No. 21-1576

In the Supreme Court of the United States

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

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

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 16, 2022
CERTIORARI GRANTED DECEMBER 13, 2022

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APPENDIX

ITEMS PREVIOUSLY REPRODUCED

In accordance with Supreme Court Rule 26.1, the following items have been omitted in printing this joint appendix because they appear on the following pages of the appendix to the Petition for a Writ of Certiorari (May 3, 2022):

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA	
v.	**SUPERSEDING <u>INDICTMENT</u> 3:19cr32/MCR**
TIMOTHY J. SMITH	

______________________________/

THE GRAND JURY CHARGES:

INTRODUCTION

At all times material to this Indictment:

1. StrikeLines Pensacola, LLC, and StrikeLines Tampa, LLC (hereinafter “StrikeLines”), both based in Pensacola, Florida, were companies that used commercial side scan sonar equipment to locate fishing reefs in the Gulf of Mexico, and sold coordinates thereto using an interactive map on their website.

2. **TIMOTHY J. SMITH** was a software engineer employed in Mobile, Alabama.

Returned in open court pursuant to Rule 6(f)
JUNE 18, 2019
Date
s/ Hope Thai Cannon
United States Magistrate Judge

COUNT ONE

Between on or about April 1, 2018, and on or about November 15, 2018, in the Northern District of Florida and elsewhere, the defendant,

TIMOTHY J. SMITH,

did knowingly and intentionally access a computer without authorization, and thereby obtained information from a protected computer, and the value of the information obtained exceeded $5,000.

All in violation of Title 18, United States Code, Sections 1030(a)(2)(C) and (c)(2)(B)(iii).

COUNT TWO

Between on or about April 1, 2018, and on or about November 15, 2018, in the Northern District of Florida and elsewhere, the defendant,

TIMOTHY J. SMITH,

with the intent to convert a trade secret belonging to StrikeLines that was related to a product and service used in, and intended for use in, interstate and foreign commerce, specifically, scanned sonar coordinates of reefs in the Gulf of Mexico, to the economic benefit of a person other than the owner thereof, and intending and knowing that the offense would injure the owner of that trade secret, knowingly, did steal and without authorization appropriate, take, carry away, and by fraud, artifice, and deception obtain such information.

In violation of Title 18, United States Code, Section 1832(a)(1).

COUNT THREE

Between on or about April 1, 2018, and on or about November 15, 2018, in the Northern District of Florida and elsewhere, the defendant,

TIMOTHY J. SMITH,

did knowingly transmit in interstate and foreign commerce, via text message, with the intent to extort from StrikeLines a thing of value, a communication containing a threat to injure the property and reputation of StrikeLines.

In violation of Title 18, United States Code, Section 875(d).

COMPUTER FRAUD FORFEITURE

The allegations contained in Count One of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeiture. From his engagement in the violation alleged in Count One of this Indictment, the defendant,

TIMOTHY J. SMITH,

shall forfeit to the United States, pursuant to Title 18, United States Code, Sections 982(a)(2)(B) and 1030(i), any and all of the defendant's right, title, and interest in any property, real and personal, constituting, and derived from, proceeds traceable to such offense, and any personal property that was used or intended to be used to commit or to facilitate the commission of such offense.

If any of the property described above as being subject to forfeiture, as a result of acts or omissions of the defendant:

i. cannot be located upon the exercise of due diligence;

ii. has been transferred, sold to, or deposited with a third party;

iii. has been placed beyond the jurisdiction of this Court;

iv. has been substantially diminished in value; or

v. has been commingled with other property that cannot be subdivided without difficulty,

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Sections 982(b) and 1030(i), to seek forfeiture of any other property of said defendant up to the value of the forfeitable property.

TRADE SECRETS FORFEITURE

The allegations contained in Count Two of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeiture. From his engagement in the violation alleged in Count Two of this Indictment, the defendant,

TIMOTHY J. SMITH,

shall forfeit to the United States, pursuant to Title 18, United States Code, Sections 1834 and 2323, any and all of the defendant's right, title, and interest in any property, real and personal, constituting, and derived from, proceeds traceable to such offense, and any personal property that was used or intended to be used to commit or to facilitate the commission of such offense.

If any of the property described above as being subject to forfeiture, as a result of acts or omissions of the defendant:

i. cannot be located upon the exercise of due diligence;
ii. has been transferred, sold to, or deposited with a third party;
iii. has been placed beyond the jurisdiction of this Court;
iv. has been substantially diminished in value; or
v. has been commingled with other property that cannot be subdivided without difficulty,

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 28, United States Code, Section 2461(c), and Title 18, United States Code, Sections 1834 and 2323, to seek forfeiture of any other property of said defendant up to the value of the forfeitable property.

A TRUE BILL:

Redacted per privacy policy

FOREPERSON

6-18-2019

DATE

s/ Lawrence Keefe

LAWRENCE KEEFE
United States Attorney

s/ David L. Goldberg

DAVID L. GOLDBERG
Assistant United States Attorney

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA,

v. **Case No. 3:19-cr-32-MCR**

TIMOTHY J SMITH.

_________________________/

ORDER

Pending before the Court are Defendant Timothy J. Smith's Motion to Dismiss for Lack of Venue, ECF No. 38, and Motion to Dismiss Indictment, ECF No. 39. Having fully considered the parties' submissions and the applicable law, the Court finds that Smith's motions are due to be denied.

Background

The Superseding Indictment[1] alleges that Smith, a software engineer employed in Mobile, Alabama, hacked the computer systems of StrikeLines Pensacola, LLC and StrikeLines Tampa, LLC (collectively "StrikeLines"), two companies based in Pensacola, Florida that used "sonar equipment to locate fishing reefs in the Gulf of Mexico, and sold coordinates thereto using an interactive map on their website." ECF No. 30 at 1. Specifically, Smith is

[1] The initial indictment was filed on April 3, 2019. *See* ECF No. 3. Thereafter, Smith filed motions for a bill of particulars and to dismiss for lack of venue, ECF Nos. 24, 25, which the Court denied as moot after the Government filed the Superseding Indictment on June 18, 2019. ECF Nos. 30, 35.

charged with 1) knowingly and intentionally accessing without authorization and obtaining information from a protected computer in violation of 18 U.S.C. §§ 1030(a)(2)(C) and (c)(2)(B)(iii); 2) theft of trade secrets in violation of 18 U.S.C. § 1832(a)(1); and 3) knowingly transmitting in interstate and foreign commerce, with intent to extort a thing of value, a communication containing a threat to the property or reputation of a person, firm, association, or corporation in violation of 18 U.S.C. § 875(d). *See* ECF No. 30. Smith argues that the Superseding Indictment should be dismissed for improper venue, *see* ECF No. 38, and, alternatively, that Count One of the Superseding Indictment should be dismissed for vagueness and failure to state an offense, *see* ECF No. 39.

Standard of Review

A party to a criminal proceeding "may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits," Fed. R. Crim. P. 12(b)(1), including that "the applicable statute is unconstitutional or that the indictment fails to state an offense." *United States v. Ferguson*, 142 F. Supp. 2d 1350, 1354 (S.D. Fla. 2000) (quoting *United States v. Montilla*, 870 F.2d 549, 552 (9th Cir. 1989)); *see also* Fed. R. Crim. P. 12(b)(3) (outlining certain "defenses, objections, and requests [that] must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits."). There is "no summary judgment procedure" nor "pre-trial determinations of sufficiency of the evidence" in criminal cases. *United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992). The sufficiency of a criminal indictment must be determined from its

face. *Id*; *United States v. Salman,* 378 F.3d 1266, 1267–68 (11th Cir. 2004) (the sufficiency of an indictment should be determined on its face and evidentiary questions should be resolved at trial); *United States v. Torkington*, 812 F.2d 1347, 1354 (11th Cir. 1987) ("[A]n indictment may be dismissed where there is an infirmity of law in the prosecution; a court may not dismiss an indictment, however, on a determination of facts that should have been developed at trial."); *see also United States v. Mann*, 517 F.2d 259, 266 (5th Cir. 1975)[2] ("[T]he allegations contained in the indictment must be taken as true."). Therefore, if a legal issue presented in a pretrial motion to dismiss is intertwined with the underlying facts of the case, "the proper procedure is to defer ruling until after the prosecution has presented its case," when the matter can be considered through a motion for judgment of acquittal. *Ferguson,* 142 F. Supp. 2d at 1354.

Discussion

Smith first argues that the Superseding Indictment should be dismissed for improper venue. *See* ECF No. 38. 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

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[2] The decisions of the Fifth Circuit handed down prior to the close of business on September 30, 1981, operate as binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. 1981).

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 (1998); *see also Locus Delicti*, Black's Law Dictionary (11th ed. 2019) (defining "*locus delicti*" as "[t]he place where an offense is committed."). "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." *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999). Specifically, this requires the Court to determine the "essential conduct elements" of the crime from the language of the statute. *See id.* at 281: *see also United States v. John*, 477 F. App'x 570, 570–571 (11th Cir. 2012). Notably, offenses that begin in one district and are completed in another, or are committed in more than one district, may be "prosecuted in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237.

A defendant may file a pretrial motion to dismiss a criminal indictment for improper venue "if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." *See* Fed. R. Crim. P. 12(b)(3)(A)(i). An indictment should not be dismissed for improper venue if the facts alleged in the indictment, if true, would be sufficient to support venue. *See United States v. Mendoza*, 108 F.3d 1155, 1156 (9th Cir. 1997) (citing *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996)) ("[O]nly the indictment may be

considered in pretrial motions to dismiss for lack of venue, and . . . the allegations must be taken as true."); *United States v. Bohle*, 445 F.2d 54. 59 (7th Cir. 1971) ("An indictment alleges proper venue when it alleges facts which, if proven, would sustain venue."), *overruled on other grounds*, *United States v. Lawson*, 653 F.2d 299 (7th Cir. 1981); *see also United States v. Snipes*, 611 F.3d 855, 866 (11th Cir. 2010) ("An indictment returned by a legally constituted and unbiased grand jury. . . if valid on its face, is enough to call for trial of the charge on the merits.") (quotations omitted); *Salman*, 378 F.3d at 1267–68; *Mann*, 517 F.2d at 266. As noted above, there is no summary judgment procedure or pretrial determination of evidence in criminal cases, *see Critzer*, 951 F.2d at 307; *see also Snipes*, 611 F.3d at 866, and venue must be proved at trial by a preponderance of the evidence. *United States v. Breitweiser*, 357 F.3d 1249, 1253 (11th Cir. 2004).

Here, Smith argues that venue is improper pursuant to *United States v. Auernheimer*, 748 F.3d 525 (3d Cir. 2014), which addressed when venue is proper under 18 U.S.C. § 1030(a)(2)(C).[3] *See* ECF No.

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[3] In *Auernheimer*, the defendant was charged and convicted in the District of New Jersey of violating 18 U.S.C. § 1030(a)(2)(C), after the defendant and a co-conspirator created a computer program that allowed them to obtain over 100,000 email addresses from AT&T's website. *See* 748 F.3d at 529. The evidence at trial established that the defendants were in San Francisco, California and in Fayetteville, Arkansas at all times relevant to the case, and that the AT&T servers they accessed were physically located in Dallas, Texas and Atlanta, Georgia. *See id.* Some of the email addresses obtained by the defendants belonged to New Jersey residents. *See id.* at 531. The court in *Auernheimer* concluded that venue was not proper in New Jersey

38. The Government argues that Smith's motion is premature and that it needs to prove venue through presentation of the evidence at trial.[4] *See* ECF No. 42. The Court agrees.

Here, the grand jury returned a facially sufficient indictment, which alleges that Smith engaged in the relevant criminal conduct, described in Counts One, Two, and Three,[5] "in the Northern District of Florida and elsewhere." *See* ECF No. 30. These allegations contained in the indictment, taken as true, are

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and vacated the defendant's conviction. *See id.* at 534–35, 541. Notably, the court held that venue was proper under § 1030(a)(2)(C) either in the district where the defendant *accessed* information without authorization or *obtained* information from a protected computer. *See id.* at 533. In relevant part, the court reasoned that venue in New Jersey was improper for purposes of § 1030(a)(2)(C) because AT&T's physical servers were not located in New Jersey and because the defendants were not located in New Jersey when they obtained the email addresses. *Id.* In light of *Auernheimer*, Smith argues that venue is improper as to Counts One and Two because he obtained the relevant information in Mobile, Alabama and accessed this information through servers physically located in Orlando, Florida or Newark, New Jersey. *See* ECF No. 38. For the reasons discussed herein, there are underlying factual issues related to venue, which need to be proved by the Government at trial, that prevent the Court from reaching an ultimate determination of venue on a pretrial motion to dismiss. *See United States v. Jones*, No. 3:16CR428-MHT, 2017 WL 727033, at *1 (M.D. Ala. Feb. 23, 2017) (denying a pretrial motion to dismiss for improper venue when there were underlying factual disputes related to venue).

[4] The Government raises additional arguments in response to Smith's motion to dismiss for improper venue. *See* ECF No. 42. The Court finds it unnecessary to address these arguments at this time.

[5] Smith does not specifically argue that venue is improper as to Count Three. *See* ECF No. 38 at 8.

sufficient to send the question of venue to the jury. *See Snipes*, 611 F.3d at 866; *see also United States v. Maxwell*, No. 5:15-CR-35-2 (MTT), 2016 WL 10651090, at *2 (M.D. Ga. Aug. 26, 2016) (denying the defendant's pretrial motion for improper venue when the indictment alleged that the drug conspiracy occurred in the Middle District of Georgia); *United States v. Valencia-Munoz*, No. 1:09-CR-025, 2010 WL 4962972, at *2–4 (N.D. Ga. Oct. 26, 2010), *report and recommendation adopted*, No. CIV. 1:09-CR-025, 2010 WL 4965873 (N.D. Ga. Dec. 1, 2010) (denying the defendant's pretrial motion to dismiss for improper venue and motion for an evidentiary hearing on venue when the indictment alleged that the criminal conspiracy occurred in the Northern District of Georgia). There are underlying factual issues that need to be decided at trial by a jury, and any determination by the Court as to whether the Government's evidence is sufficient to support a finding of venue must similarly await trial.[6] *See United States v. Jones*, No. 3:16CR428-MHT, 2017 WL 727033, at *2 (M.D. Ala. Feb. 23, 2017). Therefore, Smith's motion to dismiss for improper venue is due to be denied without prejudice.[7]

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[6] There are factual issues concerning where and how the electronic information at issue was stored, managed, and controlled and the manner in which this information was allegedly accessed and obtained. These factual questions cannot be answered on a pretrial motion to dismiss. *See Snipes*, 611 F.3d at 866.

[7] Nothing in this Order prevents Smith from challenging the adequacy of the venue evidence at trial. Furthermore, if the parties wish to contest venue at trial, the Court suggests that they submit proposed jury instructions on venue in advance of trial. *See Jones*, 2017 WL 727033, at *2.

Smith next argues that Count One of the Superseding Indictment should be dismissed because 18 U.S.C. § 1030, more specifically, the statutory term "authorization," as applied to Smith, is unconstitutionally vague. *See* ECF No. 39. The Supreme Court instructs that "[t]o satisfy due process, a penal statute must define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling v. United States*, 561 U.S. 358, 402–03 (2010) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)) (internal quotation marks omitted). The vagueness doctrine is a principle of due process that precludes enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Lanier*, 520 U.S. 259, 266 (1997) (quoting *Connally v. General Constr. Co*., 269 U.S. 385, 391 (1926)). In the criminal context, a statute must "provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal." *Buckley v. Valeo*, 424 U.S. 1, 77 (1976). "[T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Lanier*, 520 U.S. at 267; *see also United States v. Wayerski,* 624 F.3d 1342, 1347–49 (11th Cir. 2010). A criminal statute does not deprive a defendant of fair notice, however, "simply because difficulty is found in determining whether certain marginal offenses fall within [its] language." *See United States v. Nat'l Dairy Prods. Corp*., 372 U.S. 29, 32–33 (1963). Furthermore, "[i]t

is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550 (1975) (citing *Nat'l Dairy Prods. Corp.*, 372 U.S. 29); *Wayerski*, 624 F.3d at 1347 ("Where . . . a vagueness challenge does not involve the First Amendment, the analysis must be as applied to the facts of the case.").

Smith's as-applied vagueness challenge to § 1030 is premature because his arguments turn on facts that need to be proven by the Government at trial. *See United States v. Turner*, 842 F.3d 602, 605 (8th Cir. 2016) (holding that the district court erred in ruling on the defendant's as-applied vagueness challenge before trial); *United States v. Reed*, 114 F.3d 1067, 1070 (10th Cir. 1997) (same); *Ferguson*, 142 F. Supp. 2d at 1355–56 (finding that the defendant's pretrial as-applied vagueness challenge was premature and that "it should properly be raised through a Rule 29 motion for judgment of acquittal."); *United States v. Van Jackson*, No. 1:18-CR-15-AT-JKL-3, 2018 WL 6421882, at *3 (N.D. Ga. Sept. 5, 2018), *report and recommendation adopted,* No. CV 1:18-CR-0015-AT-3, 2018 WL 6415044 at *2–3 (N.D. Ga. Dec. 6, 2018); *see also Critzer*, 951 F.2d at 307. Accordingly, Smith's motion to dismiss Count One on vagueness grounds is due to be denied without prejudice with leave to renew after the presentation of the evidence at trial. *See Van Jackson*, 2018 WL 6421882, at *3.

Smith also argues that the Superseding Indictment should be dismissed for failure to state an offense. *See* ECF No. 39. The Court disagrees. Under Federal Rule of Criminal Procedure 12(b)(3)(B)(v), a

defendant may dismiss an indictment for failure to state an offense. This requires the court to determine whether "the factual allegations in the indictment, when viewed in the light most favorable to the government, [are] sufficient to charge the offense as a matter of law." *United States v. deVegter*, 198 F.3d 1324, 1327 (11th Cir. 1999). An indictment is sufficient when it "(1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense." *United States v. Walker*, 490 F.3d 1282, 1296 (11th Cir. 2007) (internal marks omitted), *cert. denied*, 552 U.S. 1257 (2008); *see also* Fed. R. Crim. P. 7(c)(1) ("The indictment . . . must be a plain, concise, and definite written statement of the essential facts constituting the offense charged."). In ruling on a motion to dismiss the indictment, the court is limited to considering the face of the indictment and the language therein. *United States v. Sharpe*, 438 F.3d 1257, 1263 (11th Cir. 2006). The factual basis must be sufficient to "apprise the defendant[,] with reasonable certainty, of the nature of the accusation" and "inform the accused of the specific offense" with which he is charged. *Id.* (internal quotation marks omitted). However, the indictment is not required to allege factual proof to be relied on in detail, which is information that a defendant can obtain through a bill of particulars. *Id.* at 1263 n.3 (citing *United States v. Crippen*, 579 F.2d 340, 342 (5th Cir. 1978)). "[T]he appropriate test is not whether the indictment might have been drafted with more clarity, but whether it conforms to minimal constitutional standards." *United States v. McGarity*,

669 F.3d 1218, 1235–36 (11th Cir.) (internal quotation marks omitted), *abrogated in part on other grounds by Paroline v. United States*, 572 U.S. 434 (2014).

Here, the Court finds Count One of the Superseding Indictment legally sufficient. In relevant part, the Superseding Indictment alleges that "[b]etween on or about April 1, 2018, and on or about November 15, 2018, in the Northern District of Florida and elsewhere, the defendant, Timothy J. Smith, did knowingly and intentionally access a computer without authorization, and thereby obtained information from a protected computer, and the value of the information exceeded $5,000." ECF No. 30 at 1–2. Notably, the Superseding Indictment tracks the language of § 1030, contains the elements of offense charged, and sufficiently appraises Smith of the charge he must be prepared to meet.[8] *See Sharpe*, 438 F.3d at 1263.[9] Therefore, Count One sufficiently states the offense charged.

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[8] As noted by the Government, the Superseding Indictment also references StrikeLines as the victim. *See* ECF No. 43 at 16; ECF No. 30; *see also deVegter*, 198 F.3d at 1327 (factual allegations in the indictment must be viewed in the light most favorable to the government).

[9] To the extent Smith seeks more details about the alleged unauthorized access to the protected computer, occurring between April 1, 2018 and November 15, 2018, *see* ECF No. 39 at 2, that additional information may be requested by filing a motion for a bill of particulars. *Sharpe*, 438 F.3d at 1263 n.3. The Court expresses no opinion as to whether a bill of particulars is required in this case. However, the Court notes that a bill of particulars should not be used as a discovery tool or as a device "to obtain a detailed disclosure of the government's evidence prior to trial," particularly "where the information sought has

Accordingly:

1. Defendant's Motion to Dismiss for Lack of Venue, ECF No. 38, is **DENIED** without prejudice.
2. Defendant's motion to dismiss Count One of the Superseding Indictment for vagueness, *see* ECF No. 39, is **DENIED** without prejudice.
3. Defendant's motion to dismiss Count One of the Superseding Indictment for failure to state an offense, *see* ECF No. 39, is **DENIED**.[10]

DONE AND ORDERED this 5th day of August, 2019.

s/ *M. Casey Rodgers*
M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE

already been provided by other sources, such as the indictment and discovery." *See United States v. Davis*, 854 F.3d 1276, 1293 (11th Cir. 2017) (internal citations omitted).

[10] The Court determines that a hearing is not necessary for the resolution of this matter. Smith's requests for a hearing are therefore **DENIED**. *See* ECF Nos. 38 at 8, 39 at 6.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v. **Case No. 3:19-cr-32/MCR**

TIMOTHY J. SMITH,
Defendant.
__________________________/

COURT'S INSTRUCTIONS TO THE JURY

Members of the Jury:

It is now my duty to instruct you on the rules of law that you must follow and apply in deciding this case. When I have finished you will go to the jury room and begin your discussions – what we call your deliberations.

It will be your duty to decide whether the Government has proved beyond a reasonable doubt the specific facts necessary to find the Defendant guilty of the crimes charged in the Indictment.

You must make your decision only on the basis of the testimony and other evidence presented here during the trial; and you must not be influenced in any way by either sympathy or prejudice for or against the Defendant or the Government.

You must also follow the law as I explain it to you whether you agree with that law or not; and you must follow all of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law.

The Indictment or formal charge against any Defendant is not evidence of guilt. Indeed, every Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove innocence or to produce any evidence at all. The Government has the burden of proving a Defendant guilty beyond a reasonable doubt, and if it fails to do so you must find that Defendant not guilty.

Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that the Defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning the Defendant's guilt.

A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the Defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

As I said earlier, you must consider only the evidence that I have admitted in the case. The term "evidence" includes the testimony of the witnesses and the exhibits admitted in the record. Remember that anything the lawyers say is not evidence in the case and is not binding on you. It is your own recollection and interpretation of the evidence that controls. Also, you should not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my

instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision concerning the facts.

In considering the evidence you may make deductions and reach conclusions which reason and common sense lead you to make; and you should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances tending to prove, or disprove, any fact in dispute. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

In deciding whether you believe or do not believe any witness I suggest that you ask yourself a few questions:

- Did the witness impress you as one who was telling the truth?
- Did the witness have any particular reason not to tell the truth?
- Did the witness have a personal interest in the outcome of the case?
- Did the witness seem to have a good memory?

- Did the witness have the opportunity and ability to observe accurately the things he or she testified about?
- Did the witness appear to understand the questions clearly and answer them directly?
- Did the witness's testimony differ from other testimony or other evidence?

You should also ask yourself whether there was evidence tending to prove that a witness testified falsely concerning some important fact; or, whether there was evidence that at some other time a witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether it was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

A Defendant has a right not to testify. If a Defendant does testify, however, you should decide in the same way as that of any other witness whether you believe the Defendant's testimony.

When the Government offers testimony or evidence that a Defendant made a statement or admission to someone after being arrested or detained, you must consider that evidence with caution and great care.

You must decide for yourself (1) whether the Defendant made the statement and (2) if so, how much weight to give to it. To make these decisions, you must consider all of the evidence about the statement—including the circumstances under which it was made.

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field is permitted to state an opinion concerning those technical matters.

Merely because such a witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely on it.

In this case you have been permitted to take notes during the course of the trial, and most of you – perhaps all of you – have taken advantage of that opportunity and have made notes from time to time.

You will have your notes available to you during your deliberations, but you should make use of them only as an aid to your memory. In other words, you should not give your notes any precedence over your independent recollection of the evidence or the lack of evidence; and neither should you be unduly influenced by the notes of other jurors.

I emphasize that notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been.

At this time I will explain the Indictment, which charges three separate offenses called "counts." I will not read it to you at length because you will be given a copy of the Indictment for reference during your deliberations. Please remember, as I have already

told you, that the Indictment is <u>not</u> part of the evidence in this case. It is merely an accusation, and you must not draw any inferences of guilt from it.

The Indictment states that two companies based in Pensacola, Florida—StrikeLines Pensacola, LLC, and StrikeLines Tampa, LLC (which I will refer to collectively as "StrikeLines")—used commercial side scan sonar equipment to locate fishing reefs in the Gulf of Mexico and sold the coordinates using an interactive map on their website. Count One charges that between on or about April 1, 2018, and on or about November 15, 2018, in the Northern District of Florida and elsewhere, the Defendant knowingly and intentionally accessed a protected computer without authorization and thereby obtained information, with a value exceeding $5,000.

Count Two charges that during the same time period and also in the Northern District of Florida and elsewhere, the Defendant stole a trade secret from StrikeLines that was used in, and intended for use in, interstate and foreign commerce (specifically, scanned sonar coordinates of reefs in the Gulf of Mexico) with the intent to convert it to the economic benefit of person other than the owner, StrikeLines, and with the intent and knowledge that the offense would injure the owner.

Count Three charges that during the same time period (between on or about April 1, 2018, and on or about November 15, 2018) and again in the Northern District of Florida and elsewhere, that the Defendant knowingly transmitted in interstate and foreign commerce via text message, a communication containing a threat to injure the property and reputation of StrikeLines, with the intent to extort from StrikeLines a thing of value.

The Defendant denies the charges.

I will now explain the law governing these counts.

With respect to Count One, it is a Federal crime to obtain information from any protected computer by intentionally accessing the computer without authorization.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) The Defendant intentionally accessed a computer;

(2) The Defendant did so without authorization;

(3) The Defendant thereby obtained information;

(4) The information was from a protected computer; and

(5) The value of the information exceeded $5,000.

The term "computer" includes any high speed data processing device that can perform logical, arithmetic, or storage functions, including any data storage facility, server or communications facility that is directly related to or operates in conjunction with a device.

To "access a computer" means to communicate with, obtain information from, or make use of a computer or its related services. "Access without authorization" means to access a computer without the approval, permission, or sanction of the computer's owner or controller. "Obtaining information" includes merely reading information on the computer. It is not necessary for the Government to prove that a loss occurred or that the Defendant copied or removed data, although copying or removing data would be examples of obtaining information.

A "protected computer" is one wherein reasonable measures have been put in place in an effort to keep some information secure or private. Such a computer must be used in interstate or foreign commerce or in a manner that affects interstate or foreign commerce. The internet is a means and facility of interstate and foreign commerce.

With respect to Count Two, it is a Federal crime to intentionally steal or convert a trade secret under certain defined circumstances.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) The Defendant intended to convert a trade secret to the benefit of anyone other than the owner;

(2) The item/information was, in fact, a trade secret;

(3) The defendant knowingly stole, or without authorization appropriated, took, carried away, or concealed, or by fraud, artifice, or deception obtained the trade secret;

(4) The defendant intended, or knew, that the offense would injure the owner of the trade secret; and

(5) The trade secret was related to or included in a product that is produced for or placed in interstate or foreign commerce.

The term "trade secret" means 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.

Information is readily ascertainable if it can be readily duplicated without involving considerable time, effort, or expense. It is not necessary for the Government to prove an exact dollar amount attributable to the secrecy of the information, only that the owner derived some actual or potential economic value from its secrecy. The Government is not required to prove there was an actual economic loss to the victim.

The term trade secret can include compilations of information. Combinations or compilations of public information from a variety of different sources, when combined or compiled in a novel way, can be a trade secret. In such a case, if a portion of the trade secret is generally known or even if every individual portion of the trade secret is generally known, the compilation or combination of information may still qualify as a trade secret if it meets the definition of "trade secret" set forth above.

With respect to Count Three, it is a Federal crime to knowingly send in interstate or foreign commerce an extortionate communication.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly sent a message in interstate or foreign commerce containing a true threat to damage the property or reputation of another or used a facility of interstate or foreign commerce to send said threat; and

(2) the Defendant did so with the intent to extort money or something else of value to the Defendant.

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.

The Government does not have to prove that the Defendant intended to carry out the threat or succeeded in obtaining money or any other thing of value.

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.

A "thing of value" is anything that has value to the Defendant, whether it is tangible or not.

Both a cellular telephone and the internet are facilities of interstate commerce.

You will note that the Indictment charges that the offense was committed "on or about" a certain date.

The Government does not have to prove with certainty the exact date of the alleged offenses. It is sufficient if the Government proves beyond a reasonable doubt that the offenses were committed on a date reasonably near the date alleged.

The word "knowingly," as that term is used in the Indictment or in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

The Sixth Amendment to the Constitution of the United States protects certain fundamental rights of any Defendant in a criminal case. One of the things it says is that "the accused shall enjoy the right to a . . . trial . . . in the state and district wherein the crime shall have been committed." This creates what is called a proper venue for the charging of any criminal offense, and it requires the Government to prove, as alleged in the Indictment for this case, that the charged offense or offenses were committed in the Northern District of Florida.

In determining where an offense was committed, you should initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts. Venue is therefore appropriate only in the district where the conduct comprising the essential elements of the offense occurred. The Government must prove that venue was proper as to each count charged.

If the offense conduct begins in one district and continues in another, or was committed in more than one district, the offense may be prosecuted in any district in which such offense was begun, continued in, or completed in.

The Court instructs you that Pensacola is in the Northern District of Florida.

On this issue of proper venue, and on that issue alone, you are instructed that the Government's burden of proof is somewhat less stringent than it is with respect to all of the other matters, which the Government must prove beyond a reasonable doubt, as I have previously explained to you. Specifically, the Government must prove venue by a "preponderance of the evidence." A preponderance of the evidence means evidence that is enough to persuade you that it is more likely than not or more probable than not that the alleged crime was committed within this District, as charged. If the 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.

A separate crime or offense is charged in each count of the Indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the Defendant guilty or not guilty as to one of the offenses charged should not affect your verdict as to any other offense charged.

I caution you, members of the Jury, that you are here to determine from the evidence in this case whether the Defendant is guilty or not guilty. The Defendant is on trial only for those specific offenses alleged in the Indictment.

Any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, to return a verdict you must all agree. Your

deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, that in a very real way you are judges–judges of the facts. Your only interest is to seek the truth from the evidence in the case.

When you go to the jury room you should first select one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you here in court.

A form of verdict has been prepared for your convenience.

[Explain verdict]

You will take the verdict form to the jury room and when you have reached unanimous agreement you will have your foreperson fill in the verdict form, date and sign it, and then return to the courtroom.

If you should desire to communicate with me at any time, please write down your message or question and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or

question you might send, that you should not tell me your numerical division at the time.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v. **Case No. 3:19cr32/MCR**

TIMOTHY J. SMITH,
Defendant.
____________________________/

VERDICT FORM

We the Jury, in the above entitled and numbered case, unanimously and beyond a reasonable doubt, find the Defendant, **TIMOTHY J. SMITH:**.

COUNT ONE

✓	Not Guilty
____	Guilty

COUNT TWO

____	Not Guilty
✓	Guilty

FILED IN OPEN COURT THIS
12-03-2019
CLERK U.S. DISTRICT
COURT NORTH DIST FLA

COUNT THREE

_____ Not Guilty

__✓__ Guilty

SO SAY WE ALL, this the 3rd day of December 2019.

Redacted per privacy policy

Foreperson's Signature

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v. **CASE NO. 3:19cr32-MCR**

TIMOTHY J. SMITH,
Defendant.
___________________________/

JUDGMENT OF ACQUITTAL ON JURY VERDICT

Based on the jury's verdict of Not Guilty on Count One of the Superseding Indictment following a trial on December 3, 2019, Defendant TIMOTHY J. SMITH is hereby ADJUDGED NOT GUILTY of the charge in Count One and this charge is hereby DISMISSED.

DONE AND ORDERED at Pensacola, Florida, this 4th day of December 2019.

s/ *M. Casey Rodgers*
M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v. **CASE NO. 3:19cr32-MCR**

TIMOTHY J SMITH,
Defendant.
_________________________/

ORDER

On December 3, 2019, following trial, a jury found the Defendant Not Guilty on Count One and Guilty on Counts Two and Three of the Superseding Indictment. At the close of the Government's evidence, the Court denied the Defendant's Motion for Judgment of Acquittal on Count Three and deferred ruling on Counts One and Two. The motion is now moot as to Count One but remains pending as to Count Two. Before ruling on the deferred motion, the Court has requested supplemental briefing by the parties on the issue of venue.

Accordingly, the parties are directed to file simultaneous supplemental briefs on the issue of venue related to Count Two on or before February 1, 2020.

DONE AND ORDERED this 4th day of December 2019.

s/ *M. Casey Rodgers*
M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

UNITED STATES OF AMERICA,	§	
	§	
	§	
v.	§	**3:19-cr-00032-MCR**
	§	
TIMOTHY J. SMITH, DEFENDANT.	§	
	§	
	§	

DEFENDANT'S POST-VERDICT MOTION FOR JUDGMENT OF ACQUITTAL AND IN THE ALTERNATIVE MOTION FOR NEW TRIAL

COMES NOW the Defendant, Timothy Jerome Smith, through counsel of record, and pursuant to Rules 29 and 33, Fed.R.Crim.P., files this Post-Verdict Motion for Judgment of Acquittal, or in the alternative, Motion for New Trial, and as grounds states the following:

* * *

B. THE GOVERNMENT'S EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE DEFENDANT'S GUILT AS A MATTER OF LAW AS TO COUNTS TWO AND THREE OF THE SUPERSEDING INDICTMENT

1. The Government Failed to Establish Venue for Count Two of the Superseding Indictment[1]

Count Two charged Smith with a violation of violation of 18 U.S.C. § 1832(a)(1); theft of a trade secret.

The Constitution, the Sixth Amendment, and Rule 18 of the Federal Rules of Criminal Procedure guarantee a defendant the right to be tried in the district in which the crime was committed. United States v. Cabrales, 524 U.S. 1, 6, 141 L. Ed. 2d 1, 118 S. Ct. 1772 (1998); United States v. Roberts, 308 F.3d 1147, 1152 (11th Cir. 2002).

Rule 18 of the Federal Rules of Criminal Procedure provides, "Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant,

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[1] Smith understands that the Court has issued a briefing schedule regarding further briefing on his motion for judgment of acquittal made at trial as to Count Two, and on which the Court currently has reserved a ruling, particularly on the issue of venue. Smith intends to submit a thorough briefing on the matter in accordance with the Court's schedule, and reserves the right to do so. He includes the issues regarding Count Two in this motion in order to preserve them in all ways possible for future review.

any victim, and the witnesses, and the prompt administration of justice." Rule 18, Fed.R.Crim.P.

For purposes of determining where the offense was committed, the Court must determine the conduct constituting the offense and then determine the location of the commission of that conduct. See United States v. Rodriguez-Moreno, 526 U.S. 275, 279, 119 S. Ct. 1239, 143 L. Ed. 2d 388 (1999); United States v. Ayo, 801 F. Supp. 2d 1323, 1328-29 (S.D. Ala. 2011).

In this case, the Government alleged that Smith used his computer to contact and obtain information from the Strikelines website. Contacting Strikelines website consisted of connecting directly with the server hosting the website. The evidence is uncontradicted that the server [the physical box] was located in Orlando, Florida at all times pertinent to the charges in this case. There was no evidence whatsoever that any computer or any person located in Pensacola was required to act or interact with Smith in this process.

As such, all essential elements of Count Two occurred in either Mobile, Alabama, where Smith was located, or in Orlando, Florida, where the server was located. Therefore, the only two places where venue was proper were the Southern District of Alabama, or the Middle District of Florida. As such, a judgment of acquittal is due to be granted on Count Two.

* * *

3. A Judgment of Acquittal Is Due On Count Three Due to Issues of Venue

As to Count Three, where a defendant is charged in more than one count, venue must be proper with respect to each count. See e.g., United States v.

Schlei, 122 F.3d 944, 979 (11th Cir. 1997) United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1188 (2d Cir. 1989); United States v. Bozza, 365 F.2d 206, 220-22 (2d Cir. 1966); United States v. Davis, 666 F.2d 195, 198 (5th Cir. Unit B 1982). Because venue is not proper in the Northern District of Florida as to Counts One and Two, it would not be a proper venue for Count Three.

4. The Government Failed to Present Sufficient Evidence of All Elements Required for A Conviction Under 18 U.S.C. § 875(D)

Count Three charged Smith with violation of 18 U.S.C. § 875(d), which reads:

> (d) 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 or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both.
>
> 18 U.S.C. § 875(d).

* * *

The post that are discussed in the texts, the post that Griggs wants removed, is a post by Smith that states the following:

> I know a lot of ppl that put out reefs every year for their own personal fishing experiences. They pay a lot of money to have these reefs put

> out. It was recently brought o my attention that there is a guy using high dollar scanning equipment finding these reefs and then reselling for personal gain. Without getting into all of the rights and wrongs of this, I would like to give anyone who has paid to have spots put out (legally) to look and see what reefs this guy has for sale or has sold in the past so you will have the option to have your spots moved. Several several of my friends have dozens and dozens of spots either for sale or have been sold by this guy. Please direct message me if you have any questions.

* * *

The Court should also grant a new trial to Smith as to Count Three of the Superseding Indictment because venue was not proper in the Northern District of Florida for Counts One and Two, and allowing the Government to try these counts to a jury along with Count Three resulted in the jury being exposed to highly prejudicial evidence on counts that could not legally be tried in this Court. This resulted in manifest injustice to Smith, and he is due to receive a new trial on Count Three as a result.

WHEREFORE PREMISE CONSIDERED, the Defendant respectfully requests that this Honorable Court set this Motion for a hearing, and after a fair and full hearing on the matter grant the motion and enter judgments of acquittal as to Counts Two and Three of the Superseding Indictment, or in the alternative, grant Smith and new trial as to Counts Two and Three of the Superseding Indictment.

Respectfully Submitted,

/s/ William K. Bradford
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IN THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

v. **CASE NO. 3:19cr32/MCR**

TIMOTHY J. SMITH

GOVERNMENT'S POST VERDICT BRIEF ON VENUE AS TO COUNT TWO

COMES NOW, the United States of America, by and through the United States Attorney for the Northern District of Florida, and respectfully submits to this Honorable Court a response to the Court's Order directing the parties to provide briefing as it relates to venue for Count Two of the Superseding Indictment. In support of this filing, the following is provided:

PROCEDURAL HISTORY

On or about April 3, 2019, a federal grand jury sitting in the Northern District of Florida indicted the defendant on charges related to computer fraud, theft of trade secrets, and extortionate threatening communications. (Doc. 3). A Superseding Indictment was returned on or about June 18, 2019, which contained the same charges with minor clarifying language within said charges. (Doc. 30). The defendant exercised his right to a jury trial and was found guilty on Counts Two and Three of the Superseding Indictment for the theft of trade secrets

and extortionate threatening communications. (Docs. 72, 74). The defendant made an oral motion for judgment of acquittal as to Counts Two and Three, and this Court denied said motion on the merits as to Count Three but reserved ruling for further briefing as to Count Two in relation to venue. (Docs. 72, 77, 78). Thereafter, the defendant filed a written motion for judgment of acquittal on Counts Two and Three, and the government filed a response thereto. (Docs. 82, 84). The Court's ruling on the defendant's written post verdict motion for judgment of acquittal remains pending as of this filing.

MEMORANDUM OF LAW

A. Motions pursuant to Rule 29.

Rule 29 of the Federal Rules of Criminal Procedure directs the Court, on a motion filed by the defendant, 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 determining if there was sufficient evidence to support a jury's verdict, the Court views the evidence in the light most favorable to the government, and draws all reasonable inferences and credibility choices in the government's favor. *United States v. Man*, 891 F.3d 1253, 1264 (11th Cir. 2018). "The verdict must stand if there is substantial evidence to support it, that is unless no trier of fact could have found guilt beyond a reasonable doubt." *United States v. Calderon*, 127 F.3d 1314, 1324 (11th Cir. 1997)(internal quotation omitted). Moreover, "[a] jury's verdict cannot be overturned if any reasonable construction of the evidence would have allowed the jury to find the defendant guilty beyond a reasonable doubt." *United States v. Holden*, 603 Fed. Appx. 744,

751 (11th Cir. 2015)(quoting *United States v. Capers*, 708 F.3d 1286, 1297 (11th Cir. 2013)).

In other words, "[t]he question is whether reasonable minds could have found guilt beyond a reasonable doubt, not whether reasonable minds must have found guilt beyond a reasonable doubt." *United States v. Bacon*, 598 F.3d 772, 775 (11th Cir. 2010)(*per curiam*)(internal quotation omitted); *accord United States v. Flores*, 572 F.3d 1254, 1264 (11th Cir. 2009)(*per curiam*). "Because a jury is free to choose among the reasonable constructions of the evidence, it is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt." *United States v. Godwin*, 765 F.3d 1306, 1320 (11th Cir. 2014)(internal quotation omitted).

B. Count Two – Theft of Trade Secrets & Venue.

Multidistrict offenses "may be . . . prosecuted in any district in which such an offense was begun, continued, or completed." 18 U.S.C. §3237(a). Moreover, "[a]ny offense involving . . . transportation in interstate or foreign commerce . . . is a continuing offense and . . . may be inquired of and prosecuted in any district from, through, or into which such commerce" takes place.[1] *Id. See also United States v. Rodriguez-Moreno*, 526 U.S. 275, 281 (1999); *United States v. Bagnell*, 679 F.2d 826, 830-831 (11th Cir. 1982). "[V]enue need only be proved by a preponderance of the evidence as opposed to beyond a reasonable doubt." *United States v. Little*, 864 F.3d 1283, 1287 (11th Cir. 2017)(internal quotation

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[1] As adduced at trial, via the testimony of Special Agent Stephanie Cassidy as well as the admission of government exhibits, this ongoing offense took place over many months.

omitted); *United States v. Nall*, 146 Fed. Appx. 462, 466 (11th Cir. 2005). "[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 280-281; *see also United States v. Bowens*, 224 F.3d 302, 308-309 (4th Cir. 2000).

In this case, the jury was provided a robust instruction as to the requirements of proof as to venue, and its verdict should thus not be disturbed. (*See* Doc. 73, pp. 21-22). Indeed, the defendant's prior arguments as to venue as it relates to Count Two are infirm in that he has spent almost the entirety of his assertions focusing on elements that relate to computer fraud – which was charged separately in Count One and resulted in a "Not Guilty" verdict. The defendant's conflation of these two counts, though they maintain distinct elements, displays the weakness in his position. Count Two is about the theft of trade secrets that were located, categorized, and then stolen from an injured victim in the Northern District of Florida, which the evidence proved to the satisfaction of a jury.

This Court should not allow the defendant to confuse its reasoning by inappropriately inserting a computer fraud component into Count Two.[2] The victim company, who did not provide authorization to take its trade secrets, was injured/harmed in the

[2] There is no cyber related essential element required to prove Count Two. Throughout the instant litigation, the defendant has repeatedly cited *United States v. Auernheimer*, 748 F.3d 525 (3rd Cir. 2014) for authority as to his arguments regarding venue. The *Auernheimer* case was not a theft of trade secrets case, and thus it is no longer instructive on the issue currently before the Court.

Northern District of Florida when the defendant repeatedly shared its trade secrets with others.[3] Venue is to be established in order to protect a defendant from being prosecuted in some far away place where he cannot prepare a proper defense. *See United States v. Cores*, 356 U.S. 405, 407, 410 (1958). Herein, the defendant was located in Mobile, Alabama, and the victim company (and this Court) are located in Pensacola, Florida. These are abutting locations, and the defendant was not subject to an unwieldy prosecution.

As noted above, the Court must look at the essential criminal elements of Count Two in order to make a determination. *Rodriguez-Moreno*, 526 U.S. at 280-281; *United States v. John*, 477 Fed. Appx. 570, 571-572 (11th Cir. 2012). "[W]here venue requirements are met, the prosecution may proceed in that district, notwithstanding the possibility that the gravamen of the wrongdoing took place elsewhere." *United States v. Engle*, 676 F.3d 405, 413 (4th Cir. 2012)(internal citation omitted); *see also United States v. Sterling*, 860 F.3d 233, 241 (4th Cir. 2017). As the Court instructed the jury, the government must prove the below elements on Count Two:

1. The defendant intended to convert a trade secret to the benefit of anyone other than the owner;
2. The item/information was, in fact, a trade secret;

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[3] The test to establish venue cannot be a rigid one, and it should consider harm to the victim. *See e.g.; United States v. Balsiger*, 2008 WL 4964716 (E.D. Wisconsin, November 11, 2008); *United States v. Muhammad*, 502 F.3d 646 (7th Cir. 2007).

3. The defendant knowingly stole, or without authorization appropriated, took, carried away, or concealed, or by fraud, artifice, or deception obtained the trade secret;
4. The defendant intended, or knew, the offense would injure the owner of the trade secret; and
5. The trade secret was related to or included in a product that is produced for or placed in interstate or foreign commerce.

The term "trade secret" means 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.

Information is readily ascertainable if it can be readily duplicated without involving considerable time, effort, or expense. It is not necessary for the government to prove an exact dollar amount attributable to the

> secrecy of the information, only that the owner derived some actual or potential economic value from its secrecy. The government is not required to prove there was an actual economic loss to the victim.
>
> The term trade secret can include compilations of information. Combinations or compilations of public information from a variety of different sources, when combined or compiled in a novel way, can be a trade secret. In such a case, if a portion of the trade secret is generally known or even if every individual portion of the trade secret is generally known, the compilation or combination of information may still qualify as a trade secret if it meets the definition of "trade secret" set forth above.

(Doc. 73, pp. 15-17). There is no dispute that the offense charged in Count Two took place in multiple districts and could have been charged in multiple districts. One of those districts is the Northern District of Florida.

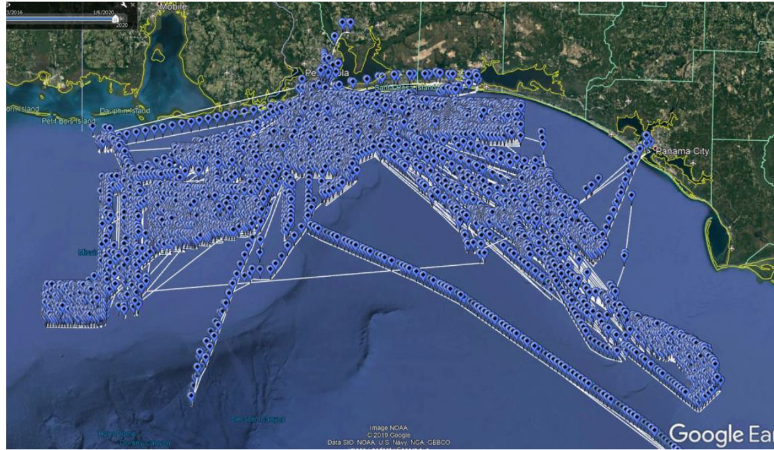
There is more than one element of the theft of trade secrets charged herein that provides for venue, by a preponderance of the evidence, in the Northern District of Florida. As to the first and fourth elements, benefitting those other than the owner of the trade secret and injuring the owner of the trade secret, both implicate the Northern District of Florida. As proven at trial through the testimony of Travis Griggs and Tristan Harper along with accompanying exhibits, the victim company was located in Pensacola, Florida, and felt injury here. As

such, the suffered harm was in the Northern District of Florida. *See Balsiger*, 2008 WL 4964716 at *2-3.[4]

As to the second and fifth elements, that the item was a trade secret and placed in interstate commerce, the trade secrets stolen herein were coordinates located in the Gulf of Mexico that physically fall within the venue of the Northern District of Florida. That is, the trade secrets themselves are located here and are categorized and managed here by the victim company.[5] For example, as proven in Government Exhibits 3 and 22A, as well as shown in the below graphic of sonar survey by StrikeLines' vessel, the compilation of coordinates is located in the waters of the Northern District of Florida.

[4] "When 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." *Bowens*, 224 F.3d at 313.

[5] Indeed, one of the main defenses put forth during trial was that the trade secrets were not actually "private" because the State of Florida published charts that outlined public fishing coordinates. This confirms that what the jury found to be trade secrets, the "private coordinates," were physically located within the waters off the Northern District of Florida in the Gulf of Mexico. *See* Defense Exhibit 24, which is essentially a concession that venue lies within the Northern District of Florida as all the coordinates are co-located here.



Lastly, as to the third element, obtaining the trade secrets without authorization from the victim company, said company was located in the Northern District of Florida – the only location where the defendant could obtain authorization to possess the trade secrets (as confirmed by the trial testimony of Travis Griggs, Tristan Harper, and Ralph Haynes).

The theft of trade secrets, as charged in Count Two, could not have been committed by the defendant without implicating the Northern District of Florida as it relates to the location of the trade secrets themselves, the authorization to obtain the trade secrets, and the causation of injury upon the local victim company. This Court, respectfully, should be reminded that the parameters regarding venue are "a guide, not a rigid test." *Muhammad*, 502 F.3d at 652. Viewing the evidence in the light most favorable to the government, venue was established at trial.

CONCLUSION

In sum, the defendant has failed to articulate any sound reason upon which his motion for judgment of acquittal on Count Two, as it relates to venue, should

be granted. Respectfully, the Court should not disturb the sound judgment of the jury.[6]

SUBMITTED this 31st of January, 2020.

LAWRENCE KEEFE
United States Attorney

/s/ David L. Goldberg
DAVID L. GOLDBERG
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[6] The undersigned believes that disturbing the verdict on Count Two might also impact the victim's ability to seek restitution as well as for the forfeiture proceedings to move forward.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

UNITED STATES OF AMERICA,	§	
	§	
	§	
V.	§	**3:19-cr-00032-MCR**
	§	
TIMOTHY J. SMITH, DEFENDANT.	§	
	§	
	§	

DEFENDANT'S POST-VERDICT BRIEF REGARDING VENUE AND COUNT TWO

COMES NOW the Defendant, Timothy J. Smith, through counsel of record, William K. Bradford of Bradford Ladner LLP, and files this post-verdict brief regarding venue, in support of his motion for judgment of acquittal as to Count Two of the Superseding Indictment, and states as follows:

I. INTRODUCTION

This brief is being submitted per the Court's request, and addresses the sole issue of venue in relation to Count Two of the Superseding Indictment. At the close of the Government's case, Defendant Smith moved for a judgment of acquittal as to all counts of the Superseding Indictment. The Court deferred ruling on the motion as to Counts One and Two, and denied the motion as to Count Three. The

jury ultimately acquitted Smith on Count One. The Court requested supplemental briefing on the issue of venue in relation to Count Two, the Economic Espionage Act count.

II. STANDARD OF REVIEW

First, as to the evidence that the Court may consider in ruling on Smith's motion for judgment of acquittal made at the end of the Government's case, Rule 29(b) provides that where a decision is reserved, the Court must decide the motion on the basis of the evidence at the time the ruling was reserved. Rule 29(b), Fed.R.Crim.P.

Venue is always an essential element that must be proven by the Government. The Government must prove venue by a preponderance of the evidence. A motion for judgment of acquittal is an appropriate vehicle to challenge the sufficiency of the Government's evidence regarding venue. Even when faced with a jury verdict of guilt, where the jury finding of venue is not supported by sufficient evidence, the Court should grant a judgment of acquittal. See United States v. Strain, 407 F.3d 379, 380 (5th Cir. 2005); United States v. Greene, 995 F.2d 793, 802 (8th Cir. 1993).

III. GENERAL VENUE PRINCIPLES

Article III of the Constitution requires that "the Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." Art. III, § 2, cl. 3. This principle is reinforced by the Sixth Amendment where it states that "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."

Rule 18 of the Federal Rules of Criminal Procedure echoes these requirements where it states that prosecutions shall be had in a district in which the offense was committed." Rule 18, Fed.R.Crim.P., See also United States v. Cabrales, 524 U.S. 1, 5, 118 S. Ct. 1772, 1775 (1998).

A. Locus Delicti

Where there is no specific venue provision in a statute, the proper district for venue purposes is that district where the offense was committed; the *locus delicti*. See United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999). In Cabrales, the United States Supreme Court held that the "*locus delicti*" of the charged offense is to be determined by the nature of the crime alleged and the location of the act or acts constituting the crime. Cabrales, 524 U.S. at 6-7. Cabrales followed the holding in United States v. Anderson, 328 U.S. 699, 703, 90 L. Ed. 1529, 66 S. Ct. 1213 (1946).

When this Court reviews the issue of venue it should identify the conduct constituting the offense, then discern the location of the commission of the criminal acts. See Cabrales, at 6-7; See also, Travis v. United States, 364 U.S. 631, 635-637, 5 L. Ed. 2d 340, 81 S. Ct. 358 (1961); United States v. Cores, 356 U.S. 405, 408-409, 2 L. Ed. 2d 873, 78 S. Ct. 875 (1958).

The verb test, although not a dispositive test, is a helpful tool in determine proper venue. Rodriguez-Moreno, 526 U.S. at 279–80. Under this test, the Court starts by analyzing the key "verbs" or actions sanctioned by the statute." United States v. Sterling, 860 F.3d 233, 241 (4th Cir. 2017). In this instance, the key verb in § 1832(a) are "steals," "appropriates,"

"takes," "carries away," "conceals," "obtains." These verbs indicate that the essential conduct making up the offense is the theft of the alleged trade secret. Once the verbs are identified in the statute, the Court looks to where the act(s) took place.

B. Essential Conduct Elements v. Circumstance Elements

The Supreme Court has established that it is the essential conduct elements that matter for purposes of determining proper venue, drawing a distinction between a "circumstance element" of an offense, and an essential conduct element, which is the actual proscribed conduct. Rodriguez-Moreno, 526 U.S. at 280 n.4. Both Rodriguez-Moreno, and Cabrales make the controlling distinction between an "essential conduct element" that establishes venue and a "circumstance element" that does not. Rodriguez-Moreno, 526 U.S. at 280 n.4; Cabrales, 524 U.S. at 7. An "essential conduct element" describes the act that the defendant committed. A "circumstance element" describes the circumstances that existed at the time of his act. Therefore, it is where the essential conduct elements take place or are committed that establishes venue.

In Cabrales the Supreme Court considered whether venue for money laundering activities was proper in Missouri. Cabrales was charged with conspiracy and money laundering based on her actions in depositing and withdrawing money derived from drug sales. The United States Supreme Court held that although the money had been generated by illegal narcotics sales in Missouri, all of Cabrales acts constituting the money laundering offense took place in Florida. Based on the fact that the essential conduct element of her charge was committed in

Florida, the Court held that venue was improper in Missouri. Cabrales, at 10.

IV. A STRAIGHTFORWARD APPLICATION OF RULE 18 DOES NOT PLACE VENUE IN THE NORTHERN DISTRICT OF FLORIDA

A. An Offense Under 18 U.S.C. § 1832(A)(1) Is Neither a Multi-District Offense, Nor A Continuing Offense

The Government, in its prior and present argument, have always assumed that a violation of 18 U.S.C. § 1832(a)(1) is a multi-district offense. Under close scrutiny, this assumption is incorrect.

Section 1832 of the Economic Espionage Act concerns the theft "trade secrets." Section 1832(a) contains five subsections, each of which set out a separate and distinct way to commit the offense. The separate subsections each contain a separate and distinct form of *actus reus* or essential conduct. For instance, 1832(a)(2) makes it illegal to copy, duplicate, sketch, draw, photograph, download, upload, alters, destroy, photocopy, replicate, transmit, deliver, send, mail, communicate, or convey a trade secret with the intent stated in the opening sentences of the statute.[1] Section 1832(a)(3) makes it illegal to receive, buy, or possess a stolen trade secret.

Smith was indicted and tried for a violation of § 1832(a)(1), and not under any other subsection of § 1832. Section § 1832(a)(1) addresses the theft of a trade secret; making it a crime when a person,

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[1] 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—

possessing the requisite intent, "steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains. . ." a trade secret.

Other portions of § 1832 may involve continuing offenses, such as the prohibited possession (§ 1832(a)(3), or the prohibition against duplicating the trade secret (§ 1832(a)(2), or even the prohibition against conspiracy (§ 1832(a)(5). Under these subsections it may be that a defendant possesses the stolen trade secret in numerous districts, or that a defendant duplicates the trade secret numerous times in different districts, or even that an overt act of the conspiracy takes place in another district from the actual theft of the trade secret. Under these scenarios the offense may be continuing. But these are not the circumstances in this case. In this case, the alleged trade secret was stolen or taken, once. Even if the alleged theft took place on more than one occasion, this does not change the fact that on each occasion the act was committed in the same location.

Under Cabrales, in order to determine proper venue, this Court must determine the nature of the alleged crime, and the location of the act or acts constituting the crime. See Cabrales, 524 U.S. at 6-7. This Court should determine this by identifying the conduct constituting the offense, and then determining the location of the commission of the criminal acts.

18 U.S.C. § 1832(a)(1) sets forth what is essentially a theft offense. The statute speaks in plain ordinary terms when it makes it illegal to "steal"

a trade secret. The prohibited act of the offense is the theft, or unlawful taking of the trade secret.[2]

The Court them must determine the location where the act of unlawful taking occurred. A theft is accomplished when the rightful owner is deprived of a piece of property by another. As such the theft cannot be completed until the property is actually in the possession of the person accused of taking the property.

Based on the evidence at trial, particularly the testimony of Ralph Haynes, it seems undisputed that Smith's acquisition of the coordinates transpired as follows: Smith's computer (in Mobile, Alabama) requested the data to view the Strikelines website from the server (in Orlando, Florida) which contained the Strikelines data. In response, the server in Orlando sent the data (including the coordinates) to Smith's computer in Mobile. Based on a common understanding of theft, it was not until Smith was in possession of the data that any theft was completed; that point in time when the data could be considered "stolen.

Under one view, the theft of or stealing of the data occurred when Smith came into possession of the data. This event occurred in Mobile, Alabama, meaning that the Southern District of Alabama was the correct venue. Under this analysis, resort to 18 U.S.C. § 3237(a) is not necessary because the act constituting the "theft" is occurs in Mobile, Alabama.

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[2] In this case, the trade secrets have always been alleged to be the coordinates to the artificial reefs; the data.

B. Even If The § 1832(A)(1) Offense Is Multi-District, The Northern District of Florida Is Still Not a Proper Venue

Even if 18 U.S.C. § 3732(a) applies to the offense in Count Two, venue would either be in the Southern District of Alabama, or the Middle District of Florida. Under § 3732(a), an offense can be prosecuted in any district where the offense was begun, continued, or completed. 18 U.S.C. § 3732(a).

The Government's evidence in this case clearly showed that the Strikeline data made subject to Count Two was located on a server (a physical computer device) physically located in Orlando, Florida, the Middle District of Florida. Further, the Government's evidence showed that at all-times pertinent to the case, Smith was located in the Southern District of Alabama (essentially Mobile, Alabama).

Assume for arguments sake that the beginning of the offense occurred when Smith, via his computer requested data from the server in Orlando, Florida. And further assume for argument's sake that the server received the request and in response sent the data to Smith's computer. The completion of the offense occurs when Smith receives the data.

Based on this, the only appropriate venue for Count Two would be the Southern District of Alabama. But even if we assume that the interim step of the server in Orlando, Florida sending the data is part of the conduct, that still leaves only two possible appropriate districts for venue; the Southern District of Alabama, or the Middle District of Florida.

Under either a straightforward application of Rule 18 and the principles from Rodriguez-Moreno and

Cabrales, or an application of § 3732(a), the only two possible proper district for venue are the Middle District of Florida or the Southern District of Alabama. As this Court noted at trial, Smith and his computer were in Mobile, Alabama, and the box containing the data was a computer server in Orlando, Florida. Nothing and no one in Pensacola was involved or necessary for the offense. As such Smith's motion for judgment of acquittal as to Count Two is due to be granted on the basis of lack of venue.

C. The Government's Arguments Are Without Merit

The Government relies on "circumstance elements"

In its brief, the Government points to "circumstance elements" as a basis for holding the Northern District of Florida as a proper venue for Count Two. The Government points to the first and fourth elements in the Court's venue jury instruction: the intent to benefit those other than the owner, and the intent or knowledge that the owner would be injured. But these elements are linked to the intent of the actor, and do not speak to the essential conduct itself required under the statute. The statue requires that the defendant have the intent to benefit someone other than the owner, and the intent or knowledge that his act would injure the owner. The statute does not require that these two things actually come to pass. Therefore, these elements only set out certain circumstances that must exist at the time the defendant commits the essential conduct element of the offense. The *mens rea* requirement of a statute constitutes "a circumstance element" and does not contribute to determining the *locus delicti* of the crime. See United States v. Coplan, 703 F.3d 46, 79 (2d Cir. 2012). Because of that, these circumstance

elements are irrelevant for purposes of venue, and venue cannot be based on these elements.

The Government Misidentifies the Trade Secrets

The Government also conflates the data (the numbers making up the coordinates themselves) with the physical artificial reef in the Gulf referred to by the coordinates. The alleged trade secrets are not physically located out in the Gulf of Mexico. All of the evidence put on by the Government shows that the alleged trade secrets were located on a server in Orlando, Florida, in the form of computer data. There was no evidence that Strikelines owned the physical location represented by the coordinates, nor the artificial reefs located below the surface.

The Government's "Authorization" Rational Is Without Merit

The Government's argument that Smith was required to obtain authorization from Pensacola in order to access the coordinates is without merit. First, the Government offered no evidence that there was any requirement that Smith or any other person had to seek and get permission to go to visit any portion of the Strikelines website. Government's witness Ralph Haynes testified that the website was open to the general public without any requirement of permission to view the website. He also testified that the coordinates were used in the Google Map on the website and that the coordinates were sent to any person viewing the website, not just Smith. Haynes also admitted that anyone visiting the website could view the same coordinates that Smith viewed by the use of any one of a number of freely available and widely used web browsers.

Second, where the statute mentions lack of authorization, it does so as a circumstance element. The theft or stealing of the alleged trade secret is required to occur under circumstances where the defendant does not have authorization to take or obtain them.

The "Effects" Of The Offense Does Not Determine Venue

The Government's argument that venue may be found based on the effects of the offense, that Strikelines suffered harm in Pensacola, is also without merit. Venue is concerned with the conduct that Congress sought to prohibit by the statute, not with speculation of what may have resulted from the offense or where that effect was felt.

In fact, the statute does not even speak of a certain effect being present as a necessary element of the offense. Under Cabrales venue cannot be based on the effects of an offense unless the statute defines the proscribed conduct in terms of an effect. The venue requirements are principally designed as a protection for the defendant. Cabrales, at 9-10. The Supreme Court noted that proper venue should not be determined based on the interest of the location where the effects of the offense are felt. Id.

Based on Cabrales, venue is not determined based on where the effects of criminal conduct are felt, unless the essential conduct element is itself defined in terms of its effects. See United States v. Bowens, 224 F.3d 302, 311 (4th Cir. 2000).

V. CONCLUSION

Whether to grant Smith's motion for judgment of acquittal as to Count Two on the basis of lack of venue is based on the evidence offered at trial by the

Government. It is undisputed that Smith and his computer were always in Mobile, Alabama at all time pertinent to the case. Equally undisputed is the fact that the data the is alleged to have taken was at all times pertinent located on a computer server in Orlando, Florida. Any conduct element of the offense in Count Two would have occurred by necessity, under those facts, either in the Southern District of Alabama or the Middle District of Florida. Venue was not proper as a matter of law in the Northern District of Florida.

The Government's arguments do not change this conclusion. The Government argues everything but the application of the essential conduct element standard set out in Rodriguez-Moreno and Cabrales. But the Government arguments must fail; circumstance elements do not dictate venue, or does the locale of the effects of the offense do not dictate venue.

WHEREFORE PREMISE CONSIDERED, the Defendant respectfully requests that this Honorable Court will grant a judgment of acquittal as to Count Two of the Superseding Indictment on the grounds of improper venue.

* * *

Respectfully Submitted,

/s/ William K. Bradford

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**Case No.: 3:19cr32/MCR**
	)	
vs.	)	Pensacola, Florida
	)	December 2, 2019
TIMOTHY J. SMITH,	)	8:13 a.m.
Defendant.	)	
	)	

DAY ONE

TRANSCRIPT OF **JURY TRIAL** PROCEEDINGS
BEFORE THE HONORABLE M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE, and a jury

* * *

[9]

* * *

THE COURT: Well, I understand. And I'll have to take this issue under advisement and look at it myself and decide whether the instruction and the evidence in support of it provides for the Court to give that instruction.

Let me discuss just a moment the outstanding issue of venue. My understanding is the venue objection is made as to Count One and Count Two. There will be a jury instruction -- the Government proposed one, the Defense did not, in spite of my

directing that both sides propose a venue instruction. But nonetheless, a venue instruction will certainly be given.

Also, the verdict form, in my view, should contain a special interrogatory on venue, and I will ask the jury to specify its finding on venue. It's a separate and different burden of proof, and so I'm going to separate that out on the verdict form.

Any response, Mr. Goldberg?

MR. GOLDBERG: Just to alert the Court to something in **[10]** advance. I anticipate a lot of the defense, including the expert witness, is going to be that the Defendant was obtaining the information -- and even wrote his own code decrypting the information when it was in transit rather than on the server.

So I actually think the Defense is going to abandon -- they're going to have to abandon the venue challenge, because this is an ongoing offense and it was transmission of information that necessarily is in the Northern District of Florida as well, and the Government is going to have plenty of evidence as to all of the venue -- striking all of the boxes. But I want the Court just to be aware of that, to be -- I know you always pay attention, but also be considering that.

Because I anticipate that, by their own argument, to a certain extent, they're going to have to abandon their venue challenge. Because their -- I anticipate the defense argument is going to be that there was no encroachment on the server at all, so just be mindful of that as we forward.

THE COURT: All right.

Mr. Bradford, any response?

MR. BRADFORD: Yes, Your Honor. We certainly are not going to abandon that defense. I think the problem here is that the venue is either going to lie in the place where the information was received and something done with it or where the information originated from. And I don't think there's going to be a factual dispute that at the time this occurred **[11]** that the server for this website was in Orlando, Florida, and that Mr. Smith lived, resided, and all of his actions were taken in the Southern District of Alabama in Mobile. So, I mean, I think that's still a viable issue regardless of how we treat the site of the actual inappropriate act that's alleged.

I think it's part of the mechanics of how websites operate that the information is transmitted from the server to a computer and the computer decodes the information and presents the website on your screen.

Either way, I think venue could only lie in either -- well, Orlando I believe is in the --

THE COURT: Middle District.

MR. BRADFORD: -- Middle District, or the Southern District of Alabama. I don't think that this particular kind of case is a case where you can argue that it's continuing in nature just because the information traveled somehow possibly through Pensacola -- which I'm not even sure we can know that for a fact -- that that supplies venue.

And we did claim it on Counts One and Two. I think our argument on Count Three is that, unless venue is proper for all counts, that it would not be proper for Three also, that Three would have to piggyback and follow the other two counts in the case venue-wise.

THE COURT: All right. Thank you.

Mr. Goldberg, do you agree with that?

[12] MR. GOLDBERG: No, that's not the law. The law is venue has to be established for each count individually, so that is actually not the law.

THE COURT: Okay. Well, that is something else I'll be looking at.

Anything else that we should discuss before the panel is seated?

MR. GOLDBERG: The only thing I would bring up just on the venue issue is Count Two. I do -- and Defense used the word "piggyback." I think the Defense is trying to piggyback Count Two to Count One.

The trade secret count has nothing to do with cyber crime. If you look at the essential elements, there's nothing cyber related. It's the trade secret that resides in Pensacola where it's inputted and managed and secured, and so on and so forth. It's going to be a question for the jury, I think.

THE COURT: Right. And I intend to ask the jury separately for its determination on venue as to each of the two counts individually or separately.

* * *

[53]

* * *

THE WITNESS: My name is Tristan Harper, H-a-r-p-e-r.

THE COURT: Mr. Goldberg, when you're ready.

DIRECT EXAMINATION

BY MR. GOLDBERG:

* * *

[79]

* * *

Q. So now we're in June of 2018. You've received coordinates, you've received customer data from Mr. Smith. At this point, what did you decide would be the prudent course of action?

A. After back and forth via text message with Mr. Smith, we made the determination that this was something we could not handle and that we had to go to law enforcement.

Q. And why did you go to law enforcement?

A. Mr. Smith was damaging our reputation, he was endangering our livelihood. He had private customer data, he had private StrikeLines data, and in our opinion Mr. Smith was acting irrationally, so we had to go to law enforcement.

Q. So the ladies and gentlemen of the jury understand -- I know we saw some of the prices up there. If someone had, say, just a thousand of your private reef coordinates, what would be the approximate value of that?

A. That would be hundreds of thousands of dollars worth of data.

* * *

[80]

* * *

CROSS-EXAMINATION
BY MR. BRADFORD:

* * *

[84]

* * *

Q. Okay. What other distinction do you place on private reefs other than whether the number is published or not?

A. Private reefs is just a term that we use to distinguish from a published public number. So, if it's a private reef, it means that it has not been published by FWC or it's not something that the county funded to put down there.

Q. Regardless of whether it's public or private, you sell them, don't you?

A. We sell private reefs. We do not sell public reefs. We give those away for free.

Q. My mistake. You give those away. You sell private reefs?

A. Yes, sir.

Q. You sell private reefs that are funded by private citizens and placed in the Gulf?

A. Yes, sir.

* * *

[111]

* * *

THE WITNESS: Ralph Haynes, H-a-y-n-e-s.

* * *

[117]

CROSS-EXAMINATION
BY MR. BRADFORD:

* * *

[120]

* * *

Q. But you can plug the Google Maps into your site so, if I go to your site, I see Google Maps, correct?

A. Yes, sir.

Q. And if I want to -- if I'm the website owner and I want to point you to certain things on that map, I can do that, can't I?

A. Yes, sir.

Q. And I do that by sending the coordinates of those locations to Google, correct?

A. Yes, sir.

Q. Now, when you use Google Maps, isn't it true that you have to have an agreement with Google? Google just doesn't give it away?

A. Yes, sir.

Q. And that agreement is a developer's agreement, correct?

A. Yes, sir.

Q. And isn't it true that part of Google's developer agreement is that, if you use it -- Google Maps -- and you send information to Google, you agree that it's public information, correct?

A. Maybe under the terms and conditions I didn't read.

Q. Well, I understand. But as far as you know, do you have **[121]** any reason to think that's incorrect, I guess?

A. No, sir, I don't have any reason to believe that's incorrect, especially in our case. Since we're talking about coordinates, I mean, there's just a spot on the map.

Q. Well, really, I mean, the fact is, if I didn't -- let me rephrase that. If I'm StrikeLines and I didn't give the coordinates to Google, my map wouldn't work, would it?

A. That's correct.

Q. It wouldn't have any blue dots on it, would it?

A. That's correct.

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[122]

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Q. So in May of 2018, if I were to go to the website and click on it and my computer sends that request and the server sends back the information to look at the private reef page, I would have gotten those coordinates, wouldn't I?

A. You would have gotten the offset coordinates, not the coordinates that were directly tied to their product.

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[124]

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Q. * * * information would have been transmitted to my computer, correct?

A. That's correct.

Q. It's just a matter of whether I clicked on the right inspector in my browser and then read it, correct?

A. It's only going to be a very curious developer who is going to get that far into it.

Q. But it could be a curious developer or it could be anybody and everybody that went to the website potentially, correct?

A. Potentially anybody, yes, sir.

Q. Back in May of 2018, the website, StrikeLines's website, it did not require any type of password to use, did it?

A. To access the front end of the site, no, sir.

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[127]

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Q. And you also said the third security feature was passwords, the importance of passwords. There is no password on this site back in May of 2018, was there?

A. No, sir.

Q. And there wasn't one in June?

A. No, sir.

Q. There wasn't one in July?

A. No, sir.

Q. And there's not one now?

A. That's correct.

Q. It's never had one, correct?

A. That's correct.

Q. The server, back in May of 2016 *[sic]*, was in Orlando?

A. That's correct, yes, sir.

Q. When did it -- it's moved now, it's somewhere different now, correct?

A. Yes, sir.

Q. Do you know when it moved?

[128] A. I couldn't pinpoint an exact date on it. I would say roughly a year ago perhaps.

THE COURT: Mr. Bradford, I believe you referenced 2016 and meant to reference 2018.

MR. BRADFORD: I did. It's 2018. My mistake.

THE COURT: Just for the record.

BY MR. BRADFORD:

Q. Has the server ever been in Orlando -- I'm sorry. Now I'm really confused. Has it ever been in Pensacola?

A. No, sir.

* * *

Q. And so, if I were a computer user, my computer's request to the website or to the server would have gone to Orlando?

A. Yes, sir.

[129] Q. And the response would have gone from Orlando back to my computer wherever I may be?

A. Yes, sir.

Q. There's no requirement that any communication -- in that aspect of it of just viewing the website, there's not any requirement of communication coming through Pensacola, is there?

A. No, sir.

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[137]

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REDIRECT EXAMINATION

BY MR. GOLDBERG:

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[139]

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THE COURT: I have one quick question, sir.

THE WITNESS: Yes, ma'am.

THE COURT: The back-end browser area that you were just asked about, I understand your testimony that it was a deep dive to get there?

THE WITNESS: Uh-huh.

THE COURT: I'm just curious, was there any administrator access requirement to that area? I thought you might have said that.

THE WITNESS: For the developer tools?

THE COURT: Right.

THE WITNESS: Where that data was viewed? No. That's an open source to the public.

THE COURT: All right.

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[140]

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RECROSS-EXAMINATION

BY MR. BRADFORD:

Q. I just want to make sure I understand. When you say "deep dive" using a developer tool, it's still just a developer tool, it's not something different from that, right?

A. That's correct.

Q. And I think you answered the judge that the developer tool, that's not something that you need authorization to use or have? In fact, it's every browser out there, isn't it?

A. That's correct.

Q. Thank you.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**Case No.: 3:19cr32/MCR**
	)	
vs.	)	Pensacola, Florida
	)	December 3, 2019
TIMOTHY J. SMITH,	)	8:22 a.m.
Defendant.	)	
	)	

DAY TWO

TRANSCRIPT OF **JURY TRIAL** PROCEEDINGS BEFORE THE HONORABLE M. CASEY RODGERS UNITED STATES DISTRICT JUDGE, and a jury

* * *

[2]

PROCEEDINGS

(Court called to order; Defendant present with counsel.)

THE COURT: Well, good morning. I apologize for the delay. We had some computer issues this morning. So we will do what we can -- our best to walk through instructions in just the few minutes that we have before the jury comes in, and then we'll just have to take it up begin a little bit later because I'm not going to have them wait.

So you have a packet that was given to you last evening before we recessed. My custom or practice is to walk through these instructions page by page and determine -- many of them are pattern instructions; there should be no objection. And I'd like to get a consensus on those that we can reach a consensus on.

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THE COURT: * * *

The special venue instruction. I had a proposal from Mr. Goldberg; did not have a proposal from the Defense. I looked at the *Little* case in the Eleventh Circuit and the District Court case that was affirmed in that Eleventh Circuit decision and the jury instruction on venue given by the District Court in that case. And again, this was cited by the Eleventh Circuit as proper, certainly not any problem with it, and I like this instruction.

The only thing I would say is, at the very end of the instruction, on page 30, last line, "If the Government has failed to establish proper venue for Count One or Count Two, by a preponderance of the evidence, you must" -- I would not say "acquit"; I would say "find the Defendant not guilty."

MR. GOLDBERG: Your Honor, obviously, because I submitted the proposed instruction, I've reviewed this **[9]** carefully, the Government's proposed instructions, the one from *Little* and then the Eighth Circuit pattern. I actually think and would request that we use the Eighth Circuit pattern instruction that Your Honor proposed or had in there because it is clean and it's concise, and I find the one

that is from the *Little* case slightly more confusing and it has a significant amount of extra verbiage that's probably not necessarily.

So I know Your Honor put it on page 31. I would just ask that the Eighth Circuit pattern instruction be given with the slightest modification, which is that on page 31, "the Government must prove it is more likely true than not true that each," instead of "the," "that each offense" because I have to prove it as to each one, "charged was begun, continued through, or completed in" -- I feel like the words "continued" and "completed" have to modify another word.

But that's a correct recitation of the law. It is concise, and I think, because it is a pattern used by the Eighth Circuit, it would be helpful and instructive for us to use it here. I just find the one from the *Little* case much more cumbersome.

THE COURT: Well, you probably don't like the fact that it refers to the Defendant's rights under the Sixth Amendment to have this decision made and that the Defendant has this right. I think it's appropriate to explain that to the jury and why this is being considered, so I'm likely to use the **[10]** *Little* case instruction.

MR. BRADFORD: That would be our preference, Your Honor.

THE COURT: I'll take it under advisement.

MR. GOLDBERG: If that is where Your Honor is leaning, then I would request some change in the verbiage. Because I think in the first sentence "there is an issue as to whether the Government has established," I think it's unfair to the Government the way that's phrased.

THE COURT: Fair enough. I'll take that out. I've got to introduce it somehow, Mr. Goldberg. I may say, "You will be asked to decide whether the Government has established what is known as proper venue."

MR. GOLDBERG: That's perfectly fine. Or, in the alternative, I do not have an objection to just starting with the Sixth Amendment to the Constitution and then just going from there.

THE COURT: That's fine, too. If that's what you prefer, I don't have a problem with that.

MR. BRADFORD: Your Honor, on that, I would prefer, if possible -- I mean, I think it's something that the Government has to prove. And to be consistent with the other instructions, I think they need to be told that, that they do bear that burden of proof.

THE COURT: Well, I do tell them that. At the end of **[11]** the instruction it tells them that if the Government has failed to establish it -- so that is -- and at the very top of page 30 it says, "This is what is called proper venue for the charging of any criminal offense, and it requires the Government to prove" -- so I don't think I need -- that is redundant.

MR. GOLDBERG: And, Your Honor, I'm trying to move as expeditiously as I can.

THE COURT: That's fine.

MR. GOLDBERG: On page 30, then, the only editions I would request, the last line of the first paragraph, I would ask that it say "continued through," so just adding the word "through." And then again --

THE COURT: This is not a conspiracy, though. So I get a little confused with some of the

cases in this language because many of them are conspiracy cases.

MR. GOLDBERG: But it's an ongoing offense. And when it's an ongoing offense, I just -- the word "continued" I just think grammatically needs to modify something. That's the only reason why I think "through" is appropriate. If Your Honor wants to overrule me, I understand that. But that would be the same thing five lines down in the last paragraph, "that the alleged crime was committed within" -- well, first of all, that should say "or through."

THE COURT: I'm sorry, where are you?

MR. GOLDBERG: Page 30, last paragraph.

[12] THE COURT: "The offense may be prosecuted in any district in which such offense was begun, continued in, or completed in" -- or I think you said "completed through." That doesn't sound right to me.

MR. GOLDBERG: "Specifically, the Government must prove venue that the alleged crime was committed within or through this district by a preponderance of the evidence."

THE COURT: Okay. Where are you?

MR. GOLDBERG: Page 30, last paragraph, five lines down, the first word is "venue" and there's a dash, unless we have different page numbers. The final paragraph starting on the --

THE COURT: Okay, I see.

MR. BRADFORD: Could you not just take that phrase out and just leave it to say, "Specifically, the Government must prove venue by a preponderance of the evidence"? I think that's the gist of that sentence.

THE COURT: Yeah, I think it's redundant to include that. I don't think we need it. That's explained up above.

MR. GOLDBERG: That's fine, Your Honor.

MR. BRADFORD: And Your Honor, I do disagree -- I agree with you, it's not a conspiracy case. I think there's an issue here about whether this is a continuing offense or whether the essential elements of what they need to find --

THE COURT: Well, maybe you should have submitted a **[13]** proposed instruction then. And that might be something you argue at the appropriate time, but it's not right now.

We're going to need to bring the jury in. I think, actually, we only have a couple of instructions left, and they're all standard pattern instructions, so I doubt there's any issue with those.

We'll have these changes made, and I will get you a revised copy as soon as I can.

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THE WITNESS: Travis Adam Griggs, G-r-i-g-g-s.

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DIRECT EXAMINATION

BY MR. GOLDBERG:

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Q. And generally speaking, what is Government's Exhibit 8?

A. It's a copy of a text messages between me and Timothy Smith.

Q. You kept those text messages?

A. I did.

MR. GOLDBERG: Your Honor, the Government would move to admit 8.

MR. BRADFORD: No objection.

THE COURT: 8 is admitted.

(Government's Exhibit 8 admitted into evidence.)

MR. GOLDBERG: If I may publish?

THE COURT: Yes.

BY MR. GOLDBERG:

Q. All right, Mr. Griggs, we're going to have a little theater here.

A. Okay.

Q. I would like you to read you, and I'm going to read Timothy Smith. Is that okay?

A. That's fine.

Q. All right. So you're in the black box, correct?

A. Yes.

Q. And I note some of them overlap, so if we just follow my **[20]** pen, hopefully that will make it easier.

A. Sure.

Q. If we look, this is the June 20th, correct, of 2018?

A. Correct.

Q. So if you can start reading, please.

A. Sure. "Hey, Tim. My web developer supposedly fixed the vulnerabilities on our website and

anonymized the map points. Are you still able to access those reef tables?"

Q. "Yes. Your guy doesn't know what he is doing."

A. "Quite possible. Could you show me how you're doing that?"

Q. "I tried once and you didn't seem interested. LOL."

A. "I forwarded everything to my web developer and just paid him a few hundred bucks to fix it."

Q. "I understand."

A. "This web stuff is over my head."

Then later: "Okay. I'm running Fiddler while I browse the web maps, and it looks like every call to the JSON file or the map API is encrypted. I don't see anything in plain text anymore."

Q. "It's not encrypted, trust me. It's enough to deter 99.9 percent of users, though. What you had before was enough. You get it sorted?"

A. "Negative. I searched every server response while browsing the map and I can't find anything like the screenshot you sent a couple months back."

[21] Q. "Noticed your new format, padding and offsets." And then he sent you an image of your private information, correct?

A. Correct.

Q. Please continue.

A. "Shit. That info is stored plain text on our server? How are you getting access to it without admin credentials?"

Q. "When it gets to the requesting computer, yes, it is eventually turned into plain text. I'm not gaining access to anything. This is what you are sending to my computer."

A. "When?"

Q. "When I say 'my' I mean anyone who goes to your site."

A. "Roger. There's no reason the map's API should be sending that back-end customer information to people browsing the web map. It should only be sending the currently displayed points and product info. I don't understand this. What call to the server is returning that data?"

Q. "Look, I tried to help you before but you didn't seem interested. I'm not sharing any of this data under any circumstances. I just know that you knew Alex so I just offered some friendly advice. Like I said earlier, you're probably okay at this point."

A. "I always knew it would be possible for someone with enough skill to pull coordinates from our website with enough effort. Apparently you're that guy. My problem now is that you have circumvented our efforts to protect the data, that you are **[22]** offering to distribute our IP" -- that's our intellectual property -- "in a public forum, and that you are telling people things about me that are not true. You've certainly moved beyond white-hat territory at this point, wouldn't you agree? I'm a live-and-let-live kind of guy, but this Facebook post is creating a lot of trouble for me. I would really appreciate it if you would stop posting stuff about us over there and just let that thread die."

Q. "I haven't circumvented anything and I haven't said anything about you. I don't even know you. And I am not distributing anything. What I did offer was to the people" -- PPL -- "that originally paid to have reefs deployed the knowledge that they were being sold, which is fair. You offer the same, correct? So,

no, I wouldn't agree. I'm neither for you or against you. I even offered to help you."

A. "Helping would be disclosing how you are getting our customer data. But on the phone and via text you have refused to simply tell me how you're doing it. Regardless, I would really appreciate it if you would stop posting that thread. I'm getting emails from clients asking why I gave you our master list. You are now causing actual harm to my reputation and my livelihood. Please stop."

Q. "Technically that's a true statement, you, your site did and continues to do so. Like I said, I have no intention of hurting you or your livelihood. You have my word I have not or **[23]** will distribute that list in any way. And by simply having this conversation I am helping you to something you would otherwise would not have known. If you want my help, you can hire me and not offer me a free fishing spot as compensation. Will not distribute. 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."

A. "What's that? Also, I appreciate that offer. It's certainly a step in the right direction."

Q. "I need deep grouper numbers, divable, 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."

A. "I've actually got a backlog of coding projects I'm trying to hire out. If you'd delete that Facebook post, we can have a conversation about freelance dev work. I will not work with someone who is actually working against my best interest, though."

Q. "I'll delete the post in good faith, but I'm not sure I'm really interested in side 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?"

A. "I really appreciate that. This is a huge relief. And yeah, no decent devs are interested in small projects even if you pay the shit out of them. That's our problem."

[24] Q. And "devs" is developers?

A. Correct.

Q. At this point, you still have no idea who this person is, correct?

A. No.

"I've definitely got grouper spots in that depth range. You'll have to run about 45 miles southeast of Destin."

Q. "I'm an enterprise-level architect, so it's hard for me to concentrate on anything other than what my company pays me to do. You don't have stuff on shelf from the Big O east?"

And, sir, what does the "Big O" mean?

A. That the Oriskany. It's an aircraft carrier that's sunk out there, it's a large artifical reef.

Q. "Deleting now. Done."

A. "Yeah, there are a couple of huge ledge systems over there. My clients have caught some big grouper off of them, but they get a lot of pressure. Stuff southeast has produced a lot of nice gags for me, especially in the winter. You can have whatever you prefer, though. I've got to cook some stabber for dinner now. We can chat more tomorrow, though."

Q. "Okay, man. Enjoy your evening."

And then do we go to the next day, sir?

A. I believe so, yes.

Q. And again, still no idea who Timothy Smith is? You don't know who he is?

[25] A. No, no.

Q. Are you trying to reason with this person?

A. I am.

Q. Is this just the list of coordinates that he puts out?

A. He is telling me what area he's interested in finding some fishing spots.

Q. "Working north about 3 miles off that line."

A. "Sure. Quick question. In that last screenshot, did you get our customer data by manipulating variables and sending simulated queries to our server?"

Q. "No, I didn't query anything. Call me."

A. "I'm on the boat at the moment. I'll call in a few."

Q. "Okay. I start bowling at 6:15."

Do we then go and then it's 9:15 at night and did he leave you a voicemail from a telephone number?

A. Yes, correct.

Q. And then 45 minutes later, so this is now after ten o'clock at night on June 21st?

A. That's correct.

Q. "Deal is off, bud. Good luck."

A. "Dude, I'm in bed with my girlfriend. We can talk business during business hours."

Q. "Deal is off. I made a good faith offer. You didn't follow through. Posts are going back up. I've literally offered to help you protect people's data four times nor and **[26]** you have refused. Four times. All I can do is shake my head. You are violating so many federal

laws it's laughable. You were told months ago and you did shit about it."

Did you then try to call him, sir?

A. Yes, the next morning I returned his phone call.

Q. And then he wrote, "Saw where you called. Like I said, I'm done. Deal is off. Not talking with you about it anymore."

Any idea who this person was doing this to you?

A. No.

Q. But you were trying to reason with him?

A. I was trying to work in our best interest and get him to come over to the light side of things.

Q. And you even offered him some fishing spots, right?

A. I did.

Q. Were you just trying to stop the harm to StrikeLines?

A. Yeah. It was -- we were getting a lot of negative comments from our customers, and I just really wanted that to stop.

Q. After this, in June of 2018, is it accurate to say StrikeLines contacted law enforcement?

A. Yes, almost immediately, I think that day or the next.

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[27]

CROSS-EXAMINATION

BY MR. BRADFORD:

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Q. But isn't it true that on Facebook what he actually said was that you can contact him and he'll crosscheck it? He didn't provide any of the coordinates on Facebook, did he?

A. I don't know if he did or not. But what he did offer on Facebook was to crosscheck them, correct, and then our customers were sending him their spots and he was replying to them whether or not he found them on our website.

Q. And so, if your customers were contacting him, they already had the coordinates, correct?

A. Yes, their own, correct.

Q. So, as we are here today, you don't have any evidence that he ever shared any coordinates with anyone that didn't already have them?

[38] A. Yeah, except for the ones that he shared that they already had and that he verified.

* * *

Q. And he makes a comment that he is not out to hurt your livelihood. And my question is: Did you suffer a financial loss because of this, in this instance, this situation?

A. I don't know. It's hard to say for sure.

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STEPHANIE CASSIDY, GOVERNMENT WITNESS, DULY SWORN

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[46]

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DIRECT EXAMINATION
BY MR. GOLDBERG:

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Q. Did you interview the Defendant at his residence that day?

A. Yes, I did.

Q. Before starting the actual interview, what, if anything, did you advise the Defendant?

A. I advised the Defendant of his Constitutional rights pursuant to *Miranda*.

Q. And before the actual interview began, did he tell you anything about himself or where he was employed or what he did?

A. Yes. He stated that he was a software engineer at the SSI Group in Mobile, Alabama.

Q. And does that match with the IP address records from AT&T in Government's Exhibit 13?

A. Yes, it does.

[63] Q. Did he tell you what his college degree was in?

A. Yes. He said he had a college degree in computer technology.

Q. Now, before even asking any questions of substance and getting into the investigation of the case, will you please tell the ladies and gentlemen of the jury what the Defendant said to you?

A. The Defendant said, "I think I know why you're here." And I asked him why, and he stated, "StrikeLines."

Q. Just that one word, "StrikeLines"?

A. Yes.

Q. Did you then begin to ask him formal questions?

A. Yes, I did.

Q. And are we talking about the Defendant here in this courtroom today who I am pointing at?

A. Yes.

MR. GOLDBERG: Your Honor, let the record reflect that is the Defendant at the trial table.

THE COURT: The record will so reflect.

BY MR. GOLDBERG:

Q. What did the Defendant tell you about how he felt regarding StrikeLines?

A. He basically said he did not agree with the company's business model.

Q. So, because he's a software engineer, did he tell you he **[64]** began to look at their website in depth?

A. Yes, did he.

Q. Did he tell you if he used any programs or techniques regarding the website; and if so, what did he tell you that he did?

A. He said that he downloaded a program called Fiddler and used that program and an application program interface call, or API call, and then a command of "get reefs."

Q. "Get reefs" as in fishing reefs?

A. Yes.

Q. So he was communicating with the server StrikeLines?

A. Yes.

Q. Did he tell you anything about writing code?

A. Yes. So the Defendant stated that he wrote a ten-line code to decrypt the information.

Q. Would that put it in a readable format?

A. Yes.

Q. So he admitted that the information was encoded and embedded?

A. Yes, he did.

Q. And that there was security on the website?

A. Yes, he did.

Q. What did he tell you about his ability to get the coordinates?

A. He stated that he was able to get roughly 10,000 **[65]** coordinates and including private customers sales data and private coordinates.

Q. Did he tell you he was able to infiltrate the website?

A. Yes, he did.

Q. And he admitted to getting thousands of coordinates?

A. Yes, he did.

Q. Was he shown some of the text messages he had sent Mr. Griggs; and if so, what did he tell you about those?

A. He verbally acknowledged that he did write those.

Q. There was a text message about Mr. Griggs violating federal law. Did you confront or ask the Defendant about that text from him; and if so, what did he say?

A. Yes, I asked if he knew any federal laws and why he would say that, and he said he said it just to say it,

he did not know of any laws that StrikeLines was violating.

Q. Did he admit being able to access the coordinates and the website even after the security upgrades?

A. Yes, did he.

Q. Did you show him a sample of his Facebook postings; and if so, what did he say about them?

A. He stated that he acknowledged that he wrote those postings.

Q. Did he admit sharing StrikeLines coordinates with others?

A. Yes.

Q. But you can agree, on Government's Exhibit 8, he told **[66]** Strikelines he would not distribute them, correct?

A. I agree with that, yes.

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Mr. Goldberg, who is your next witness?

MR. GOLDBERG: Your Honor, it's going to be Andrew Smith. And for purposes of timing, if that's where you're heading, the Government is going to finish before lunch, I assume.

THE COURT: Is he your expert?

MR. GOLDBERG: He is an expert, yes.

THE COURT: So I have -- and perhaps you detected from the two questions that I've asked, but I have some questions about the distinction between the website and the server. One **[84]** of the things that has to be established by the Government is where the crime was committed for venue purposes.

The Government has to prove that the Defendant accessed a protected computer without authorization for Count One.

So where is that protected computer?

I'm giving you the benefit of these questions that I have to ask that you incorporate this into your line of questioning. If you don't see fit to do that, then I'm probably going to have to ask the question.

MR. GOLDBERG: Just so Your Honor is aware, the next witness is not an expert in that; he's a forensic examiner.

THE COURT: Oh. Well, okay. So you don't have a computer expert.

I guess the Defendant, then, I'm giving you also the benefit of my questions. Although, I assumed this was a computer expert, and I was going to ask that this line of questioning be addressed because I suspect I'm going to be hearing a Motion for Judgment of Acquittal on the issue of venue, and so I wanted to be prepared to address that motion, and that's a question that's in my mind.

MR. GOLDBERG: Certainly, Your Honor. And I will argue off of, obviously, all three witnesses who have already testified. But that's an argument for –

THE COURT: I haven't heard an answer to that question yet.

[85] MR. GOLDBERG: Well, respectfully, they've all testified that everything took place here, and it was a continuing, ongoing uploaded data, but we can get to that.

THE COURT: I don't know that I agree with that in terms of the access. I'm just, again, giving you the benefit of my thoughts. And I may need to revise

the jury instruction on venue so that the jury is focused on what they need to be focused on properly in addressing this question.

I've done a good deal of research on the issue of substantial contact, and that is not the law in this circuit, so that instruction will not be given.

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[114]

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THE COURT: Thank you. Ladies and gentlemen, you've now heard all of the evidence the Government seeks to admit during its case in chief, and all its evidence has been admitted.

Now would be the time for the Defense, Mr. Smith, to present a case to you, if he chooses to do so. But please remember, as I've said several times to you, that the Defendant, Mr. Smith, is not required to present any case to you at all. And if he chooses not to, that's not anything you can ever consider in any way during your deliberations.

Mr. Bradford?

MR. BRADFORD: Your Honor, we do intend to call Mr. Smith. There are some motions that I'd like to take up with the Court prior to that.

THE COURT: If you would approach the bench, I'll speak to you about that here.

(Bench conference between the Court and counsel:)

THE COURT: Mr. Bradford, Mr. Goldberg knows this. **[115]** It's customary for me to have you go ahead and just make your motion, state it succinctly here on the record, and I'll take it under

advisement and hear argument at a later time, just so as to avoid interruption.

MR. BRADFORD: That's fine, Judge. I'm sorry, I wasn't aware of that.

THE COURT: No, I should have told you.

Do you have a motion?

MR. BRADFORD: I do, Judge. We'd make a Motion for Judgment of Acquittal on all three counts and further pursue that argument at the proper time.

THE COURT: The motion is preserved, and I'll hear argument at a later time.

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THE WITNESS: Timothy Jerome Smith, S-m-i-t-h.

THE COURT: Mr. Bradford, when you're ready.

MR. BRADFORD: Yes, ma'am.

DIRECT EXAMINATION

BY MR. BRADFORD:

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[132]

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Q. * * *

Based on those discussions just over all, is there some issue or controversy over these private reef numbers?

A. Yeah, major controversy.

Q. What is that? What's the substance of that?

A. I mean, from a commercial standpoint --

MR. GOLDBERG: Objection. I'm not sure that's relevant to the elements of the offenses.

THE COURT: Overruled.

THE WITNESS: From a commercial standpoint or charter standpoint, I mean, that's how they make their livelihood. So on a yearly basis, I mean, they deploy thousands of dollars of reefs for them to go catch fish and, you know, take charter boat stuff and that's -- so their issue with it is, if somebody else is coming along and getting their numbers and putting them out for sale, then the person who is buying that number thinks it's theirs. And you know, it's also affecting their livelihood. I think one guy on the Facebook messages said that **[133]** StrikeLines has sold over $100,000 worth of his numbers.

Q. As far as a recreational fisherman, is it -- to put it I guess the most blunt terms, is it just about, you know, *This is my fishing hole and it's not your fishing hole*?

A. Yes.

Q. Did that enter into your thought process in posting what you did on Facebook?

A. Yeah. I think I just wanted to let people know that there is a possibility that their numbers are being sold.

Q. Did people contact you over that?

A. Yes.

Q. Did they give you numbers?

A. Yes.

Q. And did you crosscheck them for them?

A. Yeah. And all I -- when I crosschecked them, I just -- I didn't give them back a number. I just said yes or no, that they had a number for sale in that area.

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[146]

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Mr. Bradford, I'm going to hear your motion now.

MR. BRADFORD: Your Honor, I guess I would address the Computer Fraud and Abuse Act count first. Well, I take that back.

I think there's a problem with venue. I think it's on the Government to show venue. And the only evidence I think at this point in front of the Court is that there was a server in Orlando that contained all the data that we've discussed in this case, and Mr. Smith, at all times, was in Mobile, either at his home or at his workplace.

I don't think that there's any involvement in the Northern District that would give it venue for the first two counts, because I think all the essential elements take place in either Mobile or Orlando.

And that's -- there was -- I think the *Weev* case, the *Auernheimer* case in the Third Circuit, that that was the issue, they were trying to determine how do we determine venue on this kind of case. And I think what they came down to -- and this was the topic of our first two motions to dismiss -- that, if you look at the essential elements, all of those are accomplished either at the server or at the location where the person receiving the data is located.

And I think Mr. Haynes's testimony completely supports **[147]** that conclusion that this is a process by which one computer asks for information and another computer sends it. And there's no activity whatsoever at StrikeLines's office in Pensacola for that process to take place.

Your Honor, I think, hit on one important aspect of it, and that is, you know, where is the

protected computer. And I think in this case the protected computer is the server. The protected computer would be the depository of the data, and that's where in this case it's deposited.

Granted, there may be a copy of it in Pensacola, but that's not the machine, that's not the computer that serviced the website. And I don't think that there's any evidence to controvert that based on Mr. Haynes's testimony -- well, based on everybody's testimony that the Government put up. So I think there's a problem with venue in that respect.

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[153]

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MR. GOLDBERG: * * *

As for Count One, I do think the evidence is overwhelming that the elements are met -- I'll get to venue in **[154]** a moment -- because of his access without authorization, going to private areas in the website, and there was multiple exhibits regarding that, getting private information that he didn't have access to, again, the value is in there.

THE COURT: "Private" meaning what?

MR. GOLDBERG: I'm sorry?

THE COURT: "Private" meaning what exactly? That these were areas of -- and when you say "computer," be more specific. When you're talking about the computer, the monitor and the hard drive that they were using in Pensacola or the server in Orlando?

MR. GOLDBERG: Well, it's all of that, Your Honor, because --

THE COURT: Well, that's not one -- well, we're going to veer into venue, but the statute refers to a computer.

MR. GOLDBERG: Yes, it does.

THE COURT: It's a computer crime, Count One.

MR. GOLDBERG: Right.

THE COURT: So I am going to focus on the computer.

MR. GOLDBERG: So the computer -- and we're moving in venue, and I'll just straddle the line, if it's acceptable to the Court. On that line, I'll say it's an even stronger argument for the Government, because, again, venue isn't even an element, it's a preponderance of the evidence. And I'm going to suggest respectfully to the Court, it's not as if a **[155]** piece of evidence wasn't admissible or wasn't denied; it's a question of whether at this stage, in the light most favorable to the Government, what evidence -- and I know Your Honor is referring like to the essential elements test. So there's a lot of question about access; that's one of the elements. But there are other elements, which is obtain the information. So all the information is here, all the information was coming from here, all the transmission of data was here. So those are different elements.

THE COURT: But you have to -- I believe you have to look at where he obtained it.

MR. GOLDBERG: That's access. That's a separate element. The where is where he accessed it. The obtaining is the information; it's what you are obtaining. That's what that element is, he obtained information.

THE COURT: But we're looking at venue, so you have to look at where he obtained -- where he committed that element of the crime.

MR. GOLDBERG: And again, I just -- respectfully, this is a preponderance of the evidence where that information --

THE COURT: Well, this doesn't have anything to do with burden of proof right now.

MR. GOLDBERG: Right, okay, fine, fair enough. But my position, though, is to try to make clear that this is a question for the jury. The judge can always reserve and rule **[156]** on it later.

THE COURT: That's what I'm going to do.

MR. GOLDBERG: I'm asking the Court -- because I believe the Government's position that this is a question for the jury. This is why we have trials, because it is a fact question at this point. And I know the Defense hasn't rested and the Government hasn't rebutted, but it should go to the jury. Because when information -- and this is one of the issues I have no doubt -- I believe the Court will agree with me, computer crimes are not simple little "I robbed a bank here." It's just not. That's why when Your Honor fashions the jury instructions on venue, it's begun, continued through, completed, and it's not a narrow tool.

So when information is being managed, uploaded, secured, where there's transmission of data and there's transmission of information in the Government's exhibit with all those randomized numbers that were located on the Defendant's laptop -- that was after the June 2018 security upgrade -- and it's being transmitted by Mr. Haynes and secured

by Mr. Haynes in the Northern District of Florida, it's a jury question. It's an ongoing offense.

THE COURT: But there's no evidence that he accessed it in the Northern District of Florida or obtained it in the Northern District of Florida.

I'm going to send this to the jury. I'm going to **[157]** continue to ponder it, I'm going to continue to look at the law, but I am going to reserve ruling. I'm not going to deny the motion.

MR. GOLDBERG: That's fine, Your Honor.

MR. BRADFORD: Your Honor, if I could speak to that just very briefly?

THE COURT: All right. But the motion will be denied as to Count Three.

MR. BRADFORD: But for your consideration going forward, I think the difference comes down to this: I think the Government wants to parse out those two things and say that authorization is one thing and access is another, and access was down in Orlando and authorization is residing here.

But the problem with that is that authorization is not a geographical element so much as it's a relational element. It's authorization in relationship to what? Authorization in relationship to the access. And the access occurs in Orlando, so that's where the authorization would lie, too.

I think -- you know, frankly, I think those are one -- I don't think you separate those out. I think the authorization speaks to the access, not to the person who can or can't give it.

THE COURT: Any response?

MR. GOLDBERG: That's just not the way the elements are outlined by the Court.

[158] THE COURT: All right. So, the motion as to Count One and Two is going to be taken under advisement. As to Count Three, the motion is denied.

I do have jury instructions.

MR. GOLDBERG: I didn't know if Your Honor wanted more argument on Count Two. Because there's no cyber aspect to Count Two at all; the trade secrets are all being generated here. But if Your Honor wants to reserve it, we can relitigate it later. But Defense saying that Counts One and Two are the same is an inaccurate statement of law.

THE COURT: I'll hear your argument on venue for Count Two, then. Because, again, the act has to be committed -- or one of the elements has to be committed here in the Northern District.

MR. GOLDBERG: Right, but the trade secret is here. It's coordinates in the Gulf of Mexico which would implicate both the Northern District of Florida and the Middle District of Florida. That's why the indictment says Northern District of Florida and elsewhere because the coordinates are in the Gulf of Mexico. To injure the owner, the owner is here. And the combination or compilation of --

THE COURT: Well, the trade secrets are the numbers.

MR. GOLDBERG: Right.

THE COURT: It's not the actual location.

MR. GOLDBERG: Right, and the numbers are here in the **[159]** Northern District of Florida.

THE COURT: Well, taking the evidence in the light most favorable to you, that's what was stolen were the numbers. I mean, he didn't go out and steal the physical location.

MR. GOLDBERG: Right. But the numbers are in the Northern District of Florida where they're, at the very least, compiled and put onto the website. And compilation --

THE COURT: But that's not -- I don't know that I agree with you that that's part of his crime, if he committed the crime, that it's part of his crime, that what happens by virtue of what StrikeLines does, that that's part of his crime.

MR. GOLDBERG: Count Two has -- there's no element of cyber access in Count Two.

THE COURT: That's correct, except for where was the trade secret located when he stole it?

MR. GOLDBERG: That is not like access in Count One. There's no element to that.

THE COURT: Well, he stole a trade secret. That had to be done somewhere, that act had to be committed somewhere.

MR. GOLDBERG: Right. And the trade secret -- Count Two, the information was, in fact, a trade secret belonging to StrikeLines in Pensacola, Florida.

THE COURT: No question that trade secret belongs to Strikelines.

MR. GOLDBERG: And the next element would be injured **[160]** the owner of the trade secret.

THE COURT: But he had to intend to injure the owner.

MR. GOLDBERG: Yes.

THE COURT: And that's an element that I'm looking at. There's no question that it requires an intent to injure. And I think inherent in the crime of

theft of a trade secret is an injury because of the protected nature of the information, the secrecy.

MR. GOLDBERG: And there's no dispute that StrikeLines is in Pensacola, the Defendant knows Strikelines is in Pensacola. And one of the issues for the jury is whether he wanted to injure them or he was doing this because he's a nice guy, and that's one of the issues in dispute.

THE COURT: Okay.

MR. BRADFORD: Judge, not to belabor the point, but I think I just earlier heard that the injury is not an element, that they don't have to prove an actual injury.

THE COURT: They don't have to prove an actual injury. I just said I think inherent in this crime is an injury.

MR. BRADFORD: But if it's not an essential element, I don't think it goes to venue. My analogy would be this -- and it may sound silly but -- they keep the Coca-Cola formula in Atlanta. If they took it out of the vault and the guy is flying with it to San Francisco and he gets mugged, it occurred in San Francisco. They don't bring it in Georgia. I think **[161]** you're right, I think it's where was it stolen.

MR. GOLDBERG: The Defense is conflating two things. Element four in the Court's own instructions is an intent or knew that the offense would injure the owner of the trade secret. That is part of it. But the Government is not required to prove there was actual economic loss. Those are two separate things.

THE COURT: So you're conceding that you have to prove some kind of an injury, just not economic loss?

MR. GOLDBERG: You have to prove, as outlined by the Court, that the Defendant intended or knew that the offense would injure the owner of the trade secret, which injury could be reputation, it could be money, it could be any of those things.

THE COURT: Right.

MR. GOLDBERG: But you don't have to prove actual economic loss versus intended economic loss versus loss to reputation. It's just an injury. It's an intent to injure, whether it's consummated or not.

THE COURT: My response to that, if I'm playing devil's advocate, is where is that intent formed? Where does he form that intent? The Southern District of Alabama. That's where he is located, that's where his mind is located.

MR. GOLDBERG: I didn't realize we were shifting back to venue. I apologize, Your Honor. But if you shift back to **[162]** -- on that argument, then, then the trade secret to benefit someone other than the owner -- the owner is in Pensacola and it is, in fact, a trade secret that's being prepared here in Pensacola -- it's just I fear that we're on a hamster wheel, so I don't want to bother the Court when you already said you're going to reserve. I would just request that we continue with the trial and Your Honor hears closing arguments and let the jury decide, and we can revisit this issue.

THE COURT: And I'm reserving -- and I'll just share with you, not that it would matter at the end of the day, but it's the venue that concerns me, not so much the evidence to support the elements of the offense. But I'm far from settled on my decision, and I am going to send it to the jury.

All right. Jury instructions. Please pay attention to -- I made some changes to venue. I made a change to the Count One, computer fraud; added a line about financial harm. But let's look at that line carefully as well as the language in Count Two on theft of trade secrets in terms of injury and harm and what is proposed to be given and make sure that everyone is okay with that.

And you'll see on venue I added -- and, if you like, we could start with that, now that I have my copy.

We have the correct version of 2 and 6. Oh, let me --

Where are you, Mr. Goldberg, right now in the instruction?

[163] MR. GOLDBERG: I just turned to Count One because everything else up until then seemed pattern.

THE COURT: Let's stop for a moment, now that I have my packet, and let me ask you to turn to page 8, so I'm going to go back to page 8. This is a new instruction. It was not proposed by anyone, but I think that the testimony certainly supports the giving of it.

MR. GOLDBERG: No objection, Your Honor.

THE COURT: Mr. Bradford, I presume you don't have any objection?

MR. BRADFORD: I do not.

THE COURT: Then, as to Count One?

MR. GOLDBERG: It appears there were no changes from earlier other than getting rid of the redundant language at the bottom.

THE COURT: Yes.

MR. GOLDBERG: No objections from the Government.

THE COURT: Mr. Bradford, any objection?

MR. BRADFORD: No, ma'am.

THE COURT: Then over to page 15, Count Two. So the bottom of page 16 there's reference to the language I was just discussing with you about economic value and economic loss.

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MR. GOLDBERG: Your Honor, I've read through the venue instruction. There's no real -- there's no objection from the Government, other than this request on page 22, final paragraph, final sentence -- and I may be putting myself or the **[168]** Government in more peril than I need to. But I think it's strange that it calls out Count One and Count Two and doesn't mention Count Three. I have to prove venue as to all counts every time I have trial so --

THE COURT: We debated that so --

MR. GOLDBERG: I would respectfully suggest, if we can just have that last sentence read, "If the Government has failed to establish proper venue for a count by a preponderance of the evidence, you must find the Defendant not guilty as to that count." Otherwise, it seems weird because you're just missing Count Three in there.

MR. BRADFORD: I agree, I agree.

THE COURT: It either needs to be any count or a count in the indictment. I'm not going to just say a count because I haven't referenced counts.

MR. GOLDBERG: That's fine, Your Honor, I would ask for "a count in the indictment."

THE COURT: All right. I believe that's everything. So I have a little tinkering to do on the extortion or Count Three, and then I'll make this one change.

What I would like to do is to just give you replacement pages for those -- I believe that's all we have are those two instructions; is that right? I think that's it, just those two.

So, are you both agreeable to me just giving you **[169]** replacement pages for those two instructions as opposed to an entirely new packet of instructions?

MR. BRADFORD: Yes, Your Honor.

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THE COURT: So, ladies and gentlemen, you have now heard all of the evidence that will be presented in this trial. The next phase of the trial will be your instructions on the law followed by the closing arguments of counsel. And actually, I have two follow-up instructions after closing arguments, and I'll go over those with you at that time.

For now, I'm going to begin with your instructions on **[172]** the law, and I'd ask that you please continue to pay careful attention as I give you these instructions.

Also, please know that you'll be able to follow along on the overhead screen as I read the instructions to you. And also, each of you will have

your own copy of the instructions for your reference during your deliberations.

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The Sixth Amendment to the Constitution of the United States protects certain fundamental rights of any defendant in a criminal case. One of the things it says is that the accused shall enjoy the right to a trial in the state and district wherein the crime shall have been committed.

This creates what is called proper venue for the charging of any criminal offense, and it requires the Government to prove, as alleged in the indictment in this case, that the charged offense or offenses were committed in the Northern District of Florida.

In determining where an offense was committed, you should initially identify the conduct constituting the offense, that is the nature of the crime, and then discern the location of the commission of the criminal acts. Venue is, therefore, appropriate only in the district where the conduct comprising the essential elements of the offense occurred. The Government must prove that venue was proper as to each count charged.

If the offense conduct begins in one district and **[185]** continues in another or was committed in more than one district, the offense may be prosecuted in any district in which such offense was begun, continued in, or completed in.

The Court instructs you that Pensacola is in the Northern District of Florida. On this issue of proper venue and on that issue alone, you are

instructed that the Government's burden of proof is somewhat less stringent than it is with respect to all of the other matters which the Government must prove beyond a reasonable doubt, as I have previously explained to you.

Specifically, the Government must prove venue by a preponderance of the evidence. A preponderance of the evidence means evidence that is enough to persuade you that it is more likely than not or more probable than not that the alleged crime was committed within this district as charged.

If the 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.

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THE COURT: Thank you.

Ladies and gentlemen, I have two final instructions for you which I'm going to read to you in just a moment.

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There is a verdict form that has been prepared for your convenience. The verdict form outlines three counts from the indictment, Count One, Count Two, Count Three. You have **[221]** two choices as to each of the three counts, not guilty or guilty.

And so, the verdict form reads, "We, the jury in the above entitled and numbered case, unanimously

and beyond a reasonable doubt, find the Defendant, Timothy J. Smith," Count One, Count Two, and Count Three.

But do keep in mind that, as to each of the three counts, you also have to consider, as you've been instructed, the issue of venue. And that issue of venue -- and that is where the offense in each of the three counts, where those crimes were committed -- is a decision that you'll make based on a review of all of the evidence and applying a standard of proof that's not beyond a reasonable doubt, it's preponderance of the evidence.

And this was all explained to you in the instructions I gave you just a little bit ago, and you'll be able to read that in your instructions in the jury room. But just remember that, in terms of deliberating on each of those three counts, that is a part of your deliberation. You have the elements of each of the three counts, but then you also have the issue of venue as to each of the three counts.

Once the jury has reached a unanimous verdict -- and it must be unanimous on the issue of venue as well. Once you have reached the unanimous verdict, your foreperson should sign and date the verdict form, notify the court security officer **[222]** that you've reached a verdict, and then I will have you return here to the courtroom so that we can receive the verdict here in open court.

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Ladies and gentlemen of the jury, have you reached a **[229]** verdict?

THE FOREPERSON: Yes.
THE COURT: * * *

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A Judgment of Acquittal will be entered as to Count One.

On Count Two, I still have the Motion for Judgment of Acquittal under advisement. I will continue to keep that under advisement, and I'll issue a written order in the near future. Then, if that motion is ultimately denied, then, of course, that count will be a part of sentencing. If not, then the sentencing will proceed on Count Three.

Any questions from anyone?

MR. GOLDBERG: No, Your Honor. And if the Court requires more briefing, the Government is more than happy to do it on the Count Two issue.

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[234]

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THE COURT: * * *

As to briefing on the venue issue on Count Two, that's probably a good idea. I think I could benefit from that, if **[235]** you all are so inclined. We can do this point/counter-point or simultaneously. I'm not sure it matters much to me.

MR. GOLDBERG: Simultaneously is fine with the government.

MR. BRADFORD: That's fine.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	**Case No.: 3:19cr32/MCR**
vs.	)	Pensacola, Florida June 24, 2020 1:10 p.m.
TIMOTHY J. SMITH, Defendant.	)	

SENTENCING

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE

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[54]

THE COURT: * * *

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The jury found you not guilty on Count One. Nonetheless, I certainly presided over the trial, I'm aware of those facts. Frankly, I believe the jury found you not guilty because of the venue issue, not the other elements of the crime of computer fraud. I don't know how they could have found you guilty of Counts

Two and Three and not guilty of Count One had it not been for the venue issue. But I guess all of that is speculation because we don't know exactly what the jury based its decision on.

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Now, on the other hand, in terms of mitigation, there's no proof of actual loss in the record before me. There's no evidence that you made money off of the crime, which is often the case in a case of theft or fraud.

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