

**U.S. Department of Justice**

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Marcia M. Waldron, Esq.
Clerk, U.S. Court of Appeals
for the Third Circuit
601 Market Street, Room 21400
Philadelphia, Pa 19106-1790

Re: *United States v. Andrew Auernheimer*, Dkt. No. 13-1816
Second Letter Pursuant to Fed.R.App.P. 28(j)
(Oral Argument held March 19, 2014)

Dear Ms. Waldron:

Dismissing an indictment with prejudice, which Auernheimer first sought in his 28(j) letter, is *not* the proper remedy for venue error. *See United States v. Hernandez*, 189 F.3d 785, 792-93 (9th Cir. 1999) (“We reject the contention by Hernandez that a judgment of acquittal is the appropriate remedy in the case of improper venue”); *United States v. Brennan*, 183 F.3d 139, 149-51 (2d Cir. 1999) (post-conviction reversal for improper venue; indictment “dismissed without prejudice” with guidance to consider before undertaking new prosecution “in a district where venue could properly be laid”); *Henry v. Burgess*, 799 F.2d 661, 662 (11th Cir. 1986) (no double jeopardy violation to retry a defendant whose conviction is reversed for improper venue).

Indeed, had the district court dismissed for improper venue during the trial, the Government still could have retried Auernheimer. *United States v. Kaytso*, 868 F.2d 1020, 1021 (9th Cir. 1988); *Wilkett v. United States*, 655 F.2d 1007, 1011-12 (10th Cir. 1981); *see United States v. Rosa*, 17 F.3d 1531 (2d Cir. 1994) (if evidence was insufficient on venue, double jeopardy would not prevent retrial where jury was unable to reach a verdict). It is difficult to understand why, as Auernheimer belatedly asserts, a *conviction* by the jury, which was not even asked

to decide venue, should leave him in a better position than would a midtrial judicial dismissal on venue grounds.

As for venue supposedly not being subject to harmless error review, Auernheimer continues to disregard the Supreme Court's pronouncements that only "a very limited class of errors" can "trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole." *United States v. Davila*, 133 S. Ct. 2139, 2149 (2013) (quoting *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (internal quotation marks omitted)). Improper venue, like the Rule 11(c)(1) error in *Davila*, "does not belong in that highly exceptional category." 133 S. Ct. at 2149. *See also* 28 U.S.C. § 2111 (appellate courts shall disregard errors that do not affect substantial rights).

Respectfully submitted,

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United States Attorney

/s/ Glenn J. Moramarco
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