No. 16-10197

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES,
Plaintiff-Appellee,

v.

MATTHEW KEYS,
Defendant-Appellant

Appeal from the United States District Court for the Eastern District of California
Criminal Case No. 2:13-CR-82 KJM (Hon. Kimberly J. Mueller)

APPELLANT'S OPENING BRIEF

Tor Ekeland
Mark H. Jaffe
TOR EKELAND, P.C.
195 Plymouth Street
Brooklyn, NY 11201
Tel: 718-737-7264
Fax: 718-504-5417
tor@torekeland.com
mark@torekeland.com

Jason S. Leiderman, SBN 203336
LAW OFFICES OF JAY LEIDERMAN
770 County Square Drive #101
Ventura, California 93003
Tel: 805-654-0200
Fax: 805-654-0280
jay@criminal-lawyer.me

Pro Bono Attorneys for Appellant Matthew Keys

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

CONSTITUTIONAL PROVISIONS

JURISDICTION

This is an appeal of an Eastern District of California's Trial Court's (the "Trial Court") final judgment in a criminal case. The Trial Court had jurisdiction under 18 U.S.C. § 3231 as the Indictment charged one count under 18 U.S.C. § 371 (conspiracy to cause unauthorized damage to a computer) and two counts under 18 U.S.C. § 1030(a)(5)(A)(transmission of a code that causes unauthorized damage to a computer, both substantively and as attempt). This Court has jurisdiction under 28 U.S.C. § 1291, because the Trial Court's judgment is an appealable final decision. In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of (i) the entry of either the judgment or the order being appealed; or (ii) the filing of the government's notice of appeal. Fed. R. App. P. 4 (b)(1)(A). The Trial Court entered final judgment against Mr. Keys on April 13, 2016. (ER at 176 (CR 175).) Mr. Keys filed a timely notice of appeal on April 25, 2016. (ER at 168 (CR 154).)

DETENTION STATUS

On August 4, 2016, after spending over three years on minimal supervised release without incident, Mr. Keys reported for his sentence as ordered by the Trial Court. He is currently serving his two-year sentence at U.S. Penitentiary Atwater and has a projected release date of April 30, 2018.

ISSUES PRESENTED

1. Whether the Government constructively amended Count Two of the Indictment with the introduction of irrelevant and highly prejudicial evidence related to uncharged conduct not described in the Indictment?
2. Whether the conviction should be reversed because the government introduced highly prejudicial evidence in support of its Computer Fraud and Abuse Act Damage allegations that was not within the scope of the legal definition of CFAA Damage and Loss?
3. Whether the conviction should be reversed because the introduction of irrelevant and highly prejudicial evidence tainted the whole trial?
4. Whether the evidence supported the allegation that Mr. Keys took a substantial step to attempt to damage the LA Times website?
5. Whether the preponderance of the evidence supports the Restitution Amount of $249,956.00 based on alleged damage to a database unrelated to the charged conduct when there is no evidence in the trial record that any email address list was deleted or a database damaged?

STANDARD OF REVIEW

A. Constructive Amendment

Where a defendant raises a constructive amendment claim before the district court, the claim is reviewed de novo. *U.S. v. Adamson*, 291 F.3d 606, 612 (9th Cir. 2002); *U.S. v. Pisello*, 877 F.2d 762, 764 (9th Cir. Cal. 1989); *U.S. v. McConney*,

728 F.2d 1195, 1201 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984). However, if a defendant does not object to the district court's jury instructions at trial, his constructive-amendment claim is reviewed under the plain error standard. *U.S. v. Arreola*, 446 F.3d 926, 934 & n.2 (9th Cir. 2006); *U.S. v. Hugs*, 384 F.3d 762, 766 (9th Cir. 2004). Because Counsel for Mr. Keys raised a constructive amendment claim at trial, the de novo standard of review is appropriate for this appeal.

B. Relevance and Prejudice of the Evidence

Only relevant evidence, which is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," is admissible in federal court. Fed. R. Evid. 401. Evidence may be relevant even if it is cumulative, redundant, or if it relates to undisputed facts. *Old Chief v. U.S.*, 519 U.S. 172, 179 (1997); *Boyd v. City & County of San Francisco*, 576 F.3d 938, 943 (9th Cir. 2009). Relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

A district court need not state explicitly that the probative value of the evidence substantially outweighs the danger of unfair prejudice, as long as it appears from the record that the trial judge performed the balancing required by

Rule 403. *U.S. v. Johnson*, 820 F.2d 1065, 1069 (9th Cir. Wash. 1987). A district court's decision to admit evidence is evaluated under an abuse of discretion standard. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, (1999); *U.S. v. Curtin*, 489 F.3d 935, 943 (9th Cir. 2007) (en banc). An appellate court will not reverse a district court's decisions under an abuse of discretion standard unless it is "convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances." *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000). A party seeking reversal for evidentiary error must show that the error was prejudicial, and that the verdict was "more probably than not" affected as a result. *Boyd*, 576 F.3d at 943; *see also McEuin v. Crown Equip. Corp.*, 328 F.3d 1028, 1032 (9th Cir. 2003).

C. Restitution

Under 18 U.S.C. § 3664, a district court must resolve a dispute as to the proper amount of restitution by a preponderance of the evidence. 18 U.S.C. § 3664(e); *U.S. v. Hai Waknine*, 543 F.3d 546, 556 (9th Cir. 2008); *see also U.S. v. Clayton*, 108 F.3d 1114, 1118 (9th Cir. 1997). It is the Government's burden to prove that a person or entity is a victim for restitution purposes, and to prove the amount of the loss. 18 U.S.C. § 3664(e). The district court is not obligated to make explicit findings to justify a restitution order, but it "may refer any issue arising in

connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact." 18 U.S.C. § 3664(d)(6).

The legality of a district court's restitution order is reviewed de novo. *U.S. v. Nosal*, Nos. 14-10037, 14-10275, 2016 WL 3608752 at*16 (9th Cir. July 5, 2016). Factual findings that support the order are reviewed under the clear error standard. *Id.* If the order is "'within the bounds of the statutory framework, a restitution order is reviewed for abuse of discretion.'" *Id.*

D. Federal Rule of Criminal Procedure 29 Motion

The test for determining whether to grant a motion for judgment of acquittal under Fed. R. Crim. P. 29 is whether, viewing the evidence in the light most favorable to the government, there was relevant evidence from which the jury could reasonably find the accused guilty beyond a reasonable doubt of each element of the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (sufficiency of the evidence standard); *U.S. v. Yarbrough*, 852 F.2d 1522, 1542 (9th Cir. 1988) "[E]vidence is insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government's case." *U.S v. Nevils,* 598 F.3d 1158, 1167 (9th Cir. 2010) (en banc).

Denied motions for acquittal are reviewed de novo. *U.S. v. Yossunthorn*, 167 F.3d 1267, 1270 (9th Cir. 1999), *as amended* (Mar. 31, 1999). The Court of Appeals will uphold a conviction when, "viewing the evidence in the light most

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id*.

E. Denial of Jury Charge

A defendant is entitled to a jury instruction on "his theory of the case if it is supported by law and has some foundation in the evidence." *U.S. v Echeverry*, 759 F.2d 1451, 1455 (9th Cir. 1985). The district court, however, may refuse a proposed instruction so long as the instructions given, viewed as a whole, cover that theory. *U.S. v. Kenny*, 645 F.2d 1323, 1337 (9th Cir.), *cert. denied*, 452 U.S. 920, 101 S. Ct. 3059, 69 L. Ed. 2d 425 (1981). A district court's formulation of instructions are reviewed under the abuse of discretion standard. *U.S. v. Makhlouta*, 790 F.2d 1400, 1405 (9th Cir. 1986). The jury must be instructed as to the defense's theory of the case, but the precise language proposed by the defendant need not be used, and it is not error to deny a proposed instruction so long as other instructions in their entirety cover the defense's theory. *U.S v. Makhlouta*, 790 F.2d at 1405; *Kenny*, 645 F.2d at 1337.

F. Concurrent Sentences

Mr. Keys was sentenced concurrently on all three counts. A conviction sentenced to run concurrently is to be reviewed on the merits no differently from other convictions. "It is preferable to address ourselves to the merits of all convictions before us on appeal. This will guarantee that no individual will suffer

because of our inability to foretell the future effects of an unreviewed conviction." *U.S. v. De Bright*, 730 F.2d 1255, 1259 (9th Cir. 1984) (rejecting the concurrent sentence doctrine); *see also U.S. v. Palomba*, 31 F.3d 1456, 1465 (9th Cir. 1994) (noting that rejection is especially apt in light of the sentencing guidelines' criminal history calculations and "three strikes" laws). Here, even if Mr. Keys' sentence may not be directly reduced, each conviction appealed should be reviewed on its merits.

As merited, Appellant will discuss the particularities of any given standard of review below.

STATEMENT OF THE CASE

A. Indictment

On March 14, 2013 Mr. Keys was initially indicted for his role in the edit of the Los Angeles Times website ("latimes.com") headline, slug, and byline. (ER at 244 (CR 1).) On April 23, 2013, he made his initial appearance and was released on minimal supervised release. On December 4, 2014 the Government superseded the indictment (the "Indictment"), broadening the date range for Count Two but otherwise leaving the original Indictment unchanged. (ER at 235 (CR 44).)

The Indictment alleges a conspiracy, an attempt, and an actual violation of 18 U.S.C. § 1030(a)(5)(A) of the Computer Fraud and Abuse Act ("CFAA"). Section 1030(a)(5)(A) criminalizes the knowing "transmission of a program, information, code, or command" the result of which "causes damage without

authorization, to a protected computer." If the loss caused by the damage is more than $5,000.00, then a violation of § 1030(a)(5)(A) becomes a felony. § 1030(c)(4)(B). Damage ("CFAA Damage") is defined as "any impairment to the integrity or availability of data, a program, a system, or information." § 1030 (e)(8). Loss ("CFAA Loss") is defined as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." § 1030(e)(11).

According to the Indictment, the conspiracy to violate § 1030(a)(5)(A) occurred between December 8, 2010 and December 15, 2010. (ER at 236 (Indictment at p. 2 ¶ 2).) The object of the conspiracy was "to make unauthorized changes to web sites that Tribune Company used to communicate news features to the public; and to damage computer systems used by Tribune Company." (ER at 237 (Indictment at p. 3 ¶ 3).) The Indictment lists the Tribune Company, local Sacramento television station Fox 40, and the Los Angeles Times as targets of the conspiracy. (ER at 237 (Indictment at p. 3 ¶ 4).) Fox 40 and the Los Angeles Times were owned by the Tribune Company and utilized the Tribune's Content Management System ("CMS") for much of their digital content and websites. (ER at 236 (Indictment at p. 2 ¶ 1(c)-(d)).) The CMS would back up prior versions of

stories on the Los Angeles Times website and save new version if changes were made. (ER at 92-93 (RT 228:15-229:9).)

The conspiracy was allegedly devised on an Internet Relay Chat ("IRC") between Matthew Keys and several co-conspirators claimed to be associated with Anonymous, a decentralized movement of computer hackers. The overt actions taken to carry out this conspiracy include a December 8th IRC communication in which one of the co-conspirators expressed a desire to gain access to the computer systems of Fox News. (ER at 237 (Indictment at p. 3 ¶ 9).) Mr. Keys allegedly responded by offering login credentials from his former employer that would grant access to the CMS. (ER at 237 (Indictment at p. 3 ¶ 10).) A second alleged overt act was carried out between December 8 and December 14 when a member of the conspiracy used username "anon1234" to reconnoiter the Tribune's CMS. (ER at 238 (Indictment at p. 4 ¶ 12).) On December 11 a member of the conspiracy began using the username "ngarcia" on the CMS. (ER at 238 (Indictment at p. 4 ¶ 13).)

The username "ngarcia" was eventually used to revise the title, slug, and byline of a latimes.com story on or about December 14 or 15. (ER at 238 (Indictment at p. 4 ¶ 14).) The article's title, slug and byline originally appeared as follows:

> **Pressure builds in House to pass tax-cut package**
>
> House Democratic leader Steny Hoyer sees 'very good things' in the tax-cut deal, which many representatives oppose. But with the bill

> set to clear the Senate, reluctant House Democrats are feeling the heat to pass it.
>
> By Lisa Mascaro, Tribune Washington Bureau[1]

After the minor revisions by "ngarcia," the article's title and byline allegedly read:

> **Pressure builds in House to elect CHIPPY 1337**
>
> House Democratic leader Steny Hoyer sees 'very good things' in the deal cut which will see uber skid Chippy 1337 take his rightful place, as head of the Senate, reluctant House Democrats told to SUCK IT UP.
>
> By CHIPPYS NO 1 FAN, Tribune Washington Bureau

The original was restored in approximately 40 minutes. (ER 94 (RT 295:12-15).) The last alleged overt act was on December 15, an IRC conversation among the conspirators discussing the alteration and acknowledging that they had been locked out of the system. (ER at 238 – 239 (Indictment at p. 4-5 ¶ 15).) At trial these facts were offered to support Count One, the conspiracy charge. (ER at 136 – 153 (RT 810-827).)

Count Two of the Indictment repeats the allegations contained in Count One, while extending the date range to October 28, 2010 through on or about January 5, 2011. (ER 239 - 240 (Indictment at p. 5-6 ¶ 1-2).)

---

[1] The original article is still available on the Los Angeles Times website, at http://articles.latimes.com/2010/dec/14/news/la-pn-hoyer-tax-vote-20101215 (last accessed (August 22, 2016).).

Count Three alleges an attempted violation of § 1030(a)(5)(A). Count Three incorporates the allegations in Count One but adds that the attempt occurred on or about December 15, 2010. (ER at 241 (Indictment at p. 6 ¶ 1-2).) The attempted transmission is alleged to have been aimed at causing damage that would have resulted in a loss to a person during a 1-year period aggregating at least $5,000 in value.

B. Additional Conduct Introduced at Trial

Beyond the facts alleged in the Indictment, the Government introduced additional conduct alleged to have been undertaken by Mr. Keys. Specifically, beginning on October 28, 2010, the Government alleges that Mr. Keys downloaded an email address list from the Tribune Company's CMS and used that email address list to send a series of emails from private Google and Yahoo email accounts to his former boss Brandon Mercer and individuals who subscribed to the mailing list. (ER at 6 – 8 (RT 11:21- 13:22); ER at 9-10 (RT 14:9-15:20).) Several subscribers who received the emails expressed concern to Fox40. (ER at 43 – 44 (RT 87:23- 88:23).) None testified at trial and no evidence was introduced demonstrating that any email addresses were deleted from the database they were copied from, or that any damage was done to the email address database. (ER at 88 (RT 149:10-22).) The database was operated by a third party vendor called "Green Links" ("Green Links Database"). (ER at 87 (RT 148:16-20).) Although this

course of conduct is not discussed in the Indictment, it was referred to by the Government as relating to Count Two. (ER at 6-8 (RT 11:21- 13:22); ER at 9-10 (RT 14:9-15:20); ER at 153 (RT 827:9-24).)

The email campaign was generally referred to at trial as the "Cancer Man" emails or the "Fox Mulder" emails. (ER at 15 (RT 25:9-18).) This is because several of the aliases Keys used to carry out the email campaign, cancerman4099@yahoo.co.uk, walterskinner@yahoo.co.uk, and foxmulder4099@yahoo.co.uk, were derived from the Fox television show the X-Files which features a protagonist named Fox Mulder and an antagonists referred to as the Cancer Man. (ER at 7 (RT 12:14-16).) For the sake of consistency, the course of conduct relating to these emails will hereinafter be referred to as the "Cancer Man" emails.

Additionally, the Government alleged that during the same time period as that the Cancer Man emails were sent Mr. Keys locked Sam Cohen, a Fox 40 employee, out of her CMS account for roughly a week. (ER at 10 (RT 15:8-14).) This conduct was also not mentioned in the Indictment but was referred to by the Government as relating to Count Two as well. (ER at 128 (RT 767:10-24); ER at 143 (RT 817:2-25).) Upon cross examination Ms. Cohen admitted that whenever she had difficulty with her username and password she simply requested a new username and password that allowed her to gain access to the CMS. (ER at 106

(RT 477:7-20).) She also testified that those working with her had ready access to the CMS, and contradicted her prior testimony that she had been locked out of CMS access for roughly a week. (Gov. Ex. 112) She further testified that she had not lost any documents or emails when she successfully logged back into the CMS. (ER at 105 (RT 476:21-25).)

C. Use of the Cancer Man Emails at Trial and Objections

The Cancer Man emails were featured prominently in the Government's opening statements. (ER at 6-8 (RT 11:21-13:22); ER at 9-10 (RT 14:9-15:20). The Defense objected to the relevance of these emails after the close of the Government's opening. (ER at 15 (RT 25:9-12).) The Cancer Man were also introduced during testimony from Government's first witness, Brandon Mercer, Mr. Keys former boss at Fox40. (ER at 19 – 85 (RT 63-129).) Defense objected at the beginning of Brandon Mercer's testimony as to the Cancer Man emails relevancy, (ER at 17 (RT 58:21-22), and again renewed its objection when evidence specific to the emails was introduced during his testimony. (ER at 18 (RT 61:14-22).) The Court overruled all objections as to the relevancy of the Cancer Man emails but granted the Defense a standing objection. (ER at 107 - 108 (RT 491:24-492:4).) Finally, the Cancer Man emails were discussed by Government's closing arguments as satisfying Count Two. (ER at 153 (RT 827); ER at 157 (RT 892).)

D. Rule 29

The Defense moved under Fed. R. Crim. P. 29 for a directed verdict on all counts on the basis that the elements of each count had not been established. (ER at 115 (RT 724:2-6).)

On Count One and Two the Defense argued that CFAA Damage had not been satisfied as the evidence showed that the CMS system operated securely, properly, and none of the information stored by that system was lost. Any altered information was immediately retrieved and, therefore, there was no damage under § 1030(a)(5)(A). (ER at 116 (RT 725:2-20).)

Further the defense argued that CFAA Loss had not been satisfied under Count One and Two as testimony introduced to establish loss was based on speculation, there was no expert testimony introduced to determine whether the loss incurred was reasonable relative to the damage caused, loss was recorded an imprecise manner, and most of the evidence introduced to establish loss was attributed to conduct not alleged in the Indictment or not cognizable under the CFAA. (ER at 116-117 (RT 725:21- 726:12).)

With regard to Count Three, the Defense argued that the Government had not provided sufficient evidence of intent or a substantial step to establish liability for the inchoate crime of attempt to damage a protected computer under § 1030(a)(5)(A). (ER at 116 (RT 725:3-10).)

The Court denied the motion. (ER at 119 (RT 731:25).)

E. Jury Instructions

The Defense requested that the Court have the Jury Instructions exclude from consideration as to the elements of each offense harms not cognizable under the CFAA. Specifically, the Defense asked the Court to exclude from consideration alteration of data that was backed up and readily retrievable, (ER at 120 (RT 755:2-7), alleged harm to the CMS caused by the mere sharing of passwords or the creation of additional accounts used by the co-conspirators to access the CMS, (ER at 120 – 124 (RT 755:19-759:10), and harm caused by the sending of the Cancer Man emails to Fox 40 viewers and Brandon Mercer. (ER at 84 (RT 128:15-23); ER at 129 (RT 769:18-770:15).) The Jury Instructions adopted by the Court do not caution the Jury about excluding these harms. (ER at 196 (CR 118).)

F. Verdict and Sentencing

Mr. Keys was found guilty on all three counts and was sentenced to a custodial sentence of 24 months to be served concurrently and 24 months of supervised release. (ER at 176 (CR 175).)

G. Restitution

Mr. Keys was ordered to pay $249,956.00 in restitution. (ER 176 (CR 175 at 6).) $200,000 relates to alleged damage to the Green Links Database, and $49,956 relates to "the value of employee time expended on responding to [Mr. Keys]

actions in telephone calls, meetings, e-mails, and the initial and subsequent response to defacement of the Los Angeles Times website." (ER at 283 (CR 168).)

The value of the Green Links Database "was calculated at $10.00 per customer" although no testimony or evidence was offered at trial for this proposition, and no receipts, invoices, spreadsheets or expert testimony were offered at the restitution hearing to support this hearsay statement. (ER at 163 - 164 (Restitution RT 12:18-13:4); ER at 258 (GX 1002, at ¶ 4).) Additionally, no credible evidence was offered, either at trial or the restitution hearing, that Fox40 "lost" $200,000 worth of customers and that Mr. Keys alleged access and copying of an email address list from the Green Links Database necessitated hiring a new vendor and rebuilding and entirely new database. (ER at 88 (RT 149:10-22).)

ARGUMENT SUMMARY

At trial, the Government, over a standing objection and repeated objections, introduced irrelevant and highly prejudicial evidence of uncharged conduct. Concurrent with this, it introduced, over objection, evidence of uncharged and charged conduct relating to CFAA Damage and Loss that did not meet the legal definition of those terms. The Government's insistence on introducing evidence via uncharged conduct mentioned nowhere in the Indictment resulted in a constructive amendment of Count Two of the Indictment. Additionally, the introduction of improper CFAA Damage and Loss evidence was confusing and prejudicial. Furthermore, the Government failed to prove that Mr. Keys took a substantial step

in his attempt sufficient for a conviction under Count Three. Finally, the Restitution Order should be vacated because it is not supported by the evidence.

ARGUMENT

I. THE GOVERNMENT CONSTRUCTIVELY AMENDED COUNT TWO OF THE INDICTMENT AT TRIAL

The Government introduced a course of conduct materially distinct from the course of conduct described in the Indictment involving wholly different victims and instrumentalities of the alleged crime. The introduction of this distinct course of conduct by the Government to satisfy the elements of Count Two of the Indictment constructively amended the Indictment.

A criminal defendant's right to have his conviction reversed when a constructive amendment or variance occurs is derived from the Fifth Amendment of the Constitution, which states that "[no] person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V; *see also U.S. v. Ward*, 747 F.3d 1184, 1189 (9th Cir. 2014). This clause has been interpreted as making it the "exclusive prerogative of the grand jury finally to determine the charges, and once it has done so neither a prosecutor nor a judge can change the charging part of an indictment to suit [his or her] own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes." *Ward*, 747 F.3d at 1189 (citing *Ex parte Bain*, 121 U.S. 1, 10 (1887).)

Although deriving from the same constitutional right, the standard for reversing a criminal conviction is different whether the deviation is characterized as a constructive amendment or a variance. *Id*. "[C]haracterizing an instruction as a constructive amendment typically mandates reversal, while a variance requires reversal only if it prejudices a defendant's substantial rights." *Id.* Claims of constructive amendment are only reviewed de novo where they have been raised at trial. *Id*.

A. Mr. Keys Preserved His Constructive Amendment Objection

Defense's objections on the record are sufficient to preserve an appeal based on constructive amendment. The 9th Circuit in *Ward* found the defense's constructive amendment objection was preserved where the defendant asked for a jury instruction prohibiting the Jury from considering uncharged conduct in deciding whether the elements of the crime had been satisfied. Specifically, Defense counsel stated "I'm very worried that they will look at this instruction, and the jury will think that it can consider uncharged conduct, and whether there's evidence that he might have known a different identity rather than one that's charged." *Id*. This objection to the Jury charges was enough to preserve the objection despite counsel's failure to explicitly cite the Fifth Amendment. *Id*. at 1188-89. Further, counsel also does not need to use the phrase "constructive amendment" at trial to preserve the objection. *U.S. v. Lloyd*, 807 F.3d 1128, 1164 (9th Cir. 2015).

Counsel for Mr. Keys raised objections objections similar to those in *Ward* during deliberations on jury instructions. Specifically, counsel asked the Trial Court to instruct the Jury to ignore facts related to the Cancer Man emails in deciding whether the elements of Count Two had been satisfied. (ER at 126-127 (RT at 765-66).) The Defense's concern in allowing the introduction of the "Cancer Man" emails was that "nothing regarding Cancer Man and Skinner e-mails, nothing that took place before December 8, nothing regarding e-mail addresses attributed to [Fox 40 viewers] were included in the superseding indictment." (ER at 127 (RT 766:6-9).) Further, the defense expressed concern "that so much of the facts and information and evidence . . . introduced [was] unrelated to what was expected out of Count Two under the superseding indictment" and that the Jury would inevitably render a decision on Count Two influenced by evidence concerning unindicted conduct. (ER at 126 (RT 765:14-17).)

The Judge agreed that the conduct relating to the Cancer Man emails was mentioned nowhere in the Indictment, and that the only "notice" that the "Cancer Man" emails would be used to satisfy Count Two was the date range that extended beyond the edit of the latimes.com website article. (ER at 127 (RT 766:12-15).) Although the Trial Court took Defense's objections under advisement, the final Jury charges did not caution the Jury against inclusion of the Cancer Man emails in

deciding whether Count Two had been satisfied. Rather Jury Instructions No. 21 and No. 22 instructed the Jury to consider conduct occurring outside the time of the edit of the latimes.com article, from October 28, 2010 to January 5, 2011. (ER at 196 (CR 118 at 23-24).) Additionally, the Government frequently referred to the Cancer Man emails in their opening and closing arguments when discussing what the Jury should consider when deliberating on Count Two of the Indictment. (ER at 135-155 (RT at 809 – 829).) Thus Mr. Keys constructive amendment claim is preserved and must be reviewed de novo.

B. Conduct Related to the "Cancer Man" Emails Was Not Alleged in the Indictment, Yet Was Used Extensively at Trial to Satisfy the Elements of Count Two

A constructive amendment of the Indictment occurs "when conduct necessary to satisfy an element of the offense is charged in the Indictment and the government's proof at trial includes uncharged conduct that would satisfy the same element." *Ward*, 747 F.3d at 1191. Count Two of the Indictment does not allege any additional facts beyond those alleged in Count One. The only difference between Count Two and any of the other counts is the inclusion of the wider date range. Because Count Two does not describe any additional facts, the court must look to the facts alleged in Count One to establish what conduct is being charged by Count Two.

Count One of the Indictment describes a course of conduct in which Matthew Keys, using the alias "AESCracked" and "A2SCracked," conspired to

"make unauthorized changes to web sites that Tribune Company used to communicate news features to the public; and to damage computer systems used by Tribune Company." (ER at 237 (Indictment p. 3 ¶ 3).) This object was allegedly achieved by Mr. Keys by in part identifying the Tribune Company, Fox 40, and the Los Angeles Times as targets for "online intrusion and web vandalism." (ER at 237 (Indictment p. 3 ¶ 4).) Mr. Keys also shared login credentials to "make changes to Tribune Company's CMS." (ER at 237 (Indictment p. 3 ¶ 5).) Lastly, it was part of the conspiracy to "alter the online version of a news feature published on the website of the Los Angeles Times." (ER at 237 (Indictment p. 3 ¶ 8).) The Indictment then goes on to list all the overt acts of the conspiracy occurring exclusively between December 8 and December 15, 2010. These overt acts are: a discussion regarding "gain[ing] unauthorized access to computer systems of Fox" (ER at 237 (Indictment p. 3 ¶ 9).); creating additional usernames and passwords that would grant access to the CMS (ER at 238 (Indictment p. 3 ¶ 10).); issuing a verbal command to cause damage to the CMS (ER at 238 (Indictment p. 4 ¶ 11).); and a member of the conspiracy revising the latimes.com tax cut story. (ER at 238 (Indictment p. 4 ¶ 14).)

The facts alleged in Count One, realleged as the course of conduct satisfying Count Two, tell a story of online intrusion and web vandalism of systems owned and operated by the Tribune Company. The Trial Court read Count Two as only

relating to the revision of the latimes.com story. In her opening statement of the case, Judge Mueller described Count Two as alleging "that Keys kept and used usernames and passwords for malicious purposes to help another person alter a story on the website of the Los Angeles Times." (ER at 4-5 (RT 4:22 – 5:1).) This reading is clearly encouraged by the conspicuous absence, among other things, of any mention of emails, the email list obtained from Green Links Database, any mention of the third party email services used to transmit the emails (Yahoo and Google), the individuals who received the Cancer Man emails, or any of the aliases used by Mr. Keys to send the Cancer Man emails.

The Government nevertheless used the Cancer Man emails to satisfy the elements of Count Two. Count Two requires the (1) actual transmission of information or a code that (2) causes damage without authorization and (3) for felony liability, the damage must result in at least $5000 of loss. The Government heavily implied throughout the course of the the trial that the sending of the Cancer Man emails caused both damage and subsequent loss to Fox 40 and the Tribune Company. In their opening statement, the Government described Mr. Keys sending of the emails to his former boss and Fox 40 viewers as an "attack" that preceded and was distinct from the attack he engaged in with his co-conspirators. (ER at 8 (RT 13:19-22).)

During its opening, the Government also told the Jury to consider the time and money spent figuring out who was behind the Cancer Man emails, how to respond, and how to make it stop. (ER at 9 – 10 (RT 14:9 – 15:20).) The implication of this admonition being that Mr. Keys was culpable for purported CFAA Damage and Loss resulting from this uncharged conduct. Defense counsel raised numerous objections both in their motion in limine and during trial that the Cancer Man emails were irrelevant and highly prejudicial. (ER at 15, 18, 27 (RT 25:4-12; 61:14-22; 71:15-18); ER at 232-233 (CR 69).)

During the first day of trial the Government elicited testimony from Brandon Mercer that focused extensively on the sending of the Cancer Man emails and the time and money spent responding to this uncharged course of conduct. (ER at 19-85 (RT 63:4-129:18).) For example, Brandon Mercer was asked "[w]hat was the effect when one of [the Cancer Man emails] would go to the entire newsroom?" To which he responded "[i]t temporarily shut down people from doing their job." (ER at 32 (RT at 76:22-24).) Mr. Mercer was also asked to opine on the effect of the emails on his business. He responded:

> This was terrifying to the business. We were at a pivotal point in the renaissance of Fox 40. We had put -- me personally -- blood, sweat and tears for two years into this, and we are at a point now where we were starting to really gain some traction. We had an iPad giveaway coming out. We had a new website. We had new shows. And to have something that would be communicated with the public of the nature seen in the previous e-mails was -- there couldn't have been anything more important at that moment for the station and for Tribune."
>
> (ER at 33-34 (RT 77:21 – 78:5).)

Again, the clear implication of this testimony being that the Cancer Man emails, and the response to them, qualify as CFAA Damage and Loss. During direct examination of Mr. Mercer, the Government introduced an itemized list of time Mr. Mercer and other executives spent responding to the Cancer Man emails. (ER at 253 (GX 127); ER at 55-56 (RT 99:16 – 100:15).) The itemized list includes 2 hours for Brandon Mercer labeled "phone calls, emails to viewers," 12 hours for Greg Saunders talking to Fox 40 viewers who received the Cancer Man emails, and 10 hours by Sam Cohen responding to viewers. (ER at 253 (GX 127).)

Finally, during the Government's closing arguments, the Government specifically directs the Jury to consider the testimony of Brandon Mercer regarding his time spent responding to the Cancer Man emails to calculate loss. (ER at 153 (RT at 827:9-24).). Further, the Government describes the Cancer Man emails as being specifically "calculated" to waste employees of the Tribune Company's time and money and directs the Jury to take this into consideration when deliberating on Count Two. (ER at 156-157 (RT at 891:22-892:2).)

C. The Difference Between What Was Alleged in the Indictment and the Conduct Presented at Trial Constitutes a Constructive Amendment

The divergence described above between the Government's Indictment and their case at trial is analogues to 9th Circuit cases in which the Court found a constructive amendment. The 9th Circuit in *Ward* summarized the principle that

runs though constructive amendment cases as requiring courts to have a "sensitivity to both the jury instructions as a reflection of the indictment, and to the nature of the proof offered at trial. More specifically, when conduct necessary to satisfy an element of the offense is charged in the indictment and the government's proof at trial includes uncharged conduct that would satisfy the same element, we need some way of assuring that the jury convicted the defendant based solely on the conduct actually charged in the indictment." *U.S. v. Ward*, 747 F.3d 1184, 1191 (9th Cir. 2014). The Court in *Ward* determined that they were faced with a situation where a constructive amendment had occurred because the defendant was charged with identity theft as to two named individuals and evidence regarding individuals not named in the Indictment was introduced at trial. This constituted a constructive amendment as the "identity of the victims was necessary to satisfy an element of the offense because aggravated identity theft requires proof that the victim was a real person." *Id.* at 1192.

Conversely, courts have declined to find a constructive amendment where "the indictment simply contains superfluously specific language describing alleged conduct irrelevant to the defendant's culpability under the applicable statute." *Id.* "In such cases, convictions can be sustained if the proof upon which they are based corresponds to the offense that was clearly described in the indictment." *Id.* at 1191. For example, there was no constructive amendment where the indictment

"alleged that the defendant had used two specific weapons—a Smith and Wesson .357 and a Chinese model 9mm . . . [and] the evidence at trial matched the allegations in the indictment, but a verdict form asked simply that the jury find whether the defendant brandished a firearm." *Id.* (citing *U.S. v. Hartz*, 458 F.3d 1011, 1020 (9th Cir. 2006).) The Court declined to find a constructive amendment because "the verdict form did not alter the behavior on which the defendant could be convicted, as no evidence was introduced that the defendant had used a weapon other than the two referenced in the indictment, and use of either firearm would have been sufficient to support conviction of the offense charged in the indictment." *Id.*

As used by the Government, the Cancer Man emails were not "conduct irrelevant to the defendant's culpability under the applicable statute." *Id.* Rather, the Government used the Cancer Man emails to establish that Mr. Keys was engaged in a campaign of CFAA Damage and Loss that occurred prior to and was distinct from the campaign of damage and loss caused by the conspiracy to edit the latimes.com website alleged in Count One. The loss and damage caused by the Cancer Man campaign was in part due to the transmission of emails directed at victims not associated with the Tribune Company and not named in the Indictment, namely subscribers to the Fox 40 iPad contest giveaway email mailing list.

The Government presented the targets of the email campaign and the methods Mr. Keys used to carry out that campaign as crucial to establishing every element of Count Two. Specifically, for the Jury to find that that the Cancer Man emails satisfy Count Two, they needed to find that sending harassing emails constituted the "knowing[] . . . transmission of a program, information, code, or command" designed to "intentionally cause[] damage without authorization, to a protected computer." § 1030(a)(5)(A). Because the Government framed the Cancer Man conduct as satisfying the elements of § 1030(a)(5)(A) it is not clear whether the Jury convicted on the basis of the website edit or the Cancer Man emails not mentioned in the Indictment. Thus, Count Two of the Indictment should be reversed due to the constructive amendment of the Indictment.

II. THE JURY WAS PERMITTED TO CONSIDER HARMS NOT COGNIZABLE AS CFAA DAMAGE AND LOSS

Over a standing objection and repeated objections at trial, the Trial Court allowed the government to introduce irrelevant and highly prejudicial evidence not legally cognizable as CFAA Damage or Loss. Among other things, the Government elicited testimony and introduced evidence of the following as purported instances of CFAA Damage and resulting CFAA Loss: (1) the copying of a Fox40 email address list from the Green Links Database (ER at 86-87 (RT 147:23 – 148:21).); (2) the mere threat of harm, as opposed to actual harm, to the

CMS (ER at 84 (RT 128:15-23).); and (3) the creation of "back door" user accounts on the CMS. (ER at 100, 120-125 (RT 414:15-19; 755:2-760:6).).

A. Mr. Keys Preserved His Objections as to CFAA Damage

The Defense had a standing objection to the admission of any evidence related to the Cancer Man emails. (ER at 107-108 (RT 491:24-492:4).) Additionally, the Defense asked the Court to adopt jury instructions that would have excluded from consideration the alteration of data that was backed up and readily retrievable, (ER at 120 (RT 755:2-7), alleged harm to the CMS caused by the mere sharing of passwords or the creation of additional accounts used by the co-conspirators to access the CMS, (ER at 120 (RT 755:19-759:10), and harm caused by the sending of the Cancer Man emails to Fox 40 viewers and Brandon Mercer. (ER at 84 (RT 128:15-23); ER at 129-130 (RT 769:18-770:15).) The Jury Instructions adopted by the Court do not caution the Jury about excluding these harms. (ER at 196 (CR 118).)

B. Copying an Email Address List is Not CFAA Damage

Copying information from a database does not cause CFAA Damage. The CFAA criminalizes the unauthorized access and copying of information under § 1030(a)(2)(C). Mr. Keys is charged in the Indictment under § 1030(a)(5)(A), damaging a protected computer. If the unauthorized access and copying of information constitutes CFAA Damage, this would subject conduct that violates §

§ 1030(a)(2)(C) to the higher sentencing maximum of § 1030(a)(5)(A). Section 1030(a)(2)(C) would also be rendered redundant.

Whether the copying of data can constitute CFAA damage in a criminal case appears to be a matter of first impression for the Ninth Circuit and all the Federal Appeal Courts. Several district courts across the country have ruled on the issue, but only in the civil context. District Courts in the Ninth Circuit are split on the matter, but the majority of the District Courts nationally have held that it does not. *See NetApp, Inc. v. Nimble Storage, Inc.*, No. 5:13-CV-05058, 2015 WL 400251, at *11, 14 (N.D. Cal. Jan. 29, 2015)("the mere copying of information does not constitute a claim of 'damage' within the meaning of the CFAA") (collecting cases); *see also Custom Packaging Supply, Inc. v. Phillips*, No. 2:15-CV-04584, 2016 WL 1532220, at *4 (C.D. Cal. Apr. 15, 2016) (dismissing Plaintiff's CFAA damage claim because it was solely based on copying of files) ("Defendants cite multiple cases holding that "damage" means actual harm to computers or networks as a result of a defendant's unauthorized accessed to a protected computer, rather than economic harm due to the commercial value of the data itself.").

The majority view is correct in this instance, as allowing the copying of data to constitute CFAA Damage runs the risk of making every CFAA unauthorized access case involving the transfer data an unauthorized damage case. But this cannot have been Congress' intent, as it clearly delineated between unauthorized

access claims and unauthorized damage claims and provided for different penalties for both. *Compare* 18 U.S.C. § 1030(a)(2)(C) *with* 18 U.S.C. § 1030(a)(5)(A). It is a basic canon of statutory construction to avoid a reading of a statute that renders sections redundant. *See Chickasaw Nation v. U.S.,* 534 U.S. 84, 94 (2001), *See also Ratzlaf v. U.S.,* 510 U.S. 135, 140-41 (1994). Additionally, a charge under § 1030(a)(5)(A) automatically adds four points to a defendant's U.S. Sentencing Guidelines' Calculation. (*See* U.S.S.G. § 2B1.1(b)(18)(A)(2).) The plain text of the CFAA, as well as the Sentencing Guidelines, supports the common sense view that unauthorized access is a separate crime from unauthorized damage, to be punished in different ways.

Yet, by allowing a broad definition of CFAA Damage to include the mere copying of data allows prosecutors to turn most CFAA unauthorized access cases into unauthorized damage cases even where no data has been deleted, impaired, or rendered inaccessible. This thwarts Congressional intent, and a plain text reading of the CFAA, to limit the scope of unauthorized damage to some actual harm to a computer or access to it and renders much of the CFAA superfluous as most unauthorized access cases could simply be charged under § 1030(a)(5)(A).

C. CFAA Damage Should be Based on Actual Harm and Not Speculative Harm

A lurking issue in this case is what it means for the "integrity" of the data to be impaired. *See* 18 U.S.C. § 1030(e)(8) ("the term "damage" means any

impairment to the integrity or availability of data, a program, a system, or information"). Implicit in the minority of cases that hold copying of data, and the view that possession of usernames and passwords, impairs the integrity of the data is a notion of integrity of the data being compromised by the mere unauthorized possession of the data, or the threat that damage could occur even if it hasn't. Some courts point to a 1996 Senate Report that mentions this possibility in passing without much analysis. *See, e.g. Gen. Motors L.L.C. v. Autel. US Inc.*, No. 14-14864, 2016 WL 1223357, at *10 (E.D. Mich. Mar. 29, 2016) ("the legislative history of the [CFAA] supports the conclusion that intentionally rendering a computer system less secure should be considered 'damage' under § 1030(a)(5)(A), even when no data, program, or system, is damaged or destroyed." (citation omitted).); *see also See* S. REP. N0.104-357, at 11 (1994). But the CFAA has been amended numerous times since 1996, and the view that the integrity of data or a system can be impaired by the mere threat of harm is outdated, if it ever was a valid concept to begin with.

Likewise, the 2000 case *Shurgard Storage Centers, Inc. v. Safeguard Self Storage, Inc.,* 119 F.Supp.2d 1121(W.D.Wash.2000), that is often cited for the proposition that copying files can be CFAA Damage, is no longer good law because of subsequent amendment to the CFAA. *See Garelli Wong & Associates, Inc. v. Nichols*, 551 F. Supp. 2d 704, 710 (N.D. Ill. 2008) ("We also point out that

the CFAA was amended after the decision in *Shurgard* . . . . Reliance [on it] is no longer compelling in light of the statutory amendments and other cases decided post-amendment."); *Resdev, LLC v. Lot Builders Ass'n, Inc.*, No. 6:04-CV-1374, 2005 WL 1924743, at *5 (M.D. Fla. Aug. 10, 2005) (rejecting *Shurgard*). Given the CFAA's extensive history of amendment, a passing mention in a twenty-year-old Senate Report on the CFAA is not sufficient to broaden the definition of CFAA Damage such that it vitiates a large portion of the statute by turning almost every unauthorized access crime into an unauthorized damage crime merely because information was obtained or new user accounts created.

Additionally, District Courts have rightly pointed out that *Shurgard's* definition of CFAA "integrity" runs counter to the plain dictionary meaning of "integrity." *See Resdev, LLC v. Lot Builders Ass'n, Inc.*, No. 6:04-CV-1374, 2005 WL 1924743, at *5 (M.D. Fla. Aug. 10, 2005) ("Integrity however, ordinarily means "wholeness" or "soundness," Oxford English Reference Dictionary 731 (Rev. 2nd ed.2002), and contemplates, in this context, some diminution in the completeness or useability of data or information on a computer system."); *Worldspan, L.P. v. Orbitz, LLC*, No. 05-CV-5386, 2006 WL 1069128, at *5 (N.D. Ill. Apr. 19, 2006) ("The CFAA does not define "integrity," but the dictionary definition is "an unimpaired or unmarred condition: entire correspondence with an original condition: SOUNDNESS." Webster's Third New International Dictionary

1174 (1971) (emphasis in the original).). *Shurgard* and its progeny run contrary to the majority of District Courts in the country that hold that CFAA damage must involve some type of actual impairment to a computer or the rendering of that system inaccessible. *See Phillips*, 2016 WL 1532220, at *4 ("Defendants cite multiple cases holding that "damage" means actual harm to computers or networks as a result of a defendant's unauthorized accessed to a protected computer, rather than economic harm due to the commercial value of the data itself.") (collecting cases). Thus, for there to be CFAA Damage, there must be actual harm to a computer system, whether through the deletion of data or rendering it inaccessible.

Finally, as this Court noted in *U.S. v. Nosal*, the CFAA is not a misappropriation of information statute, it is for the most part an anti-hacking statute. *See U.S. v. Nosal*, 676 F.3d 854, 863 (9th Cir. 2012) ("[T]he plain language of the CFAA "target[s] the unauthorized procurement or alteration of information, not its misuse or misappropriation." (citation omitted).) Thus, because neither the copying of data nor the creation of new usernames and password is not unauthorized procurement of information, nor its alteration, copying data or the creation of user accounts is not CFAA Damage. Consequently, no CFAA loss can follow.

D. Creation of User Accounts is Not CFAA Damage Because It Does Not Delete Data, Impair Data, or Access to Data, or System Functionality

The creation of usernames and passwords is a basic function of many shared computer systems or databases. At trial, the government introduced evidence regarding the creation of user accounts by Mr. Keys, which the government repeatedly called "backdoors," as proof of CFAA Damage. The Trial Court at one point commented that the creation of user accounts evidence could support the charges in the Indictment. (ER at 99, 100, 134 (RT 353:4-18; 414:10-17; 801:20-23).) As such the Trial Court endorsed the view that the creation of user accounts could constitute CFAA damage by impairing the "integrity" of the data and/or system. But, as discussed directly above, this runs contrary to the majority view of CFAA Damage and the dictionary definition of "integrity."

There was no testimony that any data was impaired, deleted, or rendered inaccessible merely by the creation of the user accounts. Rather, new data was added to the system - the new usernames and passwords - and the system functioned normally as it would with the routine creation of any user account. It may have been unauthorized access to enter the CMS and create the user accounts, but the Government did not charge this. It charged unauthorized damage when there was none.

E. It Was Error to Deny a Jury Charge Stating That if the Jury Found the Data was Backed up There was No CFAA Damage.

The latimes.com website edit did not constitute damage as the "integrity or availability" of the information was never impaired. Several District Courts have agreed with the theory that deletion of data does not constitute CFAA Damage where that information is otherwise available. For example, *Instant Tech., LLC v. DeFazio*, 40 F. Supp. 3d 989, 1019 (N.D. Ill. 2014) *aff'd,* 793 F.3d 748 (7th Cir. 2015) held that there was no CFAA Damage where deleted information remained available in email trash folder and on another computer accessible to the Plaintiff. *Grant Mfg. & Alloying, Inc. v. McIlvain*, No. 10-CV-1029, 2011 WL 4467767, at *8 (E.D. Pa. Sept. 23, 2011); *aff'd,* 499 F. App'x 157 (3d Cir. 2012) held that because the records marked for deletion were still available and accessible there was no CFAA damage. *Cheney v. IPD Analytics, L.L.C.*, No. 08-CV-23188, 2009 WL 1298405, at *6 (S.D. Fla. Apr. 16, 2009) held that the "deletion of files alone does not constitute damage. . . if the deleted data is still available to the plaintiff through other means."). *Dana Ltd. v. Am. Axle & Mfg. Holdings, Inc.*, No. 1:10-CV-450, 2012 WL 2524008, at *6 (W.D. Mich. June 29, 2012) held there was no CFAA damage where deleted files could be recovered. Thus, it was error not to permit the Jury to consider whether the existence of previous versions of the latimes.com story meant there was no CFAA Damage.

Moreover, there was no testimony at trial that conclusively established that any files were deleted. Rather, the trial testimony is consistent with the proposition that the changes to the latimes.com website story simply constituted a new saved version of the story, one that was easily restored to its prior version via the CMS, a CMS system that did not have its functionality impaired in any way and functioned at all relevant times as it was programed to do. (ER at 92-93 (RT 228:23 – 229:9).) Thus, while Mr. Keys alleged actions may have been an instance of unauthorized access, they did not cause CFAA Damage sufficient for a conviction under Section 1030(a)(5)(A).

F. The Rule of Lenity Requires a Narrow Interpretation of CFAA Damage

The CFAA cases cited above that discuss the meaning of impairment to the "integrity" of the data or system are all civil. Our research turned up no criminal CFAA cases that analyzed whether copying data, creating new user accounts, or the mere threat of harm to a system constituted CFAA Damage. Given the ambiguity in the definition of CFAA Damage as evidenced by the above case-law, the Rule of Lenity requires that CFAA Damage be interpreted narrowly because "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1134 (9th Cir. 2009); *see also Nosal*, 676 F.3d at 863 ("We construe criminal statutes narrowly so that Congress will not unintentionally turn ordinary citizens into criminals.") Given the

District Courts nationally are divided on what it means to impair the "integrity" of data, CFAA Damage should be construed solely to apply to instances where actual harm to a computer occurs, or a computer is rendered inaccessible.

G. The Jury Was Permitted to Consider Harms Not Cognizable as CFAA Loss

The penalties for a violation of § 1030(a)(5)(A) are determined in part by the amount of "loss" established at trial. *See* § 1030 (c)(4)(A)-(G). In this particular case, to establish felony liability, the Government needed to establish loss exceeding $5,000. (ER at 219 (CR 118 at 24).). "Loss" is defined as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." § 1030(e)(11). District Courts have limited cognizable loss to those directly related to "computer impairment or computer damages." *Farmers Ins. Exch. v. Steele Ins. Agency, Inc*., No. 2:13-CV-00784-MCE, 2013 WL 3872950, at *21 (E.D. Cal. July 25, 2013); *see also BHRAC, LLC v. Regency Car Rentals, LLC*, No. CV 15-CV-865, 2015 WL 3561671, at *3 (C.D. Cal. June 4, 2015). This interpretation excludes excludes business losses, or other loss revenue not directly related to the computer impairment. *Farmers*, 2013 WL 3872950 at *21; s*ee also BHRAC*, 2015 WL 3561671 at *3. To the extent that CFAA Loss in this case was

based on improper notions of CFAA Damage the Jury was presented with CFAA Loss numbers that should have been excluded.

H. The Loss Numbers Were Speculative and No Expert Established that they Were Reasonable

While it is not always necessary to have an expert testify to CFAA Loss numbers, there should have been such testimony in this case given the highly speculative nature of the loss numbers submitted to the Jury. As discussed above, good deal of the alleged CFAA Loss numbers entered into evidence were related to the response to the Cancer Man emails and included activities not related to responding to a computer impairment such as phone calls, emails and meetings to discuss the impact of the Cancer Man email campaign on subscribers or employees. Additionally, a good deal of CFAA Loss testimony in this case was based on Tribune Company employees testifying to their salary at the time and the time they allegedly spent responding to the Cancer Man emails course of conduct or the edit of the latimes.com story. No expert testimony established that any of these loss figures were reasonably related to the intrusion, investigation, or response to the latimes.com story edit.

III. THE INTRODUCTION OF IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE REQUIRES REVERSAL

"Unfair prejudice" refers to an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one" or "evidence designed to elicit a response from the jurors that is not justified by the evidence." 2

Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence,* § 403.04[1][b] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 1997). Here, the cumulative impact of irrelevant and prejudicial evidence that was admitted against Mr. Keys tainted the entire trial.

At the top of its opening statement the Government described to the Jury the the Cancer Man email campaign. (ER at 7 (RT 12:9-22).) As discussed above, the emails predate and are unconnected with the edit of the latimes.com story. Moreover, as argued above, the Cancer Man emails did not damage any computer systems. The emails at most exhibit misappropriation of information.

Alongside the Cancer Man email campaign, the Government presented to the Jury evidence such as the copying of the Green Links Database email address list and the creation of user accounts on the CMS that did not constitute CFAA Damage. Not only was this information irrelevant to the Government's actual charges against Mr. Keys, but it was inflammatory and prejudicial. The government's reliance on uncharged conduct gravely enhanced the danger that empaneled jurors viewed Mr. Key's guilt to be established by evidence that was unrelated to the offenses being tried. This danger was particularly apparent, given the fact that final jury charges failed to caution the Jury from factoring the Cancer Man email campaign into its final decision. Further, Jury Instructions No. 21 and

No. 22 instructed the Jury to consider conduct occurring outside the time frame in which the latimes.com story was edited. (ER at 218-219 (CR 118 at 23-4).)

The Ninth Circuit has rightly been particularly cautious in safeguarding against prejudicial evidence with minimal probative value. *See U.S v. Ellis*, 147 F.3d 1131, 1136 (9th Cir. Or. 1998). (reversing the conviction of defendant charged with receiving and concealing stolen explosives due to improper admission of evidence of the destructive capability of the stolen explosives); *U.S. v. 20 Layton*, 767 F.2d 549, 553 (9th Cir. 1985)(reversing defendant's conviction due to unduly prejudicial tape recordings of multiple suicides).

In *U.S. v. Bland*, 908 F.2d 471, 474 (9th Cir. 1990), the defendant, like Mr. Keys, waived his Miranda Rights when making a statement to the Government. *Id.* at 472. The Ninth Circuit reversed the defendant's conviction because at voir dire the district court told the jury venire of the details underlying the warrant for the defendant's arrest. *Id*. Despite the defendant's confession, the Court determined that the district court's error was not harmless: it held that these comments influenced the jury to the extent that the defendant could no longer enjoy a fair trial. *Id.*

As held in *Bland*, the admission of prejudicial and irrelevant evidence in the instant case should not be characterized as harmless error simply because Mr. Keys made a prior statement to the government. Rather, Mr. Keys is constitutionally

entitled to a fair trial, and was deprived of this right once the government elected to rely on unindicted conduct to prove its case. The cumulative effect of all the improperly introduced, highly prejudicial, evidence denied Mr. Keys' right to a fair trial by needlessly confusing the Jury.

IV. THE GOVERNMENT EVIDENCE WAS INSUFFICIENT TO PROVE THAT MATTHEW KEYS ATTEMPTED TO DAMAGE TRIBUNE'S COMPUTER SYSTEMS

Count Three of the Indictment alleges that Keys attempted to transmit a program, information, code, or command intended to cause damage without authorization to a protected computer that would have aggregated to at least $5000 in loss. (ER at 241 (Indictment at p. 6 ¶ 1-2).) At the close of trial, the Defense moved for acquittal under Fed. R. Crim. P. 29 on the grounds that the Government had not met its evidentiary burden for attempt. (ER at 115-116 (RT 724-725).) Mr. Keys motion was denied. (ER at 119 (RT 731:25).) Denied motions for acquittal are reviewed de novo. *Yossunthorn*, 167 F.3d at 1270. The Court of Appeals will uphold a conviction when, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id*. To prove attempt, the Government must prove that Mr. Keys (1) had the specific intent to commit the charged crime, and (2) he committed an overt act which was a substantial step towards committing the charged crime. *See U.S. v. Gracidas-Ulibarry*, 231 F.3d 1188, 1192 (9th Cir.

2000). The Government's evidence to satisfy either of these elements was insufficient.

To establish attempt, the Government introduced an IRC conversation in which Mr. Keys communicates to a co-conspirator, "Sharpie," that he can grant him access to the Tribune CMS again. (ER at 112 (RT 641:22-23); ER at 256 (GX 506).) While Mr. Keys is attempting to regain access to the Tribune CMS, Sharpie discusses possible strategies for damaging Tribune's computer systems, including the possibility of replacing the "whole front page layout" of the Chicago Tribune. (ER at 112-113 (RT 641-642); ER at 256 – 257 (GX 506, GX 507).) The Government also introduced computer logs that show Mr. Keys actually engaged in efforts to login to the Tribune CMS. (ER at 114 (RT 645:12-17).) The IRC conversations, and the computer logs showing Mr. Keys trying to login to the Tribune CMS, were the only evidence introduced by the Government to satisfy attempt. (ER at 117-118 (RT 726-727).) This evidence is insufficient to establish either element of the offense.

Proof of specific intent must be as to each element of the charged crime "even when the statute [does] not contain an explicit intent requirement." *Gracidas-Ulibarry*, 231 F.3d at 1192 (citing *U.S. v. Darby*, 857 F.2d 623, 626 (9th Cir. 1988).) Applying this principle to an attempt to commit § 1030(a)(5)(A), the Government must prove that Keys intended to transmit a program, information,

code, or command, and that this transmission was intended to cause damage without authorization to a protected computer. The only transmissions that Keys actually made was directed at accessing the Tribune CMS. (ER at 114 (RT 645:12-17).) Mr. Keys himself characterized these transmissions as intended to grant Sharpie access to the system. (ER at 112-113 (RT 641-642); ER at 256-257 (GX 506, GX 507).) Thus the Government's evidence, at best, establishes that Keys intended to grant a third-party unauthorized access[2] to the Tribune CMS, not that he intended to damage the Tribune CMS.

The Government also failed to prove that Keys took a substantial step to damage a protected computer. Actions that merely demonstrate Keys was *preparing* to damage a protected computer are not sufficient. *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1102 (9th Cir. 2011), as amended (Aug. 31, 2011) ("Mere preparation to commit a crime does not constitute a substantial step."). Rather, the substantial step must be of a kind that it "unequivocally" demonstrates that a protected computer would have been damaged "unless interrupted by independent circumstances." *Id.* Actions that are "necessary" to commit a crime, even when undertaken with "unquestionably criminal" intent, are also not sufficient. *Id*. For example, putting on a disguise in the parking lot of a bank was not considered

[2] Access a computer without authorization is a separate crime under the CFAA, 18 U.S.C. § 1030(a)(2), and was not charged here.

sufficient even where the defendant admitted that his preparations were for the purpose of robbing the bank. The court reasoned that for an action to be a "substantial step" it must "establish a sufficiently clear external manifestation of the suspect's specific intent to rob a particular bank in a particular manner in the immediate future." *Id.* at 1102–03 (citing *U.S. v. Still*, 850 F.2d 607, 609 (9th Cir. 1988).).

Mr. Keys' attempt to login to the CMS, and ostensibly grant Sharpie access, is analogous to the defendant discussed in *Still* and *Hernandez-Cruz* preparing a disguise and weapons for use in the commission of the substantive offense. In attempting to login, Mr. Keys was, at best, trying to lay the groundwork for Sharpie to potentially carry out one of the various strategies for damaging Tribune's computer systems. (ER at 112-113 (RT 641-642); ER at 256-257 (GX 506, GX 507).) It is not clear, however, that once Sharpie got access whether he or Keys would have sought to actually damage the Tribune's front page, alter one article as Sharpie had already done, or abandoned their plans to damage the Tribune entirely. *See Holder*, 651 F.3d at 1103 ("[E]ven after extensive preparations, a suspect could well decide to desist from his criminal endeavor."). Granting access was not a "clear external manifestation" of a specific intent to damage a particular website or computer system much like preparing disguises was not considered a clear manifestation to rob a particular bank. *See id.* Thus, the

Government has failed to establish that Keys took a substantial step towards commission of the substantive crime, seeking to damage a particular protected computer.

V. THE RESTITUTION AWARD WAS NOT SUPPORTED BY THE PREPONDERANCE OF THE EVIDENCE

The Government's evidence submitted to support restitution does not satisfy the preponderance of the evidence standard, and should be vacated or amended. "[T]he district court [may] utilize only evidence that possesses 'sufficient indicia of reliability to support its probable accuracy.'" *U.S. v. Waknine*, 543 F.3d 546, 557 (9th Cir. 2008) (quoting *U.S. v. Garcia-Sanchez,* 189 F.3d 1143, 1148-49 (9th Cir.1999)). Specifically, the Government "must provide the district court with more than just the general invoices" identifying losses for restitution. *U.S v. Menza*, 137 F.3d 533, 538-39 (7th Cir. 1998). The Government must also provide "sufficient explanations (supported by evidence reflected in the record)" showing those losses directly relate to the charged conduct. *Id*.; *accord U.S. v. Brock-Davis*, 504 F.3d 991, 1002 (9th Cir. 2007).

The Government presented no invoices or receipts documenting the $200,00.00 of restitution it attributed to the alleged need to rebuild the Green Links Database. (ER at 163 (Restitution RT 12:21-24).) Indeed, no evidence was presented at trial that any "customers" were lost or that the Green Links Database was deleted, or needed to be rebuilt, or was damaged in any way. (ER at 88 (RT

149:10-22).) The $200,000.00 figure was apparently calculated, according to hearsay statements in an FBI 302 report submitted at the restitution hearing, on the basis of $10 a lost "customer." (ER at 163 (Restitution RT 12:18-13:4).)

Additionally, the Government's evidence at trial contradicts some of the evidence it presented at the restitution hearing. The calculations of hourly rates used for the restitution calculations for some of the Tribune Company employees contradicts their testimony as to the salaries they were paid. (ER at 160 – 162 (Restitution RT 8:14 – 10:14).)

Even if there was no contradiction in the numbers, they are improperly based on a summary of alleged loss. It is error for the Trial Court to "rely[] exclusively on the one-page loss summaries provided by the victims" *Waknine*, 543 F.3d at 546. The Trial Court adopted its Restitution amount based on a short summaries provided by the Tribune Company to the Government that were then summarized by the Government at the Restitution Hearing. (ER at 163-164 (Restitution RT 12:25 – 13:11).) In addition to contradicting testimony about employees' salaries, these summaries do not provide the detailed explanation of loss required by *Waknine*. *See id.*

The evidence presented to support restitution does not meet the relatively lenient standard of a preponderance of the evidence. It is based on contradictory testimony and documentation, and not supported by the trial record. The employee

time-cost documents are unreliable summaries, lacking specifics necessary to satisfy the standard. The database loss sheet does not explain how the alleged database loss could have resulted directly from the charged conduct. For the above reasons, the restitution order should be remanded to the district court for rehearing.

CONCLUSION

For the forgoing reasons Mr. Key's conviction should be reversed. In the alternative, a new trial should be ordered and the restitution order against him should be vacated, or the Court should order such relief as it sees just.

Dated: August 24, 2016

Respectfully Submitted,

By: */s/Tor Ekeland*

Tor Ekeland
Mark H. Jaffe
TOR EKELAND, P.C.
195 Plymouth Street
Brooklyn, NY 11201
Tel: 718-737-7264
Fax: 718-504-5417
tor@torekeland.com
mark@torekeland.com

Jason S. Leiderman, SBN 203336
LAW OFFICES OF JAY LEIDERMAN
5740 Ralston Street, Suite 300
Ventura, California 93003
Tel: 805-654-0200
Fax: 805-654-0280
jay@criminal-lawyer.me

Pro Bono Attorneys for Defendant Matthew Keys

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendant-Appellant Matthew Keys is not aware of any related cases pending in this Court.

Dated: August 24, 2016

By: */s/Tor Ekeland*
Tor Ekeland
TOR EKELAND, P.C.
195 Plymouth Street
Brooklyn, NY 11201
Tel: 718-737-7264
Fax: 718-504-5417
tor@torekeland.com

Jason S. Leiderman, SBN 203336
LAW OFFICES OF JAY LEIDERMAN
5740 Ralston Street, Suite 300
Ventura, California 93003
Tel: 805-654-0200
Fax: 805-654-0280
jay@criminal-lawyer.me

Pro Bono Attorneys for Defendant-Appellant Matthew Keys

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2016, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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.

By: */s/Tor Ekeland*

Tor Ekeland
TOR EKELAND, P.C.
195 Plymouth Street
Brooklyn, NY 11201
Tel: 718-737-7264
Fax: 718-504-5417
tor@torekeland.com

Jason S. Leiderman, SBN 203336
LAW OFFICES OF JAY LEIDERMAN
5740 Ralston Street, Suite 300
Ventura, California 93003
Tel: 805-654-0200
Fax: 805-654-0280
jay@criminal-lawyer.me

Pro Bono Attorneys for Defendant Matthew Keys

Certificate of Compliance with Rule 32

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief contains 12,745 words, excluding the parts of the brief exempted by Fed. R. App P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac Version 15.24 in 14 point Times New Roman font.

Dated: August 24, 2016

By: */s/Tor Ekeland*

Tor Ekeland
TOR EKELAND, P.C.
195 Plymouth Street
Brooklyn, NY 11201
Tel: 718-737-7264
Fax: 718-504-5417
tor@torekeland.com

Jason S. Leiderman, SBN 203336
LAW OFFICES OF JAY LEIDERMAN
5740 Ralston Street, Suite 300
Ventura, California 93003
Tel: 805-654-0200
Fax: 805-654-0280
jay@criminal-lawyer.me

Pro Bono Attorneys for Defendant-Appellant Matthew Keys