonists 'beyond Seas to be tried'" as one of many "injuries and usurpations attributed to the King" in the Declaration of Independence. *Id.* at 6 & n.1 (quoting the Declaration of Independence para. 21 (U.S. 1776)).

Consistent with those concerns, the Constitution "twice safeguards the defendant's venue right." *Id.* Article III, § 2, cl. 3, instructs that "Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." The provision was included "to leave as little as possible to mere discretion" on "a subject so vital to the security of the citizen." Story, *supra*, § 1775; *see also The Federalist No. 84*, at 510-11 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (identifying Article III's venue provision as one of "various provisions in favor of particular privileges and rights" in the Constitution). During the ratification debates, however, the concern was raised that a requirement that the trial be held "in the State" where the crime was committed would not sufficiently protect criminal defendants' venue right. Anti-Federalists feared that if jurors "may come from any part of the state," then federal prosecutors "can hang any one they please, by having a jury to suit their purpose." 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 569 (Jonathan Elliot ed., J.B. Lippincott Co. 1891) (statement of Mr. Grayson at Virginia ratification convention). To allay that concern, the Founders reinforced Article III's protections by adopting the Sixth Amendment, which

calls for trials "by an impartial jury of the State *and district* wherein the crime shall have been committed." U.S. Const. amend. VI (emphasis added); *see also* Akhil Reed Amar, *The Bill of Rights As A Constitution*, 100 Yale L.J. 1131, 1197 (1991) (explaining that the Sixth Amendment was adopted "to guarantee a right to a trial within the district of the crime"). As commentators have noted, "the desirability of safeguarding the jury may have been the most consistent point of agreement between the Federalists and Anti-Federalists." Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 871 (1994).

2. In accordance with that history, this Court has consistently emphasized that "questions of venue" are of fundamental importance, and not just "matters of mere procedure." *Travis v. United States*, 364 U.S. 631, 634 (1961); *see United States v. Palma-Ruedas*, 121 F.3d 841, 861 (3d Cir. 1997) (Alito, J., concurring in part) (venue right serves "important substantive ends"), *rev'd on other grounds sub nom. United States v. Rodriguez-Moreno*, 526 U.S. 275 (1998).

First, as this Court has explained, the venue right serves to protect the accused from "needless hardship . . . by prosecution remote from home [a]nd from appropriate facilities for defense." *United States v. Johnson,* 323 U.S. 273, 275 (1944); *see also United States v. Cores*, 356 U.S. 405, 407 (1958) (explaining that venue "is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place"); Story, *supra*, § 1775 (explaining that venue right protects against "the most oppressive expenses").

Second, the venue right serves to minimize "the appearance of abuses, if not . . . abuses, in the selection of what may be deemed a tribunal favorable to the prosecution." *Johnson,* 323 U.S. at 275; *see Palma-Ruedas*, 121 F.3d at 861 (Alito, J., concurring in part) (explaining that venue right serves "to deter governmental abuses of power"); *Hyde v. United States*, 225 U.S. 347, 386-87 (1912) (Holmes, J., dissenting) (explaining that expansive interpretation of venue created "opening to oppression" based on "choice of the government to prosecute" in a favorable forum). The Court has long recognized that questions of venue are inextricably intertwined with "the fair administration of criminal justice and public confidence in it." *Johnson,* 323 U.S. at 276.

But notwithstanding the importance of the venue right, this Court has spoken only once to the procedures for giving that right practical effect—and that guidance is over a century and half old. In *Jackalow*, the Court held that a jury must "find the fact[s]" required to determine venue. 66 U.S. at 487-88. Consistent with that view, lower courts have concluded that proof of venue "is an indispensable part of the prosecution's case," *United States v. Gillette*, 189 F.2d 449, 452 (2d Cir.), *cert. denied*, 342 U.S. 827 (1951), on which the government bears the burden of proof, *Holdridge v. United States*, 282 F.2d 302, 305 (8th Cir. 1960). This makes venue, in essence, an element of the charged offense.

But this Court has never addressed the quantum of proof required to prove venue or the consequences of the government's failure of proof as to that element. In the absence of guidance, federal and state courts have adopted differing burdens of proof. Federal courts generally require proof of venue by a

preponderance of the evidence. *See*, *e.g.*, *United States v. Rommy*, 506 F.3d 108, 119 (2d Cir. 2007), *cert. denied*, 552 U.S. 1260 (2008). But many states require that venue be proven beyond a reasonable doubt. *See infra* at 27 & n.10.

During or after trial, a defendant may challenge the sufficiency of the government's venue evidence just as it would any other element of an offense, through a motion for judgment of *acquittal* pursuant to Federal Rule of Criminal Procedure 29. 2A Charles Alan Wright et al., *Federal Practice and Procedure* § 466 (4th ed. Apr. 2022 update). And, like any other element of an offense, an appellate court reviews the sufficiency of the evidence of venue by asking whether, after viewing the evidence in the light most favorable to the government, any reasonable juror could have found adequate proof of venue. *See, e.g.*, *United States v. Thompson*, 896 F.3d 155, 171-72 (2d Cir. 2018) (describing sufficiency review of venue), *cert. denied*, 139 S. Ct. 2715 (2019); *Musacchio v. United States*, 577 U.S. 237, 243 (2016) (describing sufficiency review generally).

B. Factual And Procedural Background

1. Petitioner Timothy J. Smith lives in Mobile, Alabama; works as a software engineer; and spends between 1,200 to 1,500 hours a year fishing. App. 1a, 2a. On April 3, 2019, he was indicted in the Northern District of Florida on three counts: violation of the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030(a)(2)(C), (c)(2)(B)(iii); theft of trade secrets, *id.* § 1832(a)(1); and extortion, *id.* § 875(d). Dkt. 3; Dkt.

30.[1] Each of these counts was predicated on Mr. Smith's actions in Mobile. App. 1a.

Mr. Smith is alleged to have hacked into the website of StrikeLines, a two-person business based in Pensacola, Florida. *Id.* at 2a-3a. StrikeLines identifies the locations of artificial fishing reefs, which commercial and recreational fishermen have paid to place, and sells those reefs' coordinates to other fishermen. *Id.* at 2a; CA11 Supplemental Appendix ("SA") Vol. I at 115.[2] Whether they use such "private" reefs for commercial, charter, or personal purposes, fishermen generally do not share these coordinates to prevent others from overfishing their spots. *See* SA Vol II at 136-37; App. 2a. After Mr. Smith obtained StrikeLines' data, he offered in a Facebook post to give fishermen who had placed artificial reefs at their own expense the opportunity to cross-check their reefs' coordinates against the coordinates sold or offered for sale by Strikelines. *See* App. 3a-4a; SA Vol. II at 137. That alleged conduct formed the basis for the CFAA and theft-of-trade-secrets counts. The extortion count was predicated on Mr. Smith's alleged offer to remove his social media posts discussing StrikeLines' coordinates in exchange for deep-water grouper coordinates. At no time during the alleged conduct was Mr. Smith physically present in Pensacola.

2. The government nevertheless chose to prosecute Mr. Smith in the Pensacola Division of the

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[1] Dkt. xx refers to docket entries in the district court, No. 3:19cr32-MCR (N.D. Fla.).

[2] Page references to SA Volumes reflect the PDF pagination as displayed in the PACER header.

Northern District of Florida. Before trial, Mr. Smith moved to dismiss his CFAA and theft-of-trade-secrets counts for lack of venue. Dkt. 25; Dkt. 38.[3] He argued that venue was improper because he resided in the Southern District of Alabama at all times during the relevant events, and the website's servers stored the fishing coordinates in the Middle District of Florida. Dkt. 38 ¶¶ 5-7. Accordingly, no part of the offense "was committed" in the Northern District of Florida where the government brought the case. Fed. R. Crim. P. 18. The district court found the motion premature, but noted that the government "need[ed] to prove venue through presentation of the evidence at trial." Dkt. 46 at 6-7; *see also id.* at 8 & n.6 (identifying "underlying factual issues that need to be decided at trial by a jury"). It thus denied Mr. Smith's motion without prejudice. Dkt. 46 at 13.

3. Mr. Smith was accordingly tried in Pensacola, even though he was located in Mobile, Alabama, for the entirety of the alleged conduct. At the close of the government's case, Mr. Smith moved for a judgment of acquittal, arguing that the government had failed to present sufficient evidence of venue for the CFAA and theft-of-trade-secrets counts. SA Vol. II at 119, 150. The district court reserved a ruling on the motion and submitted the issue to the jury. App. 7a. The district court instructed the jury that the government bore the burden of proving by a preponderance of evidence that venue was proper in the Northern District of Florida as to each count of the indictment. App. 7a; Dkt. 73 at 21-22. The district court explained to the jury that "[i]f the

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[3] Mr. Smith did not independently challenge venue for the extortion count. *See* Dkt. 38 at 8; Dkt. 46 at 7 n.5.

Government has failed to establish proper venue for any count in the Indictment by a preponderance of the evidence, you must find the Defendant not guilty as to that count." Dkt. 73 at 22. The jury returned a general verdict finding Mr. Smith not guilty on the CFAA count but guilty as to theft of trade secrets and extortion. Dkt. 74.

4. After the jury returned its verdict, and because the district court had reserved ruling on Mr. Smith's mid-trial motion for judgment of acquittal on venue for the theft-of-trade-secrets charge, the district court requested supplemental briefing regarding venue for that count. SA Vol. II at 238-39; Dkt. 78. In his supplemental brief, Mr. Smith argued that when a jury's finding of venue lacks sufficient evidentiary support, the proper remedy is a judgment of acquittal. Dkt. 89 at 2 (citing *United States v. Strain*, 407 F.3d 379, 380 (5th Cir. 2005) (per curiam); *United States v. Greene*, 995 F.2d 793, 802 (8th Cir. 1993)). Mr. Smith also asserted that venue in the Northern District of Florida was improper under the "essential conduct elements" test—which grounds venue in the locale where the actus rei were committed—because the essential conduct elements for the theft-of-trade-secrets offense all occurred in Alabama. *Id.* at 4, 8-9 (citing, *inter alia*, *Cabrales*, 524 U.S. at 7). The government, in contrast, contended that venue was proper in the Northern District of Florida because StrikeLines was located within the district and "felt injury" there. Dkt. 88 at 8 (citing *United States v. Balsiger*, 2008 WL 4964716, at *2-3 (E.D. Wis. Nov. 11, 2008)).

Mr. Smith also filed a post-verdict motion for judgment of acquittal under Rule 29 in which he renewed his sufficiency-of-the-evidence challenge to

venue. Dkt. 82. The court denied Mr. Smith's motion for judgment of acquittal, finding venue proper because StrikeLines, a resident of the Northern District of Florida, felt the effects of the offense in that district. App. 29a-30a. Mr. Smith was sentenced to eighteen months of imprisonment and one year of supervised release. Dkt. 108.

5. The Eleventh Circuit affirmed Mr. Smith's extortion conviction, but vacated the theft-of-trade-secrets conviction for improper venue. App. 15a, 18a. In finding improper venue, the Eleventh Circuit rejected the district court's "effects" test, and looked instead to the "essential conduct elements" of the offense, none of which had been committed in the Northern District of Florida, where Mr. Smith was prosecuted. *Id.* at 11a-12a. The Eleventh Circuit did not resolve "whether venue would be proper in the Middle District of Florida," where the servers that stored StrikeLines' data were located. *Id.* at 12a.

With respect to remedy, Mr. Smith sought entry of a judgment of acquittal on his theft-of-trade-secrets count. Smith CA11 Opening Br. 77. But, relying on circuit precedent, the Eleventh Circuit found that the "remedy for improper venue is vacatur of the conviction, not acquittal or dismissal with prejudice." App. 15a. The court relied on its decision in *Haney v. Burgess*, 799 F.2d 661, 664 (11th Cir. 1986) (per curiam), which held that "retrial in a proper venue after [a court] vacate[s] a conviction for improper venue" is permissible because the Double Jeopardy Clause "is not implicated by" the government's failure to prove venue. App. 15a. The court thus vacated Mr.

Smith's theft-of-trade-secrets count, and remanded for resentencing on the extortion count. *Id.* at 18a.[4]

REASONS FOR GRANTING THE WRIT

I. The Courts Of Appeals Are Divided Over The Question Presented

The courts of appeals are deeply and intractably divided over the proper remedy for a failure to prove venue. The Fifth and Eighth Circuits require entry of a judgment of acquittal when the government has failed to prove venue at trial. But the Sixth, Ninth, Tenth, and Eleventh Circuits hold that failure to prove venue requires vacatur or dismissal without prejudice and thus does not bar re-prosecution. And the confusion is even more pronounced at the district court level. Courts in circuits holding that vacatur is the proper remedy for insufficient evidence of venue regularly instruct juries that failure to prove venue requires *acquittal*, which would ordinarily bar re-prosecution. And district courts frequently grant Rule 29 motions for judgment of acquittal on venue grounds without specifying whether their judgments bar a subsequent prosecution. The result is a lack of consistency or clear guidance from district to district. This Court's intervention is clearly needed.

1. The decision below holds that when the government has presented insufficient evidence of venue with respect to an offense, the conviction for that offense must be vacated. App. 15a. In reaching

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[4] The resentencing is currently scheduled for August 17, 2022. Dkt. 136. The government has not yet indicated whether it will seek to re-try Mr. Smith for the theft-of-trade-secrets count in a different venue, as it is permitted to do under the Eleventh Circuit's ruling.

that conclusion, the Eleventh Circuit relied on its prior decision in *Haney v. Burgess*, 799 F.2d 661 (11th Cir. 1986).[5] There, a defendant whose Alabama state-court conviction was reversed for improper venue was re-indicted, prompting him to file a federal habeas petition. 799 F.2d at 662. The Eleventh Circuit denied relief. *Id.* Without any reference to the constitutional foundations of venue, *Haney* reasoned that "[v]enue is wholly neutral; it is a question of procedure, more than anything else, and it does not prove or disprove the guilt of the accused." *Id.* at 663 (quoting *Wilkett v. United States*, 655 F.2d 1007, 1011-12 (10th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982)). A reversal for improper venue should not bar re-prosecution, the court concluded, because it was akin to a "trial error" rather than a finding of insufficient evidence. *Id.* at 664. Accordingly, in the court's view, permitting re-prosecution would not give the government "the proverbial 'second bite at the apple'" or resemble "'the type of oppressive practices at which the double-jeopardy prohibition is aimed.'" *Id.* (citations omitted).

2. That holding squarely conflicts with rulings from the Fifth and Eighth Circuits. In cases where the government has presented insufficient evidence of venue at trial, these courts have ordered the entry of judgments of acquittal.

In *United States v. Strain* ("*Strain I*"), the defendant was convicted of harboring or concealing a

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[5] The Eleventh Circuit also cited *United States v. Davis*, 666 F.2d 195, 202 (5th Cir. Unit B 1982). App. 15a. *Davis* vacated a conviction based on the government's failure to prove venue, but provided no explanation for its choice of remedy. *See* 66 F.2d at 202.

fugitive in violation of 18 U.S.C. § 1071. 396 F.3d 689, 691 (5th Cir. 2005). The fugitive contacted the defendant via telephone while the defendant was located in the Western District of Texas in order to arrange a meeting in New Mexico, where both defendant and fugitive were arrested. *Id.* The defendant was tried and convicted in the Western District of Texas, with the jury returning a special verdict that the defendant began the offense in that district. *Id.* at 692.

On appeal, the Fifth Circuit observed that the case "would have been an easy affirmance" had it been tried in the District of New Mexico, where the defendant rented a motel room on the fugitive's behalf and lied to the police about his whereabouts. *Id.* at 691-92. But the government failed to present evidence sufficient to show that the offense was begun, continued, or completed in the Western District of Texas. *Id.* at 697. Thus, just as here, the government's choice of venue had no relationship to the defendant's alleged offense conduct. In light of the government's failure to prove venue, the Fifth Circuit ordered the district court to enter a judgment of acquittal on remand. *Id.*

The government sought rehearing, arguing that the court should have ordered "dismissal of [defendant's] conviction without prejudice." *United States v. Strain* ("*Strain II*"), 407 F.3d 379, 379 (5th Cir. 2005). The Fifth Circuit denied rehearing and made expressly clear that acquittal was the proper remedy. *Id.* at 380. The court acknowledged that other courts had vacated counts of conviction or dismissed them without prejudice for failure to prove venue. *See id.* at 380 n.*. But the Fifth Circuit found those cases unpersuasive. Rather, the Fifth Circuit

explained, venue is "a constitutionally-imposed element of every crime." *Id.* at 380. In the Fifth Circuit's view, the government's failure to prove venue at trial was thus no different than failing to prove any other element of the offense. *Id.* Even if "not an element in the traditional statutory sense," "venue turned on a question of the sufficiency of the evidence and was put before a jury." *Id.* Thus, the government's failure to present evidence at trial sufficient to support the jury's verdict did "not entitle the government to a second chance at prosecution." *Id.* In so holding, the Fifth Circuit applied the logic of this Court's Double Jeopardy cases that the Eleventh Circuit had specifically rejected in *Haney—i.e.*, the government should not receive a second chance to prove an essential part of its case against a criminal defendant. The reasoning in *Strain* and *Haney* is thus diametrically opposed and flatly irreconcilable.

The Eighth Circuit took the same approach as the Fifth Circuit in *United States v. Greene*, 995 F.2d 793 (8th Cir. 1993). There, a defendant challenged venue for a conviction of manufacturing marijuana. *Id.* at 794-95, 800-01. The Eighth Circuit agreed with the defendant that the government presented no testimony "specifically locating any marijuana fields in the district of indictment." *Id.* at 800-01. Accordingly, based on the government's failure to present sufficient evidence of venue, the Eighth Circuit reversed the defendant's conviction and remanded to the trial court for entry of a judgment of *acquittal*. *Id.* at 802.

3. In contrast to the approach of the Fifth and Eighth Circuits, the Sixth, Ninth, and Tenth Circuits have reached the same conclusion as the Eleventh Circuit, holding that the government's failure to prove

venue at trial does not warrant acquittal. *United States v. Petlechkov*, 922 F.3d 762, 771 (6th Cir. 2019) (holding that "dismissal without prejudice is appropriate"); *United States v. Hernandez*, 189 F.3d 785, 792 n.5 (9th Cir. 1999); *Wilkett*, 655 F.2d at 1011-12. Like the Eleventh Circuit, these circuits have reasoned that improper venue dismissals do not trigger the Double Jeopardy Clause. *See, e.g.*, *United States v. Ruelas-Arreguin*, 219 F.3d 1056, 1060 n.1 (9th Cir. 2000) (citing *United States v. Kaytso*, 868 F.2d 1020, 1021 (9th Cir. 1988), in stating that acquittal is not the proper remedy for improper venue); *Kaytso*, 868 F.2d at 1021 ("[T]he failure to establish venue does not go to guilt or innocence."); *Petlechkov*, 922 F.3d at 771 ("A dismissal on venue grounds does not qualify as an 'acquittal' for double jeopardy purposes."); *Wilkett*, 655 F.2d at 1012 ("[W]here, as here, the accused himself brings about the termination of the proceedings on a basis other than adjudication of guilt or innocence, former jeopardy does not take hold.").[6] On that basis, the Ninth Circuit has held that the government's failure to prove venue at trial does not preclude re-prosecution of the same defendant for the same offense, even if the re-prosecution takes place in the same district. *Kaytso*, 868 F.2d at 1021; *see also*

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[6] Without providing any rationale, the Second, Third, Fourth, and D.C. Circuits have also vacated or dismissed without prejudice convictions obtained in improper venues, with some suggesting in passing that re-prosecution may be permissible in another venue. *See United States v. Brennan*, 183 F.3d 139, 149, 151 (2d Cir. 1999); *United States v. Auernheimer*, 748 F.3d 525, 541 (3d Cir. 2014); *United States v. Jefferson*, 674 F.3d 332, 369 (4th Cir.), *cert. denied*, 568 U.S. 1041 (2012); *United States v. White*, 887 F.2d 267, 272 n.5 (D.C. Cir. 1989).

United States v. Cestoni, 2016 U.S. Dist. LEXIS 142828, at *6 (N.D. Cal. Oct. 14, 2016) (permitting government to re-indict defendant in same district where it previously failed to prove venue at trial).

4. Even among the circuits which generally agree with the Eleventh Circuit, however, there is division and confusion. While the Ninth Circuit has held that "an acquittal is [not] the proper remedy for improper venue," *Ruelas-Arreguin*, 219 F.3d at 1060 n.1, it has also found that "jeopardy . . . attach[es]" to a jury's acquittal based on failure to prove venue, *United States v. Ghanem*, 993 F.3d 1113, 1130 (9th Cir. 2021).

Thus, defendants in the Ninth Circuit face fundamentally different results depending on *who* makes the decision about the adequacy of the same venue evidence. Though a jury's not-guilty verdict premised on improper venue bars re-prosecution, an appellate determination that the government failed to present sufficient evidence of venue allows the government to try the case again elsewhere. Those divergent results run afoul of this Court's precedents. *See Evans v. Michigan*, 568 U.S. 313, 328-29 (2013) (declining to "distinguish between juries that acquit pursuant to their instructions and judicial acquittals"). And the incoherence of the Ninth Circuit's approach underscores the substantial confusion with respect to venue's status as an element necessary to sustain a conviction.[7]

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[7] Other circuits' approaches invite similar disparities. For example, despite requiring appellate courts merely to vacate convictions obtained in improper venues, the Sixth Circuit's pattern jury instructions state that for jurors "to return a guilty

5. The conflict among the courts of appeals is acknowledged and undeniable. In *United States v. Lozoya*, for example, the Ninth Circuit noted the existence of a "circuit conflict concerning the appropriate remedy when the government fails to prove venue at trial." 920 F.3d 1231, 1241 n.5 (9th Cir. 2019), *rev'd en banc*, 982 F.3d 648 (9th Cir. 2020). And the Fifth Circuit adhered to its acquittal remedy in *Strain II* even after expressly acknowledging the conflicting cases from other circuits. 407 F.3d at 380 & n.*; *see also, e.g.*, *United States v. Gaughan*, 431 F. Supp. 3d 686, 697 n.5 (D. Md. 2020) (noting the "conflicting authority" on this "less than straightforward" question). Commentators have likewise noted the circuit split. *See* Chris Thomson, Comment, *Off on a Technicality: The Proper Remedy for Improper Venue*, 73 S.M.U. L. Rev. 667, 670 (2020) (arguing that "the Supreme Court must act swiftly to prescribe a uniform remedy for cases of improper venue"); *cf. United States v. Reed*, 773 F.2d 477, 480 (2d Cir. 1985) ("Although the concept of a right to trial in the vicinage was so highly regarded as to appear twice in the Constitution, the Supreme Court has yet to articulate a coherent definition of the underlying policies."). This entrenched and acknowledged circuit

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verdict, the government must convince you that" venue has been proven. S2 *Modern Federal Jury Instructions – Criminal: Sixth Circuit Pattern Jury Instructions* § 3.07 (2022). Similarly, the Tenth Circuit vacated a conviction after finding insufficient evidence of venue in *United States v. Smith*, 641 F.3d 1200, 1207-09 (10th Cir. 2011), but if the *jury* had properly evaluated the evidence, it would have "f[ound] the defendant not guilty," under the district court's instructions, Jury Instructions at 35, *United States v. Smith*, No. 5:08-cr-272-C (W.D. Okla. Oct. 15, 2009), ECF No. 34.

conflict clearly meets this Court's certiorari criteria, and warrants review.

6. Finally, the conflict is also apparent in the district courts. While district courts in the Fifth and Eighth Circuits grant acquittal for insufficient evidence of venue when ruling on Rule 29 motions, *see, e.g.*, *United States v. Ubak-Offiong*, 2008 WL 177761, at *3-4 (E.D. Tex. Jan. 18, 2008), *aff'd*, 364 F. App'x 859 (5th Cir. 2010); *United States v. Udoh*, 2006 WL 2078195, at *1 (W.D. La. July 24, 2006); *see also* Order, *United States v. Pietrantonio*, No. 08-cr-170 (D. Minn. Apr. 6, 2011), ECF No. 134 (dismissing indictment after post-trial finding of improper venue), other district courts have expressly held that the government may "reprosecute" a defendant "in a district where venue is proper," after finding insufficient evidence of venue. *United States v. Jones*, 302 F. Supp. 3d 752, 762-63 (W.D. Va. 2017) (relying on Ninth and Tenth Circuit law); *see United States v. Douglas*, 996 F. Supp. 969, 975 (N.D. Cal. 1998).

And the confusion is even more pronounced in the district courts because there are also unreasoned orders that appear to contradict circuit precedent requiring vacatur by instead granting acquittal when the government fails to prove venue. *See, e.g.*, *United States v. Tomasetta*, 2012 WL 2064978, at *1, *5 (S.D.N.Y. June 6, 2012) (granting motion for judgment of acquittal on venue grounds); *United States v. Wesley*, 649 F. Supp. 2d 1232, 1244 (D. Kan. 2009) (same), *aff'd in part, vacated in part on other grounds sub nom. United States v. Foy*, 641 F.3d 455 (10th Cir.), *cert. denied*, 565 U.S. 969 (2011); *United States v. Canal Barge Co.*, 2008 WL 5101682, at *11 (W.D. Ky. Nov. 25, 2008) (same), *rev'd in part on other grounds*, 631 F.3d 347 (6th Cir. 2011); *United States*

v. Mikell, 163 F. Supp. 2d 720, 743 (E.D. Mich. 2001) (same). That means that courts routinely dispose of criminal cases without any clarity as to the finality of their judgments. The upshot is that district courts are in disarray, with results varying from district to district for no apparent reason. The need for this Court's guidance is manifest.

II. The Question Presented Is Exceptionally Important

The question presented is undeniably important. The government must prove venue as an element in each prosecution. And with the rise of cybercrime prosecutions, complicated questions of venue have become increasingly common. Because of the entrenched circuit conflict, however, defendants wrongfully prosecuted in an improper venue will receive different remedies for that violation based on geographic happenstance or, worse, prosecutorial strategy. This case provides an ideal vehicle to resolve this circuit conflict and bring uniformity to the implementation of the constitutional venue right.

1. As this Court's precedents recognize, the right to be tried by a jury of one's peers in the place where the crime was allegedly committed is foundational to our Nation's system of justice. *See, e.g.*, *Cabrales*, 524 U.S. at 6; *supra* at 5-7. The Founders set out venue protections in the Constitution in order "to leave as little as possible to mere discretion" on "a subject so vital to the security of the citizen." Story, *supra*, § 1775. Because the Constitution's venue provisions "touch closely the fair administration of criminal justice and public confidence in it," venue is essential to our constitutional order. *Johnson*, 323 U.S. at 276. It must be this Court, not the courts of appeals, that

has the final word on this issue of unquestionable importance. Indeed, this Court frequently grants review in cases where clarification is needed regarding the contours of a constitutional right. *See, e.g.*, *Hemphill v. New York*, 142 S. Ct. 681, 689 (2022) (Confrontation Clause); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1393-94 (2020) (Jury Trial Clause); *Betterman v. Montana*, 578 U.S. 437, 440 (2016) (Speedy Trial Clause).

Moreover, issues of venue are not only vitally important, but also frequently recurring. Venue is a potential issue in *every* criminal case that goes to trial—and in a variety of routinely litigated areas, such as cybercrime and drug trafficking, the alleged criminal conduct touches on numerous districts. *See Auernheimer*, 748 F.3d at 541 (noting importance of "constitutional limits on venue" in cybercrimes context). The difference between circuits that require a judgment of acquittal and those that permit re-trial is pronounced—in one circuit, a defendant deprived of his venue right remains at liberty without fear of prosecution, while in another he suffers a further trial, and the risk of incarceration. Whatever the correct rule, such a critical difference in result cannot be permitted to turn on geographic happenstance.

That is all the more true because this is a case where a divergence between jurisdictions creates an incentive for forum-shopping. The government has an obvious reason to bring its prosecutions in circuits with a vacatur rule, because it gets a do-over if it fails. And that incentive is particularly perverse in this context, because it increases the likelihood that the government will violate the defendant's constitutional right to a proper venue in its search for a more favorable forum.

That risk is not merely hypothetical. In *United States v. Smith*, for example, the Tenth Circuit dismissed an Oklahoma prosecution for false statements made to federal agents in Minnesota without prejudice because "any violation [of the statute] occurred in Minnesota, and consequently venue lay in Minnesota, not Oklahoma." 641 F.3d 1200, 1209 (10th Cir. 2011). Failure to prove venue in Minnesota, however, would have resulted in acquittal under the Eighth Circuit's rule. By going to Oklahoma first—even where it was obvious the conduct had a closer nexus to Minnesota—the government got two bites at the apple.[8]

Additionally, even when a case does not go to trial, venue can and does affect the shape of plea bargaining. In circuits that dismiss without prejudice, even defendants with strong venue arguments will feel pressure to accept a plea—after all, why muster a strong defense on venue, if the ultimate result is simply another onerous trial in a different location? And because courts rarely resolve venue disputes prior to trial, even a meritorious venue argument is unlikely to spare a defendant a trial in an improper venue.

2. This case is an ideal vehicle for resolving the circuit conflict. Mr. Smith raised his venue objection in both the district court and the Eleventh Circuit, and both courts below explicitly addressed the

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[8] Indeed, the cases underlying the split demonstrate that re-prosecution is a real possibility. *See Kaytso*, 868 F.2d at 1021 (involving re-indictment of defendant in same district); *Haney*, 799 F.2d at 662 (involving re-indictment of defendant in different Alabama county); *Wilkett*, 655 F.2d at 1009 (involving re-indictment of defendant in different federal district).

question of venue. App. 12a, 30a. Moreover, because the Eleventh Circuit concluded that venue was improper, it expressly addressed the question of the proper remedy for that violation. *Id.* at 15a. And the question presented is outcome determinative of whether Mr. Smith may be tried again in another district or whether further prosecution is barred by the government's failure to prove venue at trial. There is thus no obstacle to this Court's resolution of the important question presented in this case.

Indeed, this case offers a rare opportunity to consider an issue that will often evade this Court's review. Here, the case proceeded to trial and through appeal, but in many cases, a circuit's flawed rule will exert improper plea-bargaining pressure on defendants or discourage them from even raising meritorious venue challenges. Accordingly, courts are typically deprived of the opportunity to resolve important venue-related issues, such as the question presented here, even when they might materially affect a significant number of prosecutions. The Court should take this opportunity to address and clarify this critically important area of constitutional law.

III. The Eleventh Circuit's Decision Is Wrong

The decision below also warrants this Court's review, because it badly misconstrues the text, purpose, and history of the venue right, and leads to deeply inequitable results for criminal defendants that run directly counter to the Founders' intent.

When the government fails to prove venue at trial, the constitutionally required result is the entry of a judgment of acquittal, for two independent reasons. *First*, venue is a constitutionally imposed *element* of

every offense, and the government's failure to bear its burden on venue should produce the same result as it would for any other element—acquittal and preclusion of a subsequent prosecution under the Double Jeopardy Clause. *Second*, even aside from the double-jeopardy rationale, the Constitution independently requires acquittal in order to safeguard the venue right's important historical and constitutional purposes—just as this Court has recognized for the analogous speedy trial right.

1. As the Fifth Circuit has explained, the Constitution mandates acquittal when the government fails to prove venue at trial because venue is "a constitutionally-imposed element of every crime." *Strain II*, 407 F.3d at 380. This Court has held that a jury must "find the fact[s]" required to determine venue, *Jackalow*, 66 U.S. at 487-88, just as the jury must find the elements of the charged offense. *See* Element, *Black's Law Dictionary* (11th ed. 2019) ("A constituent part of a claim that must be proved for the claim to succeed."); Model Penal Code § 1.13(9)(e) (1985) (defining an "element of an offense" to include "conduct" or "attendant circumstances" as "establishes jurisdiction or venue"). In other words, just as a jury "in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element," even if the jury does not unanimously agree on the "underlying brute facts," *Richardson v. United States*, 526 U.S. 813, 817 (1999), the jury must likewise unanimously find that the government has proven venue in order

to return a valid conviction.[9] Indeed, many jurisdictions require that venue be proven beyond a reasonable doubt. *See, e.g*, *Pope v. State*, 587 So. 2d 1278, 1281 (Ala. Crim. App. 1991).[10] And the Model Penal Code likewise requires proof of venue beyond a reasonable doubt, and identifies venue as an "element of an offense." Model Penal Code § 1.13(9)(e) (defining "element of an offense" to include the conduct or circumstances which establish venue); *id.* at § 1.12(1) ("No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt.").

Inadequate proof of venue at trial should therefore carry the same consequence as inadequate proof of any other element of an offense: an acquittal that bars re-trial. In either case, the government "has been given one fair opportunity to offer whatever proof it could assemble." *Burks v. United States*, 437 U.S. 1, 16 (1978). And, in accordance with the dictates of the Double Jeopardy Clause, the prosecution is not entitled to "another opportunity to supply evidence

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[9] *See, e.g.*, S1 *Modern Federal Jury Instructions – Criminal: Third Circuit Pattern Jury Instructions* § 3.09 (2022); S1 *Modern Federal Jury Instructions – Criminal: Fifth Circuit Pattern Jury Instructions* § 1.20 (2022); 1 *Modern Federal Jury Instructions – Criminal* ¶ 3.01 (2022).

[10] *Accord Worthen v. State*, 823 S.E.2d 291, 294-95 (Ga. 2019); *State v. Hampton*, 983 N.E.2d 324, 328-29 (Ohio 2012); *State v. Anderson*, 695 N.W.2d 731, 739 n.5 (Wis. 2005); *State v. Ehmke*, 752 N.W.2d 117, 120 (Minn. Ct. App. 2008); *Rogers v. State*, 95 So. 3d 623, 630 (Miss. 2012); *State v. Mueller*, 920 N.W.2d 424, 434 (Neb. 2018); *State v. Harris*, 256 P.3d 156, 157 (Or. 2011); Comment Note, *Necessity of Proving Venue or Territorial Jurisdiction Beyond Reasonable Doubt*, 67 A.L.R.3d 988, § 6 (originally published, 1975) (collecting cases requiring proof beyond a reasonable doubt).

which it failed to muster in the first proceeding." *Id.* at 11. That rule guards defendants against "successive trials for the same offense." *Currier v. Virginia*, 138 S. Ct. 2144, 2149-50 (2018); U.S. Const. amend. V ("No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ."). Accordingly, as with any other element, where the government's evidence of venue is "legally insufficient to sustain a conviction" in the first trial, *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977), the defendant cannot be re-tried.

Nor is there any reason for a different result when an appellate court reverses for insufficient evidence. Such a reversal means that the evidence of venue was "so lacking that it should not even have been *submitted* to the jury." *Burks*, 437 U.S. at 16. The fact that an appellate court, rather than the jury, rejected the venue evidence should make no difference. *Evans*, 568 U.S. at 328-29; *Strain II*, 407 F.3d at 380; *see also Burks*, 437 U.S. at 11 (rejecting "purely arbitrary distinction" between appellate court and district court determinations of insufficient evidence). The insufficiency of the government's proof at trial should preclude a future attempt to prove venue again.

The Eleventh Circuit's contrary conclusion—that the Double Jeopardy Clause is not implicated by a "retrial in a proper venue after [a court] vacate[s] a conviction for improper venue," App. 15a (citing *Haney*, 799 F.2d at 664)—turns on the mistaken premise that venue is distinct from other factual questions that a jury must answer to return a guilty verdict. Indeed, the Eleventh Circuit treats venue as a "question of procedure" that is "wholly neutral." *Haney*, 799 F.2d at 664 (quoting *Wilkett*, 655 F.2d at

1011). But that approach is fundamentally incompatible with this Court's repeated admonition that questions of venue are "*not* merely matters of formal legal procedure." *Johnson*, 323 U.S. at 276 (emphasis added); *Travis*, 364 U.S. at 634 ("[Q]uestions of venue are more than matters of mere procedure."). The fact that venue does not go to the actus reus or mens rea elements of the crime does not obviate its status as a fact that must be proven to the jury to obtain a valid conviction. Other similar elements, such as the jurisdictional element of federal crimes, are likewise required to be proven to a jury, and a failure of proof results in acquittal.[11] Such acquittals bar a subsequent prosecution under the Double Jeopardy Clause. *See, e.g.*, *Sanabria v. United States*, 437 U.S. 54, 56-60, 77-78 (1978). There is no reason to treat venue any differently. Indeed, if anything, venue should be treated with even *more* solicitude than a jurisdictional element, given its constitutional pedigree. Because venue is a constitutionally required element of every crime, the government's failure to prove venue at trial requires acquittal.

2. Even aside from the double-jeopardy approach, the Constitution requires acquittal when the government fails to prove venue.

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[11] *See, e.g.*, *Torres v. Lynch*, 578 U.S. 452, 467 (2016) ("Both [substantive and jurisdictional] elements must be proved to a jury beyond a reasonable doubt . . . ."); *United States v. Bravo-Fernández*, 913 F.3d 244, 251 (1st Cir. 2019) (reversing for failure to prove jurisdictional element and directing entry of judgment of acquittal); *United States v. Reid*, 595 F. App'x 280, 285 (5th Cir. 2014) (per curiam) (similar); *United States v. Cruz*, 554 F.3d 840, 851 (9th Cir. 2009) (similar).

By its plain terms, the venue right is concerned with the manner in which an accused may be subject to *trial*. The Constitution mandates that "Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." U.S. Const. art. III, § 2, cl. 3. And it guarantees that an "accused shall enjoy" a "trial" by a jury "of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. The venue right thus focuses on the *process* of the prosecution, and it guarantees that the "accused"—*i.e.*, a "presumptively innocent person," *Betterman*, 578 U.S. at 443—shall not be subjected to trial in a location wholly unconnected to the alleged offense. That right is violated whenever an accused is made to stand trial in a constitutionally improper venue, *regardless* of whether he is ultimately convicted or acquitted in that venue.

That is no surprise because the venue right was intended to "secure the party accused from being dragged to a trial in some distant state, away from his friends, and witnesses, and neighbourhood." Story, *supra*, § 1775. The relevant hardship is the trial itself—not just a subsequent conviction. *Johnson,* 323 U.S. at 275 (venue right protects defendants from "needless hardship . . . by prosecution remote from home"); *Core*s, 356 U.S. at 407 (similar). And the underlying right can only be meaningfully secured when the government is discouraged from initiating prosecutions in the wrong venue, through the threat of acquittal. The Founders hardly would have thought it appropriate for a defendant to be tried in England (perhaps multiple times) for crimes committed in America, so long as the defendant was ultimately shipped back to America and convicted there.

In that sense, the venue right has much in common with the Sixth Amendment right to a speedy trial. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . ."). This Court has held that the "sole remedy for a violation of the speedy trial right" is "dismissal of the charges." *Betterman*, 578 U.S. at 444 (citing *Strunk v. United States*, 412 U.S. 434, 439-40 (1973)). Such a remedy is necessary to "fit the preconviction focus of the Clause," because like the venue right, the speedy trial right serves to shield the "accused," who is entitled to a presumption of innocence, from undue hardship at the hands of the government. *Id.* at 443 (quoting U.S. Const. amend. VI). As this Court explained in *Betterman*, "[t]he Speedy Trial Clause implements th[e] presumption [of innocence] by 'prevent[ing] undue and oppressive incarceration prior to trial'" and "'minimiz[ing] anxiety and concern accompanying public accusation.'" *Id.* at 442 (alterations in original) (citation omitted). Indeed, the Court has remarked that the speedy trial right is particularly meaningful to those who will ultimately be found *not* guilty. *Id.* at 444.

The same is true for the venue right, which protects defendants, including those who will ultimately be acquitted, from the extreme hardship and unfairness of being tried in a location wholly unrelated to the crime. That rationale is concerned with the conditions to which an accused is subjected during the course of prosecution, not the ultimate result. Indeed, the venue right and the speedy trial right work in tandem—one governing *where* the trial will take place, and the other governing *when*, both with an eye to avoiding undue hardship to the

presumptively innocent. And just as a violation of the speedy trial right cannot be remedied through a new trial, a violation of the venue right similarly requires acquittal in order to vindicate its preconviction purposes.

Moreover, permitting re-trials in multiple venues also undercuts other core purposes of the venue right. *First*, it means criminal defendants may be hindered in their ability to present an effective defense due to "the inability of procuring the proper witnesses to establish [their] innocence." Story, *supra*, § 1775; *see also Johnson*, 323 U.S. at 275 (explaining that venue right prevents prosecution far "from appropriate facilities for defense"); *id.* at 279 (Murphy, J., concurring) (recognizing that a defendant's ability to procure witness testimony may make "the difference between liberty and imprisonment"). Such a disadvantage increases the likelihood that a defendant will be convicted or succumb to the pressure to plead guilty.

Second, it permits the government to seek out a favorable tribunal, a sympathetic pool of jurors, or a more convenient location, knowing that its failure to prove venue will result, at most, in a do-over. *Johnson,* 323 U.S. at 275 (explaining that government's ability to choose venue results in abuses "in the selection of what may be deemed a tribunal favorable to the prosecution"); *Palma-Ruedas*, 121 F.3d at 861 (Alito, J., concurring in part) (noting that venue right serves "to deter governmental abuses of power"). Again, that risk is not just hypothetical. As many of the cases discussed above show, the government routinely selects borderline (and ultimately improper) venues when there are much more obvious candidates available. *See, e.g.*, *Strain I*,

396 F.3d at 691 (observing that venue would plainly have been proper in District of New Mexico, but government chose to prosecute in Western District of Texas); *Smith*, 641 F.3d at 1208-09 (explaining that venue would obviously have been proper in Minnesota, but government chose to prosecute in Oklahoma). In this case, for example, the government could easily have prosecuted Mr. Smith in the Southern District of Alabama, where he resided throughout the relevant events, but instead chose a venue with no connection to the conduct elements of the offense. Thus, giving the government a second chance to secure a conviction does nothing to deter prosecutorial overreach. And a re-trial remedy grants the venue right in name only, while "withhold[ing] its privilege and enjoyment" by failing to meaningfully deter violations of the right. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (explaining that exclusionary rule is designed "to deter" constitutional violations (citation omitted)).

Finally, the vacatur remedy exacerbates the "appearance of abuse[]." *Johnson,* 323 U.S. at 275. Even assuming the government is acting appropriately, public confidence in the justice system suffers when the government can serially re-prosecute a defendant after failing to bear its burden of proof on a constitutionally required element the first time around.

Take this case as an example. Mr. Smith was tried in a constitutionally deficient venue, but he received only a remedy that permits him to be tried again in another venue. Indeed, the Eleventh Circuit's opinion left open the possibility that the government could try Mr. Smith in an unconstitutional venue *again* by expressly declining to resolve whether the Middle

District of Florida would be a proper venue for the theft-of-trade-secrets offense. App. 11a-12a. The practical effect of the Eleventh Circuit's decision is that Mr. Smith may have to endure another criminal trial in yet another constitutionally defective venue. And if Mr. Smith were convicted and forced to take yet another appeal on grounds of improper venue, his only remedy would be vacatur, and the likely prospect of a *third* trial. That cycle of unconstitutional trials is fundamentally inconsistent with venue's status as a right of fundamental and historical importance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court Of Appeals
For the Eleventh Circuit

No. 20-12667

UNITED STATES of America, Plaintiff-Appellee,

v.

Timothy J. SMITH, Defendant-Appellant.

Filed: 01/12/2022

22 F.4th 1236

Opinion

Before WILLIAM PRYOR, Chief Judge, GRANT, and HULL, Circuit Judges.

William Pryor, Chief Judge:

This appeal concerns whether an accused can be tried in a venue where he did not commit any of the conduct elements of the charged crime. Timothy Smith is a software engineer and avid angler who obtained the coordinates of artificial fishing reefs in the Gulf of Mexico from a website owned by StrikeLines, a business that sells those coordinates. Smith remained in Mobile, Alabama, during the relevant events, but he was tried in the Northern District of Florida, where StrikeLines's office is located. The jury convicted Smith of two counts—one count of theft of trade secrets and one count of extortion—and the district court enhanced his sentence. We vacate Smith's conviction for theft of trade secrets and related sentencing enhancements for lack of venue, affirm the extortion conviction and related sentencing enhancements, and remand for resentencing.

I. BACKGROUND

Tristan Harper and Travis Griggs own a business called StrikeLines. StrikeLines sells the coordinates of artificial reefs placed in various locations in the Gulf of Mexico by commercial and recreational fishermen. The reefs create attractive fishing locations, the coordinates of which are usually not shared to prevent overfishing. StrikeLines has its office in Pensacola, but the servers where its website and data are hosted are in Orlando.

StrikeLines obtains artificial-reef coordinates in two ways. First, StrikeLines harvests data from public records. About a quarter of the coordinates on StrikeLines's website come from public records, but StrikeLines does not sell these coordinates. It offers the coordinates from public sources on its website for free. Second, StrikeLines obtains the coordinates for private reefs by launching boats equipped with sonar equipment from its base in Pensacola to trowel through the Gulf of Mexico and discover the reef locations. After processing the raw data collected by sonar, StrikeLines offers the private reef coordinates on its website, where each coordinate is sold only once, for between $190 and $199.

The defendant in this case, Timothy Smith, is a software engineer who lives in Mobile, Alabama. He fishes from 1,200 to 1,500 hours a year. He was prompted by a friend who is also an avid fisherman to look into StrikeLines, and he first visited the website in 2018.

When Smith visited the StrikeLines website, he used a web application called Fiddler, which allowed him to see the coordinates of private artificial reefs.

Smith later accessed the coordinate data again after additional security measures had been installed.

Smith noticed a photograph of someone he knew on the StrikeLines website and contacted that acquaintance with the goal of being put into contact with the owners of StrikeLines. Smith succeeded, and a series of conversations between Smith and the owners of StrikeLines followed. Smith confirmed by telephone that he obtained the private reef coordinates that StrikeLines sells on its website. Smith sent photographs of the data that he obtained to the owners of StrikeLines to confirm that he had accessed the reef coordinates. Smith refused to tell the owners of StrikeLines how he accessed the data.

After learning that someone had access to their business data, Griggs and Harper contacted their web developer, Ralph Haynes. Haynes has a degree in computer science and has worked in web development for more than ten years, but he had never seen anyone access data in the way depicted in the screenshots from Smith. And in response to Griggs and Harper sharing what Smith had sent them, Haynes added extra layers of security to the StrikeLines website.

Shortly after Haynes upgraded StrikeLines's security, several customers of StrikeLines informed the owners that Smith had posted on Facebook that he possessed all of StrikeLines's coordinates. In one post, Smith said that he "would like to give anyone who has paid to have [artificial reefs put out the opportunity] to look and see what reefs [StrikeLines] has for sale or has sold in the past" and that "[s]everal of [his] friends [had] dozens . . . of [artificial reef locations that were] for sale or [that had] been sold by [StrikeLines]." And he told viewers of the post to "direct message" him. This post was on Smith's

personal page, and similar posts were in a couple of group pages for people interested in fishing.

Smith's posts and the customer complaints about them prompted Griggs to ask Smith by text message whether he could still access the data after Haynes upgraded the security. Smith responded that he could still access the data. But Smith refused to tell Griggs how he could do so and said that what Haynes had done with the security was "enough to deter 99.9 percent of users." Smith then sent another picture of the artificial reef coordinates and internal data he accessed.

After communications about how the Facebook posts were "creating a lot of trouble" by "causing actual harm to [Strikelines's] reputation" and the owners' "livelihood," Smith told Griggs, "How about this, I'll delete the post, won't ever say anything else about it, even to those that have contacted me. I need help with one thing, though." Griggs replied, "What's that?" Smith said, "I need deep grouper numbers, div[e]able, 160 to 210. I'll also help you fix your problem free of charge. But me fixing your problem has to remain strictly between me and you, and I mean strictly." Griggs responded that if Smith deleted his Facebook posts that they might be able to talk about Smith's proposition. And Smith said, "I'll delete the post in good faith, but I'm not sure I'm really interested in side [coding] projects. I'm really just interested in deep grouper spots. I mean, I'll listen to what you've got, though. We have a deal?" Griggs and Smith exchanged more texts about the type of grouper spots that Smith wanted, and Griggs retired from the exchange for dinner.

The next day, communications broke down, apparently because Griggs did not provide Smith with

deep grouper coordinates. And because he did not receive the deep grouper numbers, Smith told Griggs that the "[p]osts are going back up." Griggs attempted to contact Smith again, but after it became clear that Smith would not cooperate, Griggs and Harper contacted law enforcement.

Officers executed a search warrant for Smith's home based on the StrikeLines website access logs evidencing that he had accessed the website over 4,500 times and Facebook records establishing that he sent pictures of the coordinates to his friends on Facebook Messenger. During the search, agents seized Smith's electronic equipment. And agents found StrikeLines's coordinates and other customer and sales data on Smith's devices.

During the search, an agent conducted an interview with Smith after advising him of his rights to remain silent and to counsel. *See Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The agent testified that Smith said that he thought he knew "StrikeLines" was the reason why the agents were searching his home. Smith admitted that "he wrote a ten-line code to decrypt the information" from the StrikeLines website. Smith also admitted to the agent that he disagreed with StrikeLines's business, accessed the website after StrikeLines had its security upgraded, wrote the Facebook posts, sent the relevant messages, shared StrikeLines's coordinates, and "infiltrate[d]" the StrikeLines website.

A federal grand jury indicted Smith on three counts in the Northern District of Florida. The first count was a violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(2)(C), (c)(2)(B)(iii), for knowingly and intentionally accessing a computer

without authorization and for obtaining information with a value exceeding $5,000 from a protected computer. The second count was for theft of trade secrets. *See id.* § 1832(a)(1). The third count was for transmitting a threat through interstate commerce with intent to extort a thing of value. *See id.* § 875(d).

Before trial, Smith moved to dismiss all counts for lack of venue. In that motion, Smith stated that he was a resident of Mobile, which is in the Southern District of Alabama, and resided there during all the events relevant to the indictment. And he explained that, although StrikeLines was headquartered in Pensacola, which is in the Northern District of Florida, its servers, where the coordinate data was stored, were in Orlando, which is in the Middle District of Florida. He argued that venue was improper in the Northern District of Florida for the first two counts because all the prohibited conduct occurred in the Southern District of Alabama and the data that was accessed and obtained was in the Middle District of Florida. Smith also argued that "[b]ecause venue is not proper in the Northern District of Florida as to Counts One and Two, it would not be proper venue for Count Three."

The United States responded that the motion was premature. In the alternative, the government raised the possibility that the effects of the crime on the victims in the Northern District of Florida were relevant for venue purposes. And the government suggested that the "substantial contacts" test for venue adopted by some courts would be enough to provide venue in this case. The district court agreed with the government that the motion was premature and denied it without prejudice.

The defense renewed its motion challenging venue at trial and challenged the sufficiency of the evidence. Smith argued that venue was improper as to the first two counts because there was no evidence that any essential conduct element occurred in the Northern District of Florida. And Smith argued that the evidence was insufficient to support a conviction on all counts.

The government responded by arguing that the evidence was sufficient on all counts and that venue was proper. The government argued that venue was proper on counts one and two because the stolen data was produced in the Northern District of Florida and later transmitted to Orlando, so the government asserted that the data was actually obtained by Smith from Pensacola. The government also argued that the effects on StrikeLines in Pensacola were relevant to venue for the purposes of count two.

The district court denied Smith's motion as to count three, the extortion count, but reserved a ruling on the other two counts. The district court submitted the case to the jury with instructions that the government bore the burden of proving venue by a preponderance of evidence. The jury returned a verdict of not guilty as to count one and guilty as to counts two and three.

The district court ordered supplemental briefing on the issue of venue for the second count. The parties renewed their arguments about venue, and Smith renewed his argument that venue was improper as to count three because it was improper as to count two.

The district court denied the defense's motion on the ground that "the essential conduct of theft or misappropriation is necessarily defined in terms of its

effects, i.e., the owner's loss of the trade secret," and "venue is proper . . . where the owner . . . feels the loss of its trade secret." The district court also rejected the argument that improper venue on count two rendered venue improper on count three. Smith filed a post-judgment motion for acquittal on sufficiency of evidence grounds, and the district court also denied that motion.

In a presentence investigation report, a probation officer grouped the offenses and determined the base offense level was six. The officer recommended a six-level enhancement for use of sophisticated means. And the officer calculated an offense level of 12 and a guideline range of 10 to 16 months.

Both parties objected to the report. The government argued for a twelve-level enhancement for the amount of loss, a two-level enhancement for use of special skill, and a two-level enhancement for obstruction of justice based on Smith's materially false testimony. Smith objected to the loss calculation, the sophisticated-means enhancement, the special-skill enhancement, and the absence of a two-level reduction for acceptance of responsibility. The probation officer issued a new report that added a recommendation of a two-level enhancement for use of a special skill. The officer then calculated an offense level of 14 and a guideline range of 15 to 21 months.

The district court sustained some of the government's objections and overruled all of Smith's objections. The district court calculated StrikeLines's loss differently from the probation officer or either of the parties and determined that the loss resulted in an eight-level increase. The district court agreed with the government that Smith's testimony that his

exchanges with the owners of StrikeLines were "negotiations" and were intended to "help" the owners of the website was materially false because the exchanges amounted to extortion, and it applied an enhancement for obstruction of justice because the testimony was materially false. The district court also overruled Smith's objection to the lack of an acceptance of responsibility reduction. Finally, the district court overruled Smith's objections to the sophisticated means and special skill enhancements, on the grounds that the code Smith wrote to obtain the coordinates was sophisticated and that he used special skills as a software engineer, and it rejected an argument that applying both was "double counting." The final offense level was 20 with a guideline range of 33 to 41 months. The district court departed downward and imposed a sentence of 18 months and one year of supervised release.

II. STANDARDS OF REVIEW

We review *de novo* a determination that the government established venue by a preponderance of the evidence. *United States v. Bradley*, 644 F.3d 1213, 1251 (11th Cir. 2011). We view evidence related to venue in the light most favorable to the government and make all reasonable inferences and credibility determinations in favor of the verdict the jury returned. *Id.* We also review challenges to the sufficiency of evidence *de novo*, view the evidence in the light most favorable to the government, and draw all reasonable inferences and credibility determinations in favor or the verdict. *United States v. Wilson*, 788 F.3d 1298, 1308 (11th Cir. 2015). A jury's verdict cannot be overturned for insufficient evidence unless there is no reasonable construction of the evidence that could support a guilty verdict. *Id.*

We review the district court's findings of fact at sentencing for clear error, but we review applications of the Sentencing Guidelines to those facts *de novo*. *United States v. Bradberry*, 466 F.3d 1249, 1253 (11th Cir. 2006). Denials of a sentencing reduction for acceptance of responsibility—findings entitled to "great deference"—are reviewed for clear error. *United States v. Knight*, 562 F.3d 1314, 1322 (11th Cir. 2009) (internal quotation marks omitted).

III. DISCUSSION

We divide our discussion in three parts. First, we discuss why venue was improper for the theft-of-trade-secrets count and why that count must be vacated, and we explain that improper venue for that count does not require vacatur of the conviction for extortion. Second, we explain that there was sufficient evidence for a conviction on the extortion count. Third, we address the sentencing issues.

A. Venue Was Improper for the Theft-of-Trade-Secrets Count, But Proper for the Extortion Count

"The Constitution, the Sixth Amendment, and Rule 18 of the Federal Rules of Criminal Procedure guarantee defendants the right to be tried in the district in which the crime was committed." *United States v. Little*, 864 F.3d 1283, 1287 (11th Cir. 2017) (internal quotation marks omitted); *see also* U.S. Const. art. III, § 2, cl.3; *id.* amend. VI; Fed. R. Crim. P. 18. Venue must be proved by a preponderance of the evidence. *Little*, 864 F.3d at 1287. Venue is proper at the *locus delicti*, which is determined by "the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279, 119 S.Ct. 1239, 143 L.Ed.2d 388 (1999) (internal quotation marks

omitted); *accord United States v. Cabrales*, 524 U.S. 1, 6–7, 118 S.Ct. 1772, 141 L.Ed.2d 1 (1998). "In performing this inquiry, a court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts." *Rodriguez-Moreno*, 526 U.S. at 279, 119 S.Ct. 1239.

Based on *United States v. Rodriguez-Moreno*, we perform a two-step venue inquiry. *Id.* First, we identify the essential conduct elements of the theft-of-trade-secrets count. *See United States v. Bowens*, 224 F.3d 302, 311 (4th Cir. 2000). Then, we "discern the location of the commission" of the essential conduct elements, which are the only relevant elements for venue, and determine whether the location of their commission is the same as the location of the trial. *See Rodriguez-Moreno*, 526 U.S. at 279, 119 S.Ct. 1239. Here, they are not.

Theft of trade secrets consists of five elements: first, the defendant must intend to convert proprietary information to the economic benefit of anyone other than the owner; second, the proprietary information must be a trade secret; third, the defendant must knowingly steal, take without authorization, or obtain by fraud or deception trade secret information; fourth, the defendant must intend or know that the offense would injure the owner of the trade secret; and finally, the trade secret must be related to a product that is in interstate or foreign commerce. *See* 18 U.S.C. § 1832(a). The first and fourth elements are mens rea elements irrelevant to venue. *See Rodriguez-Moreno*, 526 U.S. at 279, 119 S.Ct. 1239. The second and final elements are not elements of the defendant's conduct. *See id.* at 280 n.4, 119 S.Ct. 1239. The essential conduct element of

the crime is that the defendant must steal, take without authorization, or obtain by fraud or deception trade-secret information, *see* 18 U.S.C. § 1832(a), so that conduct must have taken place in the same location as the trial. *See Rodriguez-Moreno*, 526 U.S. at 279, 119 S.Ct. 1239; *Cabrales*, 524 U.S. at 6–7, 118 S.Ct. 1772; *Bowens*, 224 F.3d at 311–12.

Smith was prosecuted for theft of trade secrets in the Northern District of Florida, but the parties agree that Smith remained in Mobile, which is in the Southern District of Alabama, during the commission of the crime. The parties also agree that the data was taken from servers located in the Middle District of Florida.

Although we need not decide whether venue would be proper in the Middle District of Florida, we can say that venue would be proper in the Southern District of Alabama, where Smith was located when he took the trade secrets. But venue was not proper in the Northern District of Florida because Smith never committed any essential conduct in that location. *See Rodriguez-Moreno*, 526 U.S. at 279, 119 S.Ct. 1239; *Cabrales*, 524 U.S. at 6–7, 118 S.Ct. 1772.

The government argues that the effects of a crime are a permissible basis for venue. It relies on two pre-*Rodriguez-Moreno* decisions of this Court that considered the location of the effects of a crime in a venue analysis, and it relies on Hobbs Act prosecutions from other circuits, which likewise considered the location of the effects of the crime.

Our precedents are distinguishable. They involve a failure to pay child support, *United States v. Muench*, 153 F.3d 1298, 1300 (11th Cir. 1998), and obstruction of justice, *United States v. Barham*, 666

F.2d 521, 523 (11th Cir. 1982). Both of those offenses contained an essential element of the crime that we understood to be defined in terms of the effects of the act. *Barham*, 666 F.2d at 524 (holding that the location of the effects of the crime is proper venue because "[t]he very nature of the crime is affecting, or endeavoring to affect, the due administration of justice; the activities prohibited under the statute are those intended to influence the administration of justice where the affected judicial proceeding is being held or has been held" (internal quotation marks omitted)); *see also Muench*, 153 F.3d at 1304 (holding that venue was proper in a district where the effects of a violation of the Child Support Recovery Act were felt because the "offense . . . was completed when [the defendant's] children in [that district] failed to receive their past due support").

The Hobbs Act prosecutions are also distinguishable. As one of our sister circuits explained, although the decisions in *Rodriguez-Moreno* and *United States v. Cabrales* "require us to determine venue solely by reference to the essential conduct elements of the crime," those decisions "have [not] altered the well-established rule that Congress may, consistent with [the Constitution], define the essential conduct elements of a criminal offense in terms of their effects, thus providing venue where those effects are felt." *Bowens*, 224 F.3d at 311, 312. For the Hobbs Act, Congress defined the essential conduct element in terms of its effects on commerce. 18 U.S.C. § 1951; *Bowens*, 224 F.3d at 313 (citing the Hobbs Act as a statute that defines an essential conduct element in terms of its effects); *see also United States v. Auernheimer*, 748 F.3d 525, 537 (3d Cir. 2014) ("[I]n a prosecution for Hobbs Act robbery,

venue may be proper in any district where commerce is affected because the terms of the act themselves forbid affecting commerce."); *cf. Barham*, 666 F.2d at 524 (holding that venue was proper in an obstruction of justice prosecution where justice was obstructed because "the activities prohibited under the statute are those intended to influence the administration of justice where the affected judicial proceeding is being held or has been held" (internal quotation marks omitted)).

The theft-of-trade-secrets statute does not define any essential conduct element of the offense in terms of its effects on the owner of the trade secret. As Smith correctly argues, "[a] plain reading of the statute reveals that there is no requirement" that "the owner of the trade secret realize[ ] a loss." *See* 18 U.S.C. § 1832(a)(1). The government responds that inherent in a theft is interference with the possessory interest of the owner, and so the essential conduct element is defined in terms of its effects. But the mere presence of an implied victim of a theft does not create an inference that Congress "define[d] the essential conduct element[ ] . . . in terms of [its] effects." *See Bowens*, 224 F.3d at 311 n.4, 313.

The government also argues that it is permitted to prosecute an offense "involving . . . transportation in interstate or foreign commerce . . . in any district from, through, or into which such commerce . . . moves." 18 U.S.C. § 3237(a). But the government does not dispute that when Smith took the coordinates from the servers in Orlando he received possession of them in Mobile. The government points to no evidence that the trade secrets were taken from or transported through the Northern District of Florida, and the government offers no authority for

the idea that the location where the trade secrets were created is relevant to venue under section 3237(a).

Venue was improper in the Northern District of Florida. The remedy for improper venue is vacatur of the conviction, not acquittal or dismissal with prejudice. *See, e.g.*, *United States v. Davis*, 666 F.2d 195, 202 (5th Cir. Unit B 1982). The Double Jeopardy clause is not implicated by a retrial in a proper venue after we vacate a conviction for improper venue. *Haney v. Burgess*, 799 F.2d 661, 664 (11th Cir. 1986). Because we vacate Smith's conviction on count two for lack of venue, we express no opinion on whether there was sufficient evidence to support the conviction. *See Davis*, 666 F.2d at 201.

Smith argues that lack of proper venue on the theft-of-trade-secrets count is a structural error that requires his extortion conviction to be vacated, but we disagree. The only decision cited by Smith that addresses the effect of finding improper venue for one count on another count is *United States v. Schlei*, 122 F.3d 944 (11th Cir. 1997). And that decision supports the opposite conclusion that Smith urges us to reach. In *Schlei*, we vacated a conviction on one count because the indictment on that count alleged two separate criminal transactions, one of which was tried in an improper venue, a fact undisputed by the parties. *Id.* at 977, 979–80. Despite vacating a conviction due to lack of venue on one count, we said that the district court could reenter a judgment of conviction on a separate count that was vacated on other grounds. *Id.* at 997. Indeed, our precedent allows vacatur of a conviction on one count due to improper venue and affirmance of a conviction on another count. *See Davis*, 666 F.2d at 202.

B. The Evidence Is Sufficient to Support the Extortion Conviction.

Smith also challenges the sufficiency of the evidence to sustain his conviction for extortion. A jury's verdict cannot be overturned for insufficient evidence unless there is *no* reasonable construction of the evidence that could support a guilty verdict. *Wilson*, 788 F.3d at 1308. Smith cannot satisfy that burden.

The jury had sufficient evidence to support the guilty verdict based on the Facebook posts and the text messages that Smith exchanged with Griggs. In those text messages, Griggs told Smith that his Facebook posts regarding the StrikeLines coordinates were "creating a lot of trouble" and "causing actual harm to [his] reputation and . . . livelihood." In response, Smith said that he would take down the posts and then asked for deep grouper numbers. And when he did not receive deep grouper numbers the next day, Smith said the "[p]osts [were] going back up." The jury was entitled to construe this evidence as supporting a conviction because deep grouper numbers are "thing[s] of value." *See* 18 U.S.C. § 875(d). Smith's text that the "[p]osts," which he knew "caus[ed] actual harm to [Griggs's] reputation and . . . livelihood," were "going back up" was "transmit[ted] in interstate . . . commerce" and can be construed as a threat to "injure the . . . reputation" of Griggs "with intent to extort" from Griggs the grouper numbers. *See id.*

C. The Sentencing Enhancements Related to Count Two Must Be Vacated, but the District Court Did Not Err in Applying the Obstruction-of-Justice Enhancement or Denying the Reduction for Acceptance of Guilt.

Finally, Smith challenges all his sentencing enhancements and the denial of a reduction for acceptance of guilt. Because the district court based its calculation of loss enhancement on the loss caused by the now-vacated conviction for theft of trade secrets, we vacate that enhancement. We likewise vacate the enhancements imposed by the district court for use of sophisticated means and special skill because both of those enhancements were based on how Smith committed the now-vacated theft-of-trade-secrets offense.

Smith's argument that he should not have received the enhancement for obstruction of justice fails. The district court found that Smith gave false testimony. That finding was not clearly erroneous because it was supported by Smith's testimony that his exchanges with Griggs were a "negotiation" and not extortion. *See, e.g.*, *United States v. Singh*, 291 F.3d 756, 763 (11th Cir. 2002) (explaining that the district court is "accord[ed] great deference" on obstruction-of-justice enhancement determinations (internal quotation marks omitted)). And "false testimony concerning a material matter with the willful intent to provide false testimony" is sufficient to support an obstruction-of-justice enhancement. *United States v. Duperval*, 777 F.3d 1324, 1337 (11th Cir. 2015) (internal quotation marks omitted).

Smith's argument that his sentence should have been reduced for acceptance of responsibility also fails. Smith does not make any affirmative argument

that he accepted responsibility for his crime either before this Court or the district court. Denials of a sentencing reduction for acceptance of responsibility are findings reviewed for clear error and entitled to "great deference." *Knight*, 562 F.3d at 1322 (internal quotation marks omitted). The finding that Smith never accepted responsibility for the extortion count was not clearly erroneous. We affirm both the denial of an acceptance of responsibility reduction and the enhancement for obstruction of justice, and we remand to the district court for resentencing only on count three.

IV. CONCLUSION

We **VACATE** Smith's conviction on count two and his sentence enhancements for sophisticated means, special skills, and calculated loss. We **AFFIRM** Smith's conviction on count three, the sentence enhancement for obstruction of justice, and the denial of a sentence reduction for acceptance of responsibility. And we **REMAND** for resentencing based only on count three.

UNITED STATES DISTRICT COURT,
N.D. Florida,
Pensacola Division.

UNITED STATES of America,

v.

Timothy J SMITH.

Case No. 3:19cr32-MCR

Signed 06/22/2020

469 F. Supp. 3d 1249

ORDER

M. CASEY RODGERS, UNITED STATES DISTRICT JUDGE

Timothy Smith was charged by Superseding Indictment with computer fraud, theft of trade secrets, and extortion in relation to offshore fishing reef location coordinates. Smith went to trial and was found guilty of theft of trade secrets and extortion but not guilty of computer fraud. At trial, his Motion for Judgment of Acquittal made at the close of the Government's case was denied on the extortion charge but the Court took the motion under advisement on the computer fraud and theft of trade secret charges. Smith has now filed a Post-Verdict Motion for Judgment of Acquittal and, in the Alternative, Motion for New Trial, pursuant to Federal Rules of Criminal Procedure 29 and 33, ECF No. 82. Having presided over the trial and considered the record, the Court finds the motion is due to be denied.

StrikeLines Pensacola, LLC and StrikeLines Tampa, LLC (collectively, "StrikeLines") were two Pensacola-based companies owned and operated by Travis Griggs and Tristian Harper.[1] As part of its business, StrikeLines sold coordinates for private artificial fishing reefs in the Gulf of Mexico, which the company found through the use of commercial sonar equipment and by processing publicly accessible sonar data.[2] StrikeLines also sold fishing charts and provided free coordinates for public fishing reefs on its website. Griggs and Harper testified that all of the data on StrikeLines' website, including the private reef coordinate data, was collected, compiled, processed, managed, controlled, uploaded, and secured in Pensacola, Florida while the data itself was stored on the website's server in Orlando, Florida.

StrikeLines sold the private coordinates on its website at a price of $190-$199. Harper testified that although the general location of the coordinates was displayed on a map on the StrikeLines website, customers had to actually purchase the coordinates to obtain the exact location of the private reefs. Harper and Griggs further testified that each set of private coordinates was sold only to one customer and never resold.

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[1] Griggs wholly owned StrikeLines Pensacola, LLC, while Griggs and Harper co-owned StrikeLines Tampa, LLC. Both companies were owned and operated in Pensacola.

[2] Harper testified that StrikeLines found approximately 75% of the private reef coordinates by scanning the Gulf with sonar equipment on its boats. He further testified that StrikeLines discovered the remaining coordinates by processing and "marking up" sonar data created by public entities.

In May 2018, Alex Fogg[3] contacted StrikeLines and informed the company that an individual named Timothy Smith[4] had obtained StrikeLines' private coordinates after discovering a "vulnerability" in its computer system. On May 14, 2018, Harper contacted Smith to question him about the coordinate data, and Smith confirmed that he had obtained the private coordinates and other private information[5] from the company's website.[6] Smith told Harper that the website had security vulnerabilities, but he did not explain how he was able to access the data. Following the call, Griggs and Harper made the decision to upgrade StrikeLines' website's security.

StrikeLines' web developer, and the person who did the initial security for the website and later the upgrades, was Ralph Haynes. Haynes testified that he initially secured the website's private coordinate data by randomizing the last three to four digits of the coordinates, and then later, after Smith's initial security breach, he encoded the data by converting it into a computer programing language known as Base64.[7] Later on, after another security breach by

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[3] Fogg was an acquittance of Griggs and Harper.

[4] Unbeknownst to Griggs and Harper, Smith was a software engineer employed in Mobile, Alabama. At this time, neither Griggs nor Harper knew Smith.

[5] Griggs testified that Smith also obtained customer and sales data.

[6] Smith sent Harper and Griggs screenshots of the data as proof.

[7] In computer science, "Base64 is an encoding and decoding technique used to convert binary data to an American Standard for Information Interchange (ASCII) text format, and vice versa." *Base64*, TECHOPEDIA, https://www.techopedia.com/definition/27209/base64 (last

Smith, Haynes further secured StrikeLines' data, at the company's request, by implementing certain server restrictions on the website.

At trial, evidence was presented showing that Smith told friends, through text and Facebook messages, that he "cracked" into StrikeLines' security and obtained the company's private coordinates. Gov't Exhibit 14H. In addition, Smith discussed methods for bypassing the website's upgraded security measures with one of his friends. There was also evidence showing that Smith used, or intended to use, StrikeLines' coordinates himself and that he shared the coordinates with multiple friends.[8] *See* Gov't Exhibits 22b, 22c, 22d, 22e, 22h. Harper and Griggs testified that Smith did not have authority or permission to access StrikeLines' coordinate data at any time.

In June 2018, StrikeLines' customers contacted Griggs and Harper and informed them that Smith was posting on Facebook that StrikeLines had given him all of its coordinate data.[9] On June 20, 2018, Griggs texted Smith to ask him whether he was still able to access the data. Griggs also asked Smith to

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visited May 26, 2020). It is "generally used to transfer content-based messages over the Internet. It works by dividing every three bits of binary data into six bit units. The newly created data is represented in a 64-radix numeral system and as seven-bit ASCII text. Because each bit is divided into two bits, the converted data is 33 percent, or one-third, larger than the original data. Like binary data, Base64 encoded resultant data is not human readable." *Id.*

[8] There was evidence that Smith was sharing StrikeLines' private coordinates with others as early as May 12, 2018.

[9] As noted above, StrikeLines asked Haynes to implement additional security measures on the website around this time.

stop accessing the data, offering to share the data with others, and posting messages about the company on Facebook. *See* Gov't Exhibit 8. In response, Smith texted that he could still access the data but insisted he was not sharing it.[10] Smith also stated that he would delete the Facebook posts and stop discussing the coordinates with people online if Griggs gave him "deep grouper numbers."[11] Griggs accepted Smith's offer, agreeing to provide Smith with the deep grouper numbers in exchange for Smith deleting the Facebook posts. The following day, however, Smith texted Griggs back and told him the deal was off and that the Facebook posts were going back up. *See id.* Shortly thereafter, Harper and Griggs contacted law enforcement, which led to an investigation.

On November 15, 2018, the FBI interviewed Smith at his residence in Mobile, Alabama, following execution of a search warrant. At the start of the interview, Smith told the agents he suspected they were there because of StrikeLines. During the interview, Smith admitted to accessing StrikeLines' website; infiltrating the website's security; obtaining the company's private coordinates; and sharing the coordinates with others. He further admitted that he obtained StrikeLines' data through the use of a free

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[10] Instead, Smith maintained that he was only offering to cross-check StrikeLines' coordinates to see if they matched the coordinates of other individuals' privately-placed fishing reefs. *See* Gov't Exhibit 8. However, as noted above, there was evidence that Smith actually shared StrikeLines' coordinates with others.

[11] Specifically, Smith wanted private coordinates for deepwater fishing spots for grouper.

web-bugging program called Fiddler, together with a program he created himself.[12]

Standard of Review

Rule 29 of the Federal Rules of Criminal Procedure directs a court to "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). In reviewing the sufficiency of the evidence, a court is required to view the evidence "in the light most favorable to the government, with all reasonable inferences and credibility choices made in the government's favor." *United States v. Barsoum*, 763 F.3d 1321, 1329–30 (11th Cir. 2014) (quoting *United States v. Ortiz*, 318 F.3d 1030, 1036 (11th Cir. 2003)). Viewing the record in this light, this Court must determine whether a reasonable jury could have found Smith guilty beyond a reasonable doubt. *United States v. Mercer*, 541 F.3d 1070, 1074 (11th Cir. 2008) (citing *United States v. Ward*, 197 F.3d 1076, 1079 (11th Cir. 1999)). Courts must uphold a jury verdict if supported by "any reasonable construction of the evidence." *United States v. Rodriguez*, 732 F.3d 1299, 1303 (11th Cir. 2013).

The Federal Rules of Criminal Procedure permit the granting of a new trial when there is newly discovered evidence or the interest of justice requires it. Fed. R. Crim. P. 33. The decision of whether to grant a new trial based on the weight of the evidence is within the sound discretion of the district court.

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[12] Fiddler is a free web debugging proxy tool that allows users "to log all HTTP(S) traffic between [their] computer and the Internet." Fiddler, TELERIK, https://www.telerik.com/fiddler (last visited May 26, 2020). Smith called his self-created program, "Decrypt StrikeLines."

United States v. Martinez, 763 F.2d 1297, 1312 (11th Cir. 1985). In reviewing a motion for a new trial based on the weight of the evidence, the court need not view the evidence in light most favorable to the government; instead, "[i]t may weigh the evidence and consider the credibility of the witnesses." *Id.* However, "the court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable." *Id.* at 1312-13. Indeed, "[t]he evidence must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *Id.* at 1313. Notably, motions for new trials based on the weight of the evidence are disfavored and should only be granted sparingly in exceptional cases. *Id.*

Discussion

I. Judgment of Acquittal – Theft of Trade Secrets

a. Venue

Smith first argues that the Government failed to present sufficient evidence to establish venue on the charge of theft of trade secrets. A criminal defendant has a constitutional and statutory right to be tried in the district where his crimes were committed. U.S. Const. art. III, § 2, cl. 3 ("The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed."); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."); *see* Fed. R. Crim. P. 18 ("[T]he government must prosecute an offense in a district where the offense was committed."). In a criminal case, "the *locus delicti* must be determined from the

nature of the crime alleged and the location of the act or acts constituting it." *United States v. Cabrales*, 524 U.S. 1, 6–7, 118 S.Ct. 1772, 141 L.Ed.2d 1 (1998); *see also Locus Delicti*, Black's Law Dictionary (11th ed. 2019) (defining "*locus delicti*" as "[t]he place where an offense is committed."). Specifically, to determine the *locus delicti* of a crime, the "court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts." *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279, 119 S.Ct. 1239, 143 L.Ed.2d 388 (1999). This requires the court to determine the "essential conduct elements" of the crime from the language of the statute. *See id.* at 281, 119 S.Ct. 1239: *see also United States v. John*, 477 F. App'x 570, 570–571 (11th Cir. 2012).

Smith argues venue was not proper in the Northern District of Florida because the essential conduct elements for the crime of theft of trade secrets under Count Two occurred either in the Southern District of Alabama, more specifically, Mobile, Alabama, where he allegedly received StrikeLines' data, or in the Middle District of Florida, more specifically, Orlando, Florida, where the server holding the data was physically located. The Government argues venue was proper in this district, where StrikeLines was located and the effects of the crime were felt.

Several courts have recognized that, under certain circumstances, venue may lie within the district where the effects of the criminal conduct are felt. *See, e.g., United States v. Bowens*, 224 F.3d 302, 311 (4th Cir. 2000); *see also United States v. Muench*, 153 F.3d 1298, 1301 (11th Cir. 1998) ("The place that suffers the effects of a crime deserves consideration for venue

purposes."). For example, courts have found venue proper in the district where the effects of criminal conduct were felt in prosecutions for failure to pay child support, *see, e.g., Muench*, 153 F.3d at 1301–04 (holding that venue was proper under the Child Support Recovery Act, 18 U.S.C. § 228, in the district where the children resided),[13] obstruction of justice, *see, e.g., United States v. Barham*, 666 F.2d 521, 524 (11th Cir. 1982) (holding that venue under 18 U.S.C. § 1503[14] was proper in the district where the court affected by the obstructive acts was located),[15] and Hobbs Act robbery, *see United States v. Davis*, 689 F.3d 179, 187 (2d Cir. 2012) ("[V]enue for a substantive Hobbs Act charge is proper in any district where interstate commerce is affected or where the alleged acts took place.") (citations and quotations omitted). Specifically, venue may lie where the effects of criminal conduct are felt "when an essential conduct element is itself defined in terms of its effects." *Bowens*, 224 F.3d at 311, 313 ("When

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[13] Congress has since amended the Child Support Recovery Act ("CSRA") to include a venue provision, *see* Deadbeat Parents Punishment Act of 1998, Pub. L. No. 105–187, 112 Stat. 618 (1998), which is now codified at 18 U.S.C. § 228(e). *See Muench*, 153 F.3d 1298, 1303 n.1 ("While this appeal was pending, Congress clarified its intent that a prosecution under the CSRA can be brought in the district where the child resides.").

[14] In 1988, Congress amended 18 U.S.C. § 1512 to include a specific venue provision for § 1503 and § 1512 offenses, *see* Anti–Drug Abuse Act of 1988, PL 100–690 (HR 5210), 102 Stat 4181 (1988), which is now codified at 18 U.S.C. § 1512(i).

[15] *But see United States v. Swann*, 441 F.2d 1053, 1055 (D.C. Cir. 1971) (holding that venue in prosecution for intimidating or influencing a witness under § 1503 was only proper where the influencing acts occurred, not in the district where the witness was set to testify).

Congress defines the essential conduct elements of a crime in terms of their particular effects, venue will be proper where those proscribed effects are felt."); *see also United States v. Auernheimer*, 748 F.3d 525, 537 (3d Cir. 2014).

To establish a violation of 18 U.S.C. § 1832(a)(1), the government must prove "(1) that the defendant intended to convert proprietary information to the economic benefit of anyone other than the owner; (2) that the proprietary information was a trade secret; (3) that the defendant knowingly stole [or appropriated, took, or carried away without authorization] trade secret information; (4) that the defendant intended or knew the offense would injure the owner of the trade secret; and (5) that the trade secret was included in a product that is placed in interstate commerce."[16] *See United States v. Wen Chyu Liu*, 716 F.3d 159, 169–70 (5th Cir. 2013) (citing 18 U.S.C. § 1832). The essential conduct at issue then is the act of knowingly stealing a trade secret or appropriating, taking, or carrying away a trade secret without authorization.[17] Necessarily embedded in

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[16] 18 U.S.C. § 1832(a)(1) specifically provides: "Whoever, with intent to convert a trade secret, that is related to a product or service used in or intended for use in interstate or foreign commerce, to the economic benefit of anyone other than the owner thereof, and intending or knowing that the offense will, injure any owner of that trade secret, knowingly--(1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains such information . . . shall, except as provided in subsection (b), be fined under this title or imprisoned not more than 10 years, or both."

[17] While not relevant here, 18 U.S.C. § 1832(a)(1) also prohibits the acts of concealing a trade secret or obtaining a trade secret by fraud, artifice, or deception.

this conduct is the act of taking the trade secret from its rightful owner. Indeed, there can be no act of theft or misappropriation without another's loss of property. *See* 18 U.S.C. § 1839(5)(A) (defining "misappropriation" under the statute as the "acquisition of a *trade secret of another* by a person who knows or has reason to know that the trade secret was acquired by improper means.") (emphasis added); *see also Theft*, Black's Law Dictionary (11th ed. 2019) (defining "theft" as "[t]he wrongful taking and removing of *another's personal property* with the intent of depriving the true owner of it.") (emphasis). In other words, the essential conduct of theft or misappropriation is necessarily defined in terms of its effects, i.e., the owner's loss of the trade secret. *See Bowens*, 224 F.3d at 313. The fact that Congress did not explicitly define "stealing" or "theft" within the statute does not alter this conclusion. Where, as here, the terms Congress failed to explicitly define have a clear and common ordinary meaning, the Court finds it appropriate to consider that meaning in its venue analysis. *See Konikov v. Orange Cty., Fla.*, 410 F.3d 1317, 1329 (11th Cir. 2005) ("Where a statute does not define a term, we must give words their common and ordinary meaning, absent some established technical definition, unless the legislature intended otherwise."). Accordingly, venue is proper under § 1832(a)(1) in the place where the owner of the trade secret is located and feels the loss of its trade secret.[18]

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[18] In the civil context, it is generally recognized that intellectual property, such as a trade secret, resides with the property's owner. *See Horne v. Adolph Coors Co.*, 684 F.2d 255, 259 (3d Cir. 1982) ("[I]nsofar as the situs of the property damaged by the alleged wrongdoing is a concern, both a state trade secret and a patent should be deemed to have their

See Bowens, 224 F.3d at 313; *see also Muench*, 153 F.3d at 1301.

Here, it is undisputed that StrikeLines owned the trade secret at issue, i.e., the private fishing coordinate data, and that StrikeLines resided in the Northern District of Florida when the trade secret was stolen. Further, the evidence at trial was sufficient to establish that Smith targeted StrikeLines and its website and thereby stole or misappropriated StikeLines' private coordinate data, causing a loss to the company in this district. Under these circumstances, the Court finds venue proper.

b. Sufficiency of the Evidence

Smith also moves for a Judgment of Acquittal on the theft of trade secrets charge on grounds that the Government failed to present sufficient evidence of each element of § 1832(a)(1). ECF No. 82 at 6–9. The Court disagrees.

Smith first argues there was insufficient evidence of his intent to convert a trade secret to the benefit of someone other than StrikeLines, *see* 18 U.S.C.

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fictional situs at the residence of the owner."); *SMA Med. Labs. v. Advanced Clinical Lab. Sols., Inc.*, No. CV 17-3777, 2018 WL 3388325, at *3 (E.D. Pa. July 12, 2018) (determining that the trade secrets at issue had their "fictional situs" in the district where the owner was located for purposes of determining personal jurisdiction and venue); *see also Geodetic Servs., Inc. v. Zhenghzou Sunward Tech. Co.*, No. 8:13-CV-1595-T-35TBM, 2014 WL 12620804, at *3 (M.D. Fla. Apr. 4, 2014) (recognizing that the situs of the injury in trade secret misappropriation and copyright infringement case was in the state where the owner of the intelligential property resided); *cf. GP Credit Co., LLC v. Orlando Residence, Ltd.*, 349 F.3d 976, 979 (7th Cir. 2003) ("The general rule is that intangible personal property is 'located' in its owner's domicile."). Applying this principle here, Smith's act of theft unquestionably would have been committed in this district.

§ 1832(a)(1). Specifically, he argues the evidence showed that he did not intend to share or distribute StrikeLines' coordinates but rather only intended to cross-check the coordinates to see if they matched the coordinates of other individuals' privately-placed fishing reefs. *See* ECF No. 82 at 7. However, as the Government correctly notes, there was evidence showing that Smith used, or intended to use, StrikeLines' fishing coordinates himself and that he gave the coordinates to multiple friends. *See* Gov't Exhibits 22b, 22c, 22d, 22e, 22h.

Smith also argues there was insufficient evidence establishing that StrikeLines' fishing coordinates constituted a trade secret. *See Wen Chyu Liu*, 716 F.3d at 169. In relevant part, the Economic Espionage Act defines the term "trade secret" as:

> . . . all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if--
>
> (A) the owner thereof has taken reasonable measures to keep such information secret; and
>
> (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information[.]

18 U.S.C. § 1839(3).

The Court rejects Smith's argument that there was insufficient evidence showing that StrikeLines' took reasonable measures to protect the coordinate data. *See* 18 U.S.C. 1839(3)(A). StrikeLines hired Haynes, a web developer, to secure the data. Haynes secured the data–through encoding, randomization, and other methods–and updated StrikeLines' web security on multiple occasions at StrikeLines' request. Notably, Smith himself admitted, in text messages to Griggs, that the security measures put in place would "deter 99.9% of users" from accessing the company's data. Gov't Exhibit 8. Additionally, in Facebook messages, Smith discussed methods for accessing the information after additional security measures were put in place and he acknowledged that he had to "crack" the website's security. Gov't Exhibit 14H ("[H]e changed the security recently but I cracked it in about 5 min."); *id.* ("I want to figure out his latest randomization but I haven't had time.").

The Court also rejects Smith's argument that the data did not constitute a trade secret because the information was readily ascertainable, *see* 18 U.S.C. 1839(3)(B), as "the vast majority, [i]f not all the coordinates [StrikeLines] sell[s] are publicly available." ECF No. 82 at 7. Smith's argument assumes that StrikeLines' private coordinates relate to reefs placed in the Gulf by private parties, which were required to be permitted and whose locations were published on public databases. The evidence at trial, however, showed that a substantial majority of the reef coordinates StrikeLines sold were located through the use of sonar equipment on the company's

boats[19] and that many of the reefs in the Gulf were either naturally occurring or had been placed by private parties without permits.[20] Viewing this evidence in the light most favorable to the Government, a reasonable jury could infer that the reefs StrikeLines found with its sonar equipment were not publicly listed, permitted reefs.[21] Furthermore, although Smith argues that StrikeLines' private coordinates were publicly available, he, himself, referred to the coordinates as being associated with "private" fishing spots. *See* Gov't Exhibit 22H ("You interested in all of the strikeline numbers including all the private spots he has for sell [sic] and all the ones he has sold?"); Gov't Exhibit 14L ("Roughly 1800 are private."). Moreover, a reasonable jury could infer, from Smith's discussions with his friends about the value of StrikeLines' private coordinates, that these coordinates were not generally known or readily ascertainable.[22] *See* Gov't Exhibit 22g ("These

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[19] Harper testified that approximately 75% of the coordinates StrikeLines sold were found using sonar equipment and the remaining 25% were found by processing and analyzing public sonar data. While not at issue in this case, StrikeLines also posted coordinates for public reefs for free on its website.

[20] Griggs testified that some reefs were created by shipwrecks and a substantial number were placed by private parties without a permit.

[21] While Smith does not make a specific argument on this point, a reasonable jury could find that StrikeLines' remaining private coordinates were not readily ascertainable because there was evidence that StrikeLines had to process and analyze raw public sonar data to obtain these coordinates.

[22] Smith's argument that StrikeLines' private coordinates were all available on public databases for permitted reefs is undermined by the fact he and his friends, who all fished in the

strikeline numbers are legit"); *id.* ("The shelf and pipeline mapping's [sic] are the most impressive"); Gov't Exhibit 22b (noting that the StrikeLines coordinates Smith sent him were remarkable).

Smith also argues that the jury could not have found that Smith *stole or misappropriated* StrikeLines' trade secret, *see* 18 U.S.C. § 1832(a)(1), because this would be inconsistent with the jury's acquittal on the computer fraud charge in Count One. *See* ECF No. 82. The Court easily dismisses this argument. Even assuming *en arguendo* that the jury's verdicts were inconsistent,[23] an inconsistency, standing alone, would not be grounds to reject the jury's guilty verdict on Count Two. *See United States v. Mitchell*, 146 F.3d 1338, 1345 (11th Cir. 1998) ("[A]s long as the guilty verdict is supported by sufficient evidence, it must stand, even in the face of an inconsistent verdict on another count.").[24]

Lastly, Smith argues there was insufficient evidence to show that he intended to harm StrikeLines. *See* 18 U.S.C. § 1832(a)(1); *Wen Chyu Liu*, 716 F.3d at 169. The Court disagrees. There was

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Gulf, were impressed by the coordinates and eager to fish the spots. A reasonable jury could infer that Smith, who had experience locating reef coordinates himself, would not have been so enthusiastic about sharing these coordinates with friends and fishing them had they otherwise been publicly available.

[23] The Court notes that the jury's verdicts on Counts One and Two are not necessarily inconsistent because the crimes charged have different elements and the jury had to separately assess venue for each count.

[24] The Court finds that there was more than sufficient evidence from which a reasonable jury could find that Smith stole or misappropriated StrikeLines' data.

sufficient evidence from which the jury could have found that Smith intended to harm StrikeLines, including texts/Facebook messages in which Smith boasted about accessing StrikeLines' coordinates, *see* Gov't Exhibit 22c ("I've got all his shit shhhh . . . . Thousands of spots") and offered the coordinates, which he knew StrikeLines had for sale or had already sold, to his friends for free. *See* Gov't Exhibit 22h. Smith's Motion for Judgment of Acquittal as to Count Two is due to be denied.

c. Motion for New Trial Based on the Weight of the Evidence

Alternatively, Smith moves for a new trial on the theft of trade secrets charge based on the weight of the evidence, arguing that the "Government's proof failed as a matter of law to prove the elements necessary to convict [him] on Count[ ] Two."[25] ECF No. 82 at 17. The Court disagrees for the reasons discussed above.

II. Extortion

Smith has also renewed his Motion for Judgment of Acquittal, and has alternatively moved for a new trial, on the extortion charge in Count Three, arguing lack of venue[26] and insufficiency of the evidence. The

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[25] Smith essentially relies on the same arguments raised in support of his Motion for Judgment of Acquittal to support his motion for a new trial. *See* ECF No. 82.

[26] As previously discussed at trial, Smith's venue argument lacks merit. *See* ECF No. 82 at 9–10. While Smith is correct that venue must be proper as to each count where a defendant is charged with multiple counts, *see United States v. Schlei*, 122 F.3d 944, 979 (11th Cir. 1997) ("Venue must exist for each offense charged."); *United States v. Davis*, 666 F.2d 195, 198 (5th Cir. Unit B. 1982) ("Venue may properly be laid in one district with respect to one count of an indictment, but still be improper

same as with Count Two, the motions are due to be denied.

a. Judgment of Acquittal Based on Sufficiency of the Evidence

To establish a violation of 18 U.S.C. § 875(d), the Government was required to prove that 1) Smith knowingly sent a message containing a true threat[27] to damage the property or reputation of another; 2) that he did so with intent to extort a thing of value; 3) and that the threat was sent in interstate or foreign commerce or through a facility of interstate or foreign commerce. *See* 18 U.S.C. § 875(d).[28]

The trial evidence showed that Smith engaged in conduct online that was damaging to StrikeLines' business, i.e., telling people on Facebook that StrikeLines gave him its master list of private coordinates and sharing, and offering to share, the coordinates with others. Griggs testified that Smith's actions harmed StrikeLines' reputation and

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with respect to the other counts."), this does not support "the facially illogical position that proper venue as to one count is destroyed by improper venue as to another." *United States v. Ayo*, 801 F. Supp. 2d 1323, 1332 (S.D. Ala. 2011) (rejecting similar argument).

[27] "A 'true threat' is a serious threat – not idle talk, a careless remark or something said jokingly – that is made under circumstances that would place a reasonable person in fear of damage to their property or reputation." ECF No. 73 at 18.

[28] 18 U.S.C. § 875(d) specifically provides: "Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee . . . shall be fined under this title or imprisoned not more than two years, or both."

credibility because the company's business model depended on the private coordinates being known only to the person who purchased them. Furthermore, a reasonable jury could infer, from the evidence showing that Smith used these coordinates himself and shared them with others for free, that Smith's actions harmed the value of StrikeLines' property, i.e., the private coordinate data. Notably, after Griggs informed Smith that this conduct was harming the business, Smith told Griggs that he would only stop if Griggs gave him "deep grouper numbers." Gov't Exhibit 8. Viewing this evidence cumulatively and in the light most favorable to the Government, a reasonable jury could find that this constituted a true threat to damage, or continue damaging, the property and/or reputation of StrikeLines and that Smith communicated this threat with intent to procure a thing of value, i.e., the deep grouper numbers.[29] *See* ECF No. 73 at 19 ("To act with 'intent to extort' means to act with the purpose of obtaining money or something of value from someone who consents because of the true threat."); *see also United States v. Killen*, 729 F. App'x 703, 711 (11th Cir.), *cert. denied*, —— U.S. ——, 139 S. Ct. 611,

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[29] In light of the evidence showing that StrikeLines' private fishing coordinates sold for $190-$199 combined with the nature of Smith's discussions with Griggs and his friends regarding the "deep grouper numbers" and StrikeLines' other coordinates, the Court finds there was sufficient evidence to establish that "deep grouper numbers" constituted a "thing of value." *See United States v. Nilsen*, 967 F.2d 539, 543 (11th Cir. 1992) (broadly interpreting the term "thing of value" to include, not just tangible objects with monetary value, but also intangible considerations, whose value can be established from the conduct and expectations of the defendant and the target of the extortionate threat).

202 L.Ed.2d 441 (2018) (to establish that the defendant had intent to extort, "the government must prove that the defendant had the intent to procure something of value through wrongful conduct.") (citations omitted).[30]

b. Motion for New Trial Based on the Weight of the Evidence

Taking into account the evidence and testimony presented at trial, the Court rejects Smith's argument that the evidence heavily preponderates against the jury's guilty verdict on Count Three. *See Martinez*, 763 F.2d at 1313. Indeed, this is not one of those exceptional cases where the evidence weighs so heavily against the jury verdict that a miscarriage of justice would result if it were not set aside. *Id.*

Accordingly, Smith's Post-Verdict Motion for Judgment of Acquittal and, in the Alternative, Motion for New Trial, ECF No. 82, is **DENIED**.

DONE AND ORDERED this 22nd day of June, 2020.

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[30] Smith's arguments that his Facebook posts do not constitute true threats directed at StrikeLines are misplaced. *See* ECF No. 82. As discussed, Smith *sent texts directly to StrikeLines' owner* containing threats to continue engaging in conduct that was harming StrikeLines' reputation and/or property.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12667-BB

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

TIMOTHY J. SMITH,

Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Florida

February 16, 2022

BEFORE: WILLIAM PRYOR, Chief Judge, GRANT, and HULL, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by the Appellant is DENIED.

UNITED STATES DISTRICT COURT
Northern District of Florida

UNITED STATES OF AMERICA	)	**JUDGMENT IN A CRIMINAL CASE**
v.	)	
	)	Case Number: 3:19cr32-001/MCR
TIMOTHY J. SMITH	)	USM Number: 26380-017
	)	William Bradford (Retained)
	)	Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) Two and Three of the Superseding Indictment on December 3, 2019 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18 U.S.C. § 1832 (a)(l)	Theft of Trade Secrets	November 15, 2018	Two
18 U.S.C. § 875(d)	Interstate Threatening Communications	November 15, 2018	Three

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) One. See Judgment of Acquittal on Jury Verdict (doc. #76.)

☐ Count(s)_____ ☐ is ☐ are dismissed on the motion to the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If

ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

June 24, 2020
Date of Imposition of Judgment

/s/ M. Casey Rodgers
Signature of Judge

M. Casey Rodgers, United States District Judge
Name and Title of Judge

July 9, 2020
Date

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IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of: **18 months as to Count s Two and Three, with said terms to run concurrently, one with the other**.

☒ The court makes the following recommendations to the Bureau of Prisons:

The court recommends to the Bureau of Prisons that the defendant be designated to a Federal Prison Camp for confinement near Pensacola, Florida. If that is not available, as a secondary alternative, the court would recommend the Federal Prison Camp at Maxwell Air Force Base in Montgomery, Alabama. If the neither Federal Prison Camp is available in Pensacola or Maxwell, the court would recommend the closest Federal Prison Camp to Southern District of Alabama or Northern District of Florida that the BOP can accommodate.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ ☐ as notified by the United States Marshall.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☒ before 12:00 noon on August 24, 2020.

☒ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

1 year as to Counts Two and Three, with said terms to run concurrently, one with the other.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.

3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)

4. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable}*

5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

* * *

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 200.00	$ 0 – None	$ 0 – Waived	$ 0 – None

☐ The determination of restitution is deferred up to _____.

An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS

☐ Restitution amount ordered pursuant to plea agreement $._____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C, § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $200.00 Monetary assessment shall be due immediately, balance due

☐ not later than _____, or

☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below); or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ ___.___ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ ___.___ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

See Final Order of Forfeiture (doc, #105) entered on June 25, 2020.

Payments shall be applied in the following order:(1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.