

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

United States of America,	.	Third Circuit: #13-1816
	.	
Appellee,	.	
	.	
V.	.	
	.	
Andrew Auernheimer,	.	
a/k/a Weev,	.	
a/k/a Weelos,	.	
a/k/a Escher,	.	
	.	
Andrew Auernheimer,	.	
	.	
Appellant.	.	

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BEFORE CIRCUIT JUDGES:

THE HONORABLE MICHAEL A. CHAGARES  
THE HONORABLE JOSEPH A. GREENAWAY, JR.  
THE HONORABLE THOMAS I. VANASKIE

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1 JUDGE CHAGARES: Good morning. The first case we'll  
2 hear will be United States versus Auernheimer.

3 MR. KERR: May it please the Court, my name is Orin  
4 Kerr and I represent Andrew Auernheimer. I request four  
5 minutes --

6 JUDGE CHAGARES: Before you start, counsel, are you  
7 going to reserve any time for rebuttal?

8 MR. KERR: Yes, I reserve four minutes for rebuttal,  
9 please.

10 JUDGE CHAGARES: Okay, that's granted.

11 MR. KERR: The convictions in this case should be  
12 reversed because there was no unauthorized access under the  
13 Computer Fraud and Abuse Act. And that's true for a simple  
14 reason important to every internet user. When information is  
15 made available on the World Wide Web, such that anyone in the  
16 world can access it with a web browser by simply entering the  
17 website address into the address line, that information is  
18 effectively published to the world. Whoever makes the  
19 information available assumes the risk that others will  
20 discover that information and, as a result, collecting that  
21 published information cannot be unauthorized as a matter of law  
22 and is legal under the Computer Fraud and Abuse Act.

23 JUDGE CHAGARES: Maybe we could start at the  
24 threshold issue, which you raised, venue. Now the Supreme  
25 Court tells us to look to essential conduct elements and

1 circumstance elements. Let's deal with that a little bit. Is  
2 the violation of New Jersey law an essential conduct element or  
3 a circumstance element?

4 MR. KERR: It is a circumstance element, Your Honor,  
5 because it occurs in § 1030(c), which is a part of the statute  
6 that only deals with the proper punishment for a violation of  
7 1030(a). Congress did not make it a crime to violate New  
8 Jersey law, it merely -- it made it a crime to access a  
9 computer without authorization or exceed authorized access, and  
10 none of those essential conduct elements occurred in New  
11 Jersey. So that is an alternative ground for reversing the  
12 convictions in this case.

13 JUDGE VANASKIE: Now in Alleyne, the Supreme Court  
14 recently said that any fact that increases the punishment that  
15 a Defendant faces is an element that must be proved beyond a  
16 reasonable doubt. So how do we distinguish between what is a  
17 crucial element and what is a circumstance element for purposes  
18 of venue?

19 MR. KERR: Under purpose -- for purposes of venue,  
20 the distinction is between what the Defendant actually did, the  
21 conduct, and the circumstances in which the person did that  
22 act.

23 JUDGE VANASKIE: But an essential element under the  
24 New Jersey Statute is the disclosure of the personal  
25 identifying information, so isn't that a crucial element of

1 getting that felony enhancement?

2 MR. KERR: Two points. First, it is not a crucial  
3 element, because the disclosure did not occur in New Jersey;  
4 and second, it's not an element that Congress identified as a  
5 crime. The question is what Congress did, not what the New  
6 Jersey legislature did. The enhancement only occurred in the  
7 conduct -- in the context of the felony enhancement in  
8 § 1030(c)(2), not in one of the actual crimes set out in  
9 § 1030(a), which is where the conduct elements of the offense  
10 are located.

11 JUDGE GREENAWAY: So is that the distinction you  
12 draw, then, between Rodriguez-Moreno on the one hand and this  
13 case on the other?

14 MR. KERR: Yes, that's correct. So the controlling  
15 distinction under Rodriguez-Moreno and Cabrales is that between  
16 the essential conduct elements and the circumstance elements,  
17 where was the act occurring? So that would be the access, that  
18 would be obtaining information under § 1030(a)(2), but it would  
19 not include some sort of effect that may have occurred  
20 eventually later on.

21 JUDGE GREENAWAY: So I'm sure we'll give your  
22 adversary an opportunity to answer this question, but I  
23 presume, from your standpoint, venue would be rather limited,  
24 you'd say Arkansas, Georgia, Texas, where else?

25 JUDGE VANASKIE: California.

1 MR. KERR: California as well --

2 JUDGE GREENAWAY: California obviously.

3 MR. KERR: -- where Spitler was located, at least  
4 four different jurisdictions where this case could have been  
5 brought under § 3237, the venue statute. There is at least a  
6 hypothetical possibility, if there were proof, of where the  
7 traffic actually passed, the course of the internet traffic.  
8 If there were any evidence of that, that at least possibly  
9 could have been other districts, but not merely a district  
10 where there are alleged individuals who were related to  
11 information that was disclosed. That's not a conduct element  
12 of the offense.

13 JUDGE GREENAWAY: One of the venue arguments they  
14 make is that it should -- a factor that we take in -- oh, a  
15 factor that we take into account should be the Gawker article  
16 and the expanse of it, you know, where it's available, which is  
17 probably all 50 states. So I presume, I'll let them argue this  
18 when they come up, but I presume then, venue would be proper in  
19 all 50 states and you would take contrast to that, right?

20 MR. KERR: Yeah, I believe the Government's argument  
21 is that venue -- in any internet crime that leads to anything  
22 posted on the web that could be viewed from the web -- that  
23 there would be jurisdiction wherever the news story is viewed.  
24 So there would be -- under the Government's theory, there would  
25 be venue in every district, and that's contrary to the general

1 venue principles, venue should be construed narrowly, and of  
2 course, this Court should discourage interpretations of the  
3 venue statute that would allow the Government to create venue  
4 in any district where the Government would want to create  
5 venue. The crime just did not occur in New Jersey, which is  
6 this alternate ground of reversal.

7 JUDGE CHAGARES: So under your theory, the essential  
8 conduct elements under the Supreme Court's regime would be  
9 accessing a computer without authorization, one, and two,  
10 obtaining information, are those the conduct elements?

11 MR. KERR: That's correct.

12 JUDGE CHAGARES: Okay.

13 MR. KERR: There could be exceeding authorized access  
14 to the extent that's considered distinct, although it's  
15 generally grouped together --

16 JUDGE CHAGARES: Oh, okay, right. But in this case I  
17 don't know if that's it.

18 MR. KERR: But that's correct, those are the conduct  
19 elements. And then for the second crime, count two of the  
20 Indictment, the identity theft count --

21 JUDGE CHAGARES: Right.

22 MR. KERR: -- the essential conduct elements would be  
23 the transfer, possession, use, perhaps where the underlying  
24 predicate offense was under the 2nd Circuit's precedent, and  
25 none of those happened in New Jersey. There's no evidence of

1 any traffic in New Jersey, there's no evidence of any  
2 individuals in New Jersey in terms of Defendants or where the  
3 crime actually occurred.

4 JUDGE CHAGARES: So your view is violation of that  
5 New Jersey law has no relevance to the venue question.

6 MR. KERR: That is correct. It is simply part of the  
7 circumstance element in the felony enhancement in § 1030(c).  
8 Congress made it a felony instead of a misdemeanor to commit a  
9 1030(a)(2) misdemeanor offense in furtherance of some other  
10 crime, and that's just the circumstance of the punishment.

11 JUDGE CHAGARES: How about -- your adversary makes a  
12 pretty large deal about the effects and cites our case in  
13 Goldberg, it's from 1987. How do you respond to that, that the  
14 effects are felt in New Jersey?

15 MR. KERR: Yeah, the substantial effects test is a  
16 Constitutional standard which some circuits have adopted, other  
17 circuits have not, which is in addition --

18 JUDGE CHAGARES: Have we adopted it?

19 MR. KERR: It has only been referenced in Goldberg.  
20 It's cited and the Reed case is quoted, but then the Court  
21 resolves the decision on other grounds. I don't think this  
22 Court has adopted the substantial effects test, but even where  
23 it's adopted, it is a Constitutional standard in addition to  
24 the statutory standard under § 3237. So it's another threshold  
25 the Government has to satisfy, not a way of establishing venue



1 that is, in some sense, easier for the Government to satisfy  
2 than the statutory venue standard.

3 JUDGE GREENAWAY: Let's say -- I'm sorry, were you  
4 going to --

5 JUDGE VANASKIE: No.

6 JUDGE CHAGARES: Oh, no.

7 JUDGE GREENAWAY: Let's say you're right on venue,  
8 all right -- we all agree you're right. What about the  
9 harmless error analysis that the Government poses? Should we  
10 default to that? Is there any showing of prejudice at this  
11 point? Obviously we've been through trial, it's gone how it's  
12 gone. What should be the next step?

13 MR. KERR: It's hornbook --

14 JUDGE GREENAWAY: Vacate and remand?

15 MR. KERR: It's hornbook law that there is no  
16 harmless error test for venue errors. This Court has never  
17 applied a harmless error standard. The Government cites a  
18 single District Court case from the Southern District of New  
19 York which involved just a question of which side of the  
20 Brooklyn Bridge the case should have been brought in. The 2nd  
21 Circuit seems to have disavowed that test.

22 JUDGE GREENAWAY: The Eastern District would probably  
23 see it a little differently, no?

24 MR. KERR: I assume that a fight between the  
25 Brooklynites and the Manhattanites continues. But nonetheless,

1 that's the only case that I'm aware of that applied a harmless  
2 error review standard to venue errors, and this Court has  
3 certainly never applied such a standard. It's not even certain  
4 what such a standard would look like. And here the case was  
5 brought in New Jersey when the Defendant had never been to New  
6 Jersey and the Defendant was coming from Arkansas. So even if  
7 there were a harmless error standard, this would not be a case  
8 for harmless error.

9 If I could go back to the unauthorized access issue as  
10 well, because of course, if the Court reverses on the grounds  
11 of unauthorized access, that leads to an acquittal for Mr.  
12 Auernheimer. There is no unauthorized access in this case  
13 because of the nature of the World Wide Web. When you put  
14 information on the World Wide Web so that it's available to  
15 anyone to access, you assume the risk that others are going to  
16 access that information. It's because the World Wide Web is an  
17 open protocol, it's designed to allow anyone to visit the  
18 website and see the website. It's clear from the record that  
19 AT&T did not intend for individuals other than the relevant  
20 iPad owners to visit those addresses, but that's a risk that  
21 they assumed. The Government's case for unauthorized access  
22 relies a lot on the idea --

23 JUDGE GREENAWAY: Why is that a risk that they  
24 assume?

25 MR. KERR: It's the nature of the World Wide Web.

1 The World Wide Web is a publishing platform. It is a way of  
2 making information available to the public, using that browser  
3 and the address line at the top of the browser.

4 JUDGE VANASKIE: Is that --

5 JUDGE GREENAWAY: So under what circumstance is  
6 anything private on the web? Or are you taking the position  
7 that nothing, under any circumstances, no matter how many  
8 passwords and firewalls that you put in, is anything other than  
9 public?

10 MR. KERR: No, it's absolutely a great deal of what's  
11 on the World Wide Web is private, but it's protected by a  
12 password. That's how you create privacy on the World Wide Web,  
13 you introduce some authentication mechanism that says only one  
14 person knows this information, your secret password only known  
15 to you, and you then can access your private account  
16 information. In this case there was no private account  
17 information that was accessed. The only information that was  
18 collected was from public website addresses --

19 JUDGE VANASKIE: So is a code-based restriction the  
20 same as a password? Are they equivalent?

21 MR. KERR: A password is certainly an example of a  
22 code-based restriction, yes.

23 JUDGE VANASKIE: Well, give me an example, then, of a  
24 code-based restriction that's not a password.

25 MR. KERR: Another would be if you visit a website

1 that does not -- I think a web server, for example, that does  
2 not have any way of accessing the account directly. There's no  
3 actual account, no password box. But you may be able to, for  
4 example, hack into the machine, find out information that has  
5 not been made publicly available, through any particular  
6 computer exploit. It's a way of effectively breaking into the  
7 machine, rather than looking at what has been publicly made  
8 available, and that is the key distinction. So absolutely it's  
9 possible to create internet privacy on the World Wide Web, but  
10 it's through some sort of an authentication mechanism, some  
11 password gate or other way of keeping people out, not just  
12 hoping that people don't find the address of information that  
13 you have posted to the public on the web.

14 JUDGE CHAGARES: Thank you, counsel.

15 MR. KERR: Thank you.

16 JUDGE CHAGARES: Lest you -- I know you -- 15 minutes  
17 doesn't seem like a lot of time, and we can't cover everything,  
18 but rest assured we poured through your briefs, so we're well  
19 aware of your positions on the other issues.

20 MR. KERR: Thank you, Your Honor.

21 JUDGE CHAGARES: Okay.

22 MR. MORAMARCO: Good morning, Your Honors. Glenn  
23 Moramarco on behalf of the Government.

24 JUDGE CHAGARES: Good morning.

25 MR. MORAMARCO: I'm happy to begin with either venue

1 or the CFAA, depending on the Court's preference.

2 JUDGE CHAGARES: Let's start with venue.

3 MR. MORAMARCO: Sure. Our position, actually, is  
4 that obviously what makes it a felony is part of the essential  
5 elements of the offense. The notion that --

6 JUDGE VANASKIE: So would you concede that if you  
7 didn't have the felony enhancement provision, there would be no  
8 venue in New Jersey.

9 MR. MORAMARCO: Well, we do have a fallback argument  
10 about the failure to get authorization from the individuals in  
11 there, but I think our strongest argument is based on the  
12 felony. But we do have fallback arguments as well.

13 But certainly, I mean, again, the implications of the  
14 argument that Mr. Kerr is making are that the felony is  
15 irrelevant. So if you had a CFAA crime in which the objective  
16 were to blow up a nuclear power plant in New Jersey, there'd be  
17 no venue in New Jersey if the guy's pushing the buttons in  
18 Arkansas. He says that Congress -- he wants you to look at  
19 what Congress sort of incorporated, but Congress incorporated  
20 the notion that there be felonies, and that felonies would be  
21 based on violations of State or Federal law.

22 JUDGE CHAGARES: Yes, but counsel, I mean, it looks  
23 to me like § 1030(a)(2)(c) is -- I mean, it says a violation is  
24 done when, you know, intentionally accessing information from a  
25 protected computer. Isn't -- aren't those the essential

1 elements we need to look to?

2 MR. MORAMARCO: Well --

3 JUDGE CHAGARES: I mean, do we really need to resort  
4 to something else?

5 MR. MORAMARCO: Well, in terms of venue, it's not --  
6 For a continuing crime, venue can continue as the effects work  
7 its way through. So if you had a kidnapping, the kidnapping  
8 would be complete when you first grab the guy. But if you  
9 carry him through seven states as part of the kidnapping, you'd  
10 have venue in all of those states. So it really doesn't turn  
11 on when you have sufficient factual support for it, it really  
12 is when the crime ends. And when you have effects that are  
13 ongoing, and here the effect was -- and frankly, we're talking  
14 about the object of the conspiracy. You know, he's calling it  
15 a circumstance, but, you know, this is the object of the  
16 conspiracy. So to call it a mere circumstance -- in Cabrales  
17 the circumstance was that there had been a prior crime already  
18 committed, so it wasn't part of the money laundering, which was  
19 being charged against those individuals. That's a very  
20 different situation from the object of the conspiracy itself.

21 JUDGE VANASKIE: The Gawker article that you mention  
22 as a basis for saying that there's venue in New Jersey, did it  
23 identify any New Jersey residents?

24 MR. MORAMARCO: The Gawker article in particular did  
25 not, no. And, you know, what was -- the initial distribution,

1 which is not being disputed here, was the distribution to the  
2 reporter, and that contained the entire lists.

3 JUDGE GREENAWAY: So if they talked to the New York  
4 Times rather than Gawker, you'd say because the New York Times  
5 is distributed throughout the United States, that venue is  
6 proper in all 50 states?

7 MR. MORAMARCO: Well, actually, Gawker's location  
8 wasn't in New Jersey either, just so the record is clear. We  
9 are saying that there is jurisdiction throughout the United  
10 States in this case because, not the Government chose that, but  
11 he chose to have 114,000 victims. So, as a matter of fact, he  
12 chose to have victims in every state. That is the case when  
13 you've got --

14 JUDGE GREENAWAY: So we could be in the District of  
15 Hawaii, which I wouldn't mind, but --

16 (Laughter)

17 MR. MORAMARCO: We could make a motion to change  
18 venue there, which, by the way, there was not in this case.  
19 And I'll get back to that when we're discussing harmless error.

20 JUDGE GREENAWAY: Granted, only the panel can go,  
21 but -

22 JUDGE CHAGARES: Yes, that'd be great.

23 MR. MORAMARCO: But yeah, opposition is, just like in  
24 a mail fraud. If you have a mail fraud against one person and  
25 that person is in New Jersey, then you prosecute it in New

1 Jersey. If you have a mail fraud against 114,000 people --

2 JUDGE CHAGARES: Yes, but even in New Jersey, even  
3 the essential elements of the conduct under New Jersey law are  
4 accessing a computer and disclosing information, and neither of  
5 those happened in New Jersey.

6 MR. MORAMARCO: Well, the information was disclosed  
7 throughout the country -

8 JUDGE CHAGARES: Well --

9 MR. MORAMARCO: -- to the extent that there was  
10 internet, you know, there was internet application.

11 JUDGE VANASKIE: Well, wait a second, no -

12 JUDGE GREENAWAY: I thought the key words -

13 JUDGE VANASKIE: I don't understand that. You said  
14 it was disclosed throughout the country, but it was disclosed  
15 to a reporter at Gawker.

16 MR. MORAMARCO: Well, it says Gawker with the  
17 intention that it be further disclosed, and to the -- you  
18 know -

19 JUDGE VANASKIE: Well, I'm trying to understand.  
20 There are 4,500 New Jersey residents --

21 MR. MORAMARCO: Right.

22 JUDGE VANASKIE: -- whose e-mails were identified.  
23 Where -- do we know any of the New Jersey residents whose --

24 MR. MORAMARCO: Oh, yeah. I mean, they were -- in  
25 the exhibits that were given to the jury, they were broken down



1 by state, so that's how we --

2 JUDGE VANASKIE: And -- but where did that disclosure  
3 occur of those New --

4 MR. MORAMARCO: That disclosure was when the  
5 Defendant, Auernheimer, sent them over the internet to the  
6 reporter at Gawker. That was the initial disclosure. Then the  
7 Gawker article and other articles, you know, talked about  
8 individual people; those did not reference New Jersey people in  
9 particular.

10 JUDGE VANASKIE: All right, okay.

11 MR. MORAMARCO: The further thing.

12 JUDGE VANASKIE: Okay.

13 MR. MORAMARCO: I do want to discuss the harmless  
14 error point, because to say it's hornbook law that venue can't  
15 be harmless, I think is -- well, perhaps not overstating every  
16 hornbook, but overstating what the Supreme Court has said. The  
17 Supreme Court in The United States vs. Lane and United States  
18 vs. Neder has said that Rule 52(a) admits of no exceptions.  
19 The exceptions they have recognized are for structural error,  
20 and no Court has ever held that venue is structural error.  
21 Certainly the Supreme Court has not held that it's structural  
22 error.

23 JUDGE GREENAWAY: So then let me ask you this  
24 question on that point. So if we found that there was a venue  
25 defect here, you argue harmless error.

1 MR. MORAMARCO: Yes.

2 JUDGE GREENAWAY: Right, you want to prevail. When  
3 would you not prevail?

4 MR. MORAMARCO: Well --

5 JUDGE GREENAWAY: What circumstance could there be  
6 when there would be a venue defect that you would not  
7 prevail -

8 MR. MORAMARCO: Sure.

9 JUDGE GREENAWAY: -- on a harmless error analysis?

10 MR. MORAMARCO: There definitely would be  
11 circumstances, Your Honor. There would be cases in which the  
12 individual didn't have access to the witnesses that he wanted  
13 because it was an inconvenient forum. He might not have had  
14 the counsel of his choice because it was an inconvenient forum.  
15 I do think it's crucial here that there was no --

16 JUDGE GREENAWAY: No, no, no, but I mean at this  
17 stage. I mean, those are arguments that --

18 MR. MORAMARCO: Right, at this stage. If he said,  
19 you know --

20 JUDGE GREENAWAY: -- no, those are arguments you make  
21 at the beginning.

22 MR. MORAMARCO: -- if we had been in Arkansas, I  
23 would have called these three --

24 JUDGE CHAGARES: Hold on, counsel, let -

25 JUDGE GREENAWAY: No, one second.

1 MR. MORAMARCO: I'm sorry.

2 JUDGE CHAGARES: -- let Judge Greenaway speak.

3 JUDGE GREENAWAY: Those are arguments that you would  
4 make, right, at the beginning. At the beginning of every civil  
5 case that I can remember, "Oh, no, we shouldn't be in New York,  
6 we should be wherever, because, you know, nine million people  
7 are there and nobody is here and" yada yada, right. But I'm  
8 talking about at this stage, right. We've already had a trial.

9 MR. MORAMARCO: Right.

10 JUDGE GREENAWAY: Presumably after you make your  
11 argument, you're going to want me to ask him, "Well, what's the  
12 prejudice if I apply a harmless error analysis," which I'm  
13 prepared to do in a moment. But for right now, I want to ask  
14 you what's the circumstance where, after we've had a trial and  
15 there is a difficulty, as you would presume, showing prejudice,  
16 when would I not apply harmless error?

17 MR. MORAMARCO: Well, perhaps I'm missing the point,  
18 but I would have thought it would have been those same  
19 questions, that it would have been -- if he could stand up  
20 before Your Honor and say we weren't in Arkansas and if we had  
21 been in Arkansas I would have called these three witnesses who  
22 were not available to me because they wouldn't go to New  
23 Jersey, or I would have had a different counsel. I mean, in  
24 this case what the record reflects is that he had pro bono  
25 counsel which very generously -- you know, right outside of New

1 Jersey, right outside of Newark, across in New York, made their  
2 services available to him for free, so --

3 JUDGE VANASKIE: But we're dealing with a -- we're  
4 dealing with a concept that's embedded in the Constitution in  
5 two places, in our Bill of Rights and in the Constitution  
6 itself.

7 MR. MORAMARCO: Sure. Well --

8 JUDGE VANASKIE: And has the Supreme Court said that  
9 it's -- has the Supreme Court ever said that venue is not a  
10 structural problem?

11 MR. MORAMARCO: No, it has not said anything about  
12 venue being structural or not structural.

13 JUDGE VANASKIE: Not said one way or another, okay.

14 MR. MORAMARCO: But certainly it's late in the day  
15 for -- the Supreme Court has often held that Constitutional  
16 violations are subject to harmless error analysis; we do that  
17 every day. What they're looking for in terms of structural  
18 error are things that really go to the integrity of the trial,  
19 so they've looked at a biased tribunal, they've looked at a  
20 failure to have counsel, or a failure to have self-  
21 representation. To me, this is more like a misjoinder, which  
22 is the issue that they were dealing with, I believe, in Lane.  
23 You know, it's a circumstance -- you shouldn't have tried that  
24 count there. It was in -- you know, they shouldn't have been  
25 joined together for trial, but the Court held that that was

1 harmless error, and it reversed the 2nd Circuit which had said  
2 that these kinds of errors are not subject to harmless error  
3 analysis, and that was the case where the Court really said  
4 there are no bright line rules here. Again, leaving aside the  
5 categories of structural error which have already been --  
6 already been suggested. I would suggest this is a favorable  
7 forum for Mr. Auernheimer because of the -- because he had  
8 such -

9 JUDGE CHAGARES: I don't think he'd argue that right  
10 now.

11 (Laughter)

12 MR. MORAMARCO: Well, again, when you do harmless  
13 error analysis, you do it on the basis of, in fact, the  
14 strength of the evidence. And we have a case here where we see  
15 it very differently from our two respective corners here. I  
16 see a case where he's arguing that this was completely open to  
17 everyone. But you look at the testimony of Daniel Spitler and  
18 the steps he had to take in order to get to this wide open, you  
19 know, web, and I'm flabbergasted that this could be called  
20 anything other than a hack. He had to -- he had to download  
21 the entire IOS system on his computer. He had to decrypt it.  
22 He had to do all sorts of things I don't even understand what  
23 they are, and certainly are beyond the ken of, you know,  
24 ordinary web users. When you publish something to the web, the  
25 notion is that it's, you know, it's searchable; you can get

1 there. This was really a members only site. This was a site  
2 where you had to -- it asked -- it basically asked two  
3 questions: are you an iPad, and if you're an iPad, which iPad  
4 are you? That's the ICC ID address, and that was the --

5 JUDGE CHAGARES: Well, you've artfully moved from --

6 MR. MORAMARCO: Okay.

7 JUDGE CHAGARES: -- from venue. I want to -- I want  
8 to know about your --

9 JUDGE GREENAWAY: We're bringing you back.

10 JUDGE CHAGARES: -- alternative argument, if New  
11 Jersey law doesn't apply.

12 MR. MORAMARCO: Well, if New Jersey law doesn't  
13 apply, then we have to go with his failure to obtain  
14 authorization from the victims in New Jersey. That's our --

15 JUDGE CHAGARES: And that's effects, right?

16 MR. MORAMARCO: Yeah, that's effects, too. And  
17 again, even in the cases that he cites, you know, there is  
18 recognition that effects matter in some cases. I mean, you  
19 know, this is an area where if you don't go the harmless error  
20 route, you really are probably going to have to write some new  
21 law, because there really isn't a ton on venue under the CFAA.

22 JUDGE CHAGARES: Right.

23 MR. MORAMARCO: So, you know, he's trying to  
24 analogize it to certain things; I'm trying to analogize it to  
25 certain other things. But if we really take a step back and

1 think about computer crimes, I would really urge the Court not  
2 to go narrow on computer crimes, because when the founding  
3 fathers were talking about, you know, trying a crime where it  
4 occurred, you didn't have things like the internet, obviously,  
5 you didn't have -- I mean, crimes occurred, you know. You've  
6 got, you know -- typically crimes occur, you know, right there.

7 JUDGE GREENAWAY: But if we went broadly, as you  
8 suggest, that would mean in every computer crime, in every  
9 Court in America, it would always be 50 states.

10 MR. MORAMARCO: Well, not if you had a targeted crime  
11 that involved individual victims. I mean, again, if Mr.  
12 Auernheimer wanted to sort of get your personal identifying  
13 information, you know, and he was trying to target you, then we  
14 couldn't try that in Arkansas -- well, if you did it in  
15 Arkansas, but we couldn't try that in Hawaii if you were the  
16 only victim of the offense. And I think the problem is he's  
17 trying to adopt a rule that doesn't really work very well when  
18 the felony enhancement is a serious one where the effects are  
19 important.

20 JUDGE GREENAWAY: Well, one -- since you've mentioned  
21 felony enhancement, I'm still not clear as to how you get  
22 around Rodriguez-Moreno and Cabrales. I know Cabrales you  
23 mentioned in a footnote, and you spent most of your time on  
24 Rodriguez-Moreno. I'm not getting that.

25 JUDGE CHAGARES: And Goldberg.

1 JUDGE VANASKIE: Right, right, sorry.

2 MR. MORAMARCO: Well, I don't think Rodriguez-Moreno  
3 is a bad case for me. I think that when you take a step back  
4 and you look at it, what it's saying is, again, it came up  
5 through this Circuit where this Circuit had held the opposite,  
6 and Judge Alito sort of dissented and said you can't just look  
7 at the verbs, you've got to look at the crime in total. And so  
8 they have really -- there were two parts to that crime, just  
9 like there are two parts here. You had the using and carrying  
10 of a firearm, and you had the -- you know, in furtherance of a  
11 kidnapping. And what you have here is, you know, use of a  
12 computer in furtherance of the New Jersey crime, and you put  
13 them together. -

14 JUDGE GREENAWAY: Yes, but here you're relying on the  
15 violation of the New Jersey crime. In Rodriguez-Moreno, it's -  
16 - the key is felony enhancement. How are those meshing?

17 MR. MORAMARCO: Well, you have to -- again, in  
18 Rodriguez-Moreno, it would have been very easy for the Court to  
19 have said, as Justice Scalia said in dissent, that you're being  
20 charged with using a firearm during and relation to a crime --  
21 to a kidnapping where everyone concedes that he didn't have a  
22 gun in New Jersey. But it was okay to charge it in New Jersey,  
23 because when you looked at the crime overall, kidnapping was a  
24 part of it, and it was an important part of it. But even  
25 though nothing in New Jersey happened related to that gun, and



1 he was charged with during and relation, that was enough to  
2 bring it in. So what I'm suggesting here is that bringing in  
3 the violation of New Jersey law is enough to make this strong.

4 But let me get a little bit to -- because I haven't really  
5 discussed the substantial contacts test, which this Court did  
6 at least --

7 JUDGE CHAGARES: That's Goldberg, right?

8 MR. MORAMARCO: Yes.

9 JUDGE CHAGARES: Now did we really adopt that test in  
10 that case? I mean, there's a quotation there. I don't see  
11 adopt anywhere.

12 MR. MORAMARCO: Well --

13 JUDGE CHAGARES: And we've -- and, as far as I know,  
14 we haven't followed Goldberg in any other case.

15 MR. MORAMARCO: Well, fair enough, in the sense that  
16 it is a quotation and that's the only place, though, where the  
17 Court sets out what the standard would be. So typically when  
18 you quote another Court's standard, if you're disagreeing with  
19 it you'll say, and if you're not disagreeing with it, you're  
20 probably agreeing that at least it -

21 JUDGE CHAGARES: All right.

22 MR. MORAMARCO: -- works in this case. So that's  
23 where that came from. Importantly, in Rodriguez-Moreno, the  
24 Government argued a substantial contacts argument, and they  
25 said in footnote two that they were leaving that open, they

1 were not reaching that question; they didn't need to because  
2 they were doing it under the locus delicti --

3 JUDGE CHAGARES: Right.

4 MR. MORAMARCO: -- which is very narrow. But the  
5 fact that the Court left it open, it surprised me that some of  
6 the cases seem now to be suggesting that you automatically  
7 lose, you know, under substantial contacts, because the Supreme  
8 Court didn't adopt it in Rodriguez-Moreno, and I think that's  
9 an overread.

10 And I think even the cases that he relies on, some of  
11 those are quite good for us. The Oceanpro case out of the 4th  
12 Circuit, which he cites in his reply brief, I mean, that's a  
13 case where the effects are felt in another District and the  
14 Court said fine. It was obstruction of justice, and the  
15 deposition was given in one jurisdiction, and the obstruction  
16 would have been in -- it was given in D.C., the obstruction  
17 would have been in a Maryland tribunal, and the Court said  
18 fine, the effects there should be felt. And so I would urge  
19 this Court to look at effects, because victims do matter.

20 It doesn't really matter where the server is located. I  
21 mean, if we're going that route, I mean, again, the law ought  
22 to make some sense. It's one thing to say, obviously where he  
23 hits the "send" button, you know, there he's doing some  
24 contact.

25 JUDGE GREENAWAY: Well, if the law is supposed to

1 make sense, I mean, it is obtaining and accessing, right,  
2 that's what we're supposed to be focused on.

3 MR. MORAMARCO: Yeah, but it's identity fraud, too.  
4 And so how do you obtain somebody's identity? I mean, it's  
5 sort of a very --

6 JUDGE GREENAWAY: Sure, but you want to think about  
7 what are the means employed, how did you go about it.

8 MR. MORAMARCO: I want to think about the harms,  
9 Judge Greenaway. That's what I want to think about. Who is  
10 harmed by this, and isn't that what makes it a crime? What  
11 makes it a crime is there's somebody, you know, sitting home in  
12 New Jersey, you know, whose identity has been taken by this  
13 individual, and he didn't have to take 114,000 of them if he  
14 didn't want to be subject to nationwide.

15 JUDGE GREENAWAY: It would have been very easy for  
16 them --

17 JUDGE CHAGARES: But --

18 JUDGE GREENAWAY: -- to say that in Cabrales and  
19 Rodriguez-Moreno if that's what they meant.

20 MR. MORAMARCO: They didn't need to reach it because  
21 the locus delicti alone was enough. The Court has left it  
22 open. It may be an issue that you have to reach if you don't  
23 go the harmless error route. I would urge you to think broadly  
24 on that.

25 JUDGE CHAGARES: All right, thank you, counsel.

1 MR. MORAMARCO: Thank you.

2 MR. KERR: On rebuttal, I'd like to make just two  
3 points about harmless error. First, the Government says that  
4 Rule 52 should apply and the harmless error standard there.  
5 The difficulty is that venue is a statutory standard in  
6 addition to a rule-based standard. So the venue law comes from  
7 three different sources, the Constitution, the statutes, and  
8 the Federal Rules. The fact that there are harmless error  
9 standards of review for the Federal Rules does not address  
10 whether there is a harmless error standard for the statute  
11 3237. This case is being brought under the statute and that's  
12 why there is no harmless error standard.

13 In terms of the question of prejudice, which Judge  
14 Greenaway mentioned, there are several types of prejudice here  
15 if the Court does reach a harmless error standard. One is that  
16 there are computer crime units in all of the major U.S.  
17 Attorneys' offices right now, and to be candid, they are  
18 looking for cases. And if the standard --

19 JUDGE GREENAWAY: You want to help Atlanta? What -  
20 (Laughter)

21 MR. KERR: If the standard is that any district can  
22 bring a case, then any individual defendant doesn't only have  
23 to get a denial in one district or two districts or four  
24 districts, but any prosecutor in any district can bring the  
25 case. And as revealed by the fact that Mr. Auernheimer is

1 serving 41 months in prison right now, clearly he has felt  
2 prejudiced with the prosecution of this case.

3 I also wanted to address the issue of -- the Government  
4 says that the --

5 JUDGE CHAGARES: Is there any other prejudice we  
6 should be aware of?

7 MR. KERR: It's sort of a metaphysical question, I  
8 think, as to how the case would have gone in a district where  
9 there was venue. It's not clear even what that means. Venue  
10 was certainly challenged below. The Government says there was  
11 no motion to transfer venue. There was a motion to dismiss for  
12 a lack of venue. It was, in fact, the first issue that was  
13 challenged when this case was brought.

14 JUDGE GREENAWAY: I'm not getting you on I'm  
15 prejudiced then.

16 MR. KERR: So the fact that he was prosecuted is one  
17 form of prejudice. If this case could only be prosecuted in  
18 some districts, in certain districts, that means that only  
19 several U.S. Attorneys' offices can bring the case. And if  
20 venue can be brought in any district, then every U.S.  
21 Attorney's office has the opportunity to determine, do we want  
22 to bring a prosecution in this particular case. And that's in  
23 addition to we just don't know how the case would have gone if  
24 it had been brought in Arkansas where the Defendant was  
25 located, what resources he would have been able to bring to the

1 case. There's no record on that question. It's one of the  
2 reasons why, I think, there is no harmless error standard for  
3 venue error --

4 JUDGE VANASKIE: And shouldn't it be enough that you  
5 raised venue initially in -- I mean, that's your prejudice.

6 MR. KERR: Absolutely. Yeah, it was raised  
7 initially, it was raised -- that was the first --

8 JUDGE VANASKIE: You said we don't -- we shouldn't be  
9 tried here.

10 MR. KERR: That's right. And it was the first --

11 JUDGE VANASKIE: The case should have never been  
12 brought here.

13 MR. KERR: That's absolutely correct, the first issue  
14 raised in this case. The Government also says that under  
15 Rodriguez-Moreno, it's left open whether there is an effects  
16 test. I think that's a misreading of the Rodriguez-Moreno  
17 case. That case leaves open that there may be another  
18 possibility of a statutory standard, that is, other venue  
19 statutes may allow an effects test. So if there's an essential  
20 conduct element written into the statute that is phrased in  
21 terms of an effect, then that can be considered under the  
22 statute. So it's possible in other cases that there would be  
23 such a test, but there is not under § 3237, which specifies the  
24 essential conduct elements under the Cabrales case. If there  
25 are no further questions.

1 JUDGE CHAGARES: Thank you, counsel.

2 MR. KERR: Thank you, Your Honor.

3 JUDGE CHAGARES: Counsel, thank you so much for your  
4 excellent briefing and excellent argument. We'll take the case  
5 under advisement.

6 (Court adjourned)

7

8

CERTIFICATION

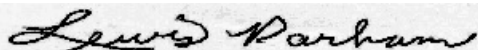
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10 I certify that the foregoing is a correct transcript from the  
11 electronic sound recording of the proceedings in the above-  
12 entitled matter.

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Signature of Transcriber

\_\_\_\_\_  
Date

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

UNITED STATES OF AMERICA,

Appellee,

v.

ANDREW AUERNHEIMER,  
a/k/a WEEV,  
a/k/a WEELOS,  
a/k/a ESCHER,

Appellant.

Third Circuit No. 13-1816

**CERTIFICATION OF COUSEL**

Following review of the transcript by all parties, including counsel for the government, I hereby certify on behalf of all parties that the foregoing transcript is accurate.

Dated this 7<sup>th</sup> day of April, 2014.

Respectfully submitted,

*/s/ Hanni M. Fakhoury*

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on April 7, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 7, 2014

By: /s/ Hanni M. Fakhoury  
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