# 12-240

*To Be Argued By:*
SARALA V. NAGALA

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 12-240**

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UNITED STATES OF AMERICA,
*Appellee,*

-vs-

STAVROS M. GANIAS,
*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

**BRIEF FOR THE UNITED STATES OF AMERICA**

DAVID B. FEIN
*United States Attorney*
*District of Connecticut*

SARALA V. NAGALA
ANASTASIA E. KING
SANDRA S. GLOVER *(of counsel)*
*Assistant United States Attorneys*

**Table of Contents**

## Table of Authorities

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

### Cases

**Statutes**



**Rules**



**Other Authorities**

## Statement of Jurisdiction

The district court (Ellen Bree Burns, J.) had subject matter jurisdiction over this criminal case under 18 U.S.C. § 3231. Judgment entered on January 18, 2012, Joint Appendix 26 ("JA__"), and the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on January 18, 2012, JA26. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

## Statement of Issues Presented for Review

1. Whether the district court properly denied a motion to suppress computer evidence that was seized pursuant to valid warrants and examined within a reasonable period of time after the seizure.

2. Whether the district court abused its discretion in denying the defendant's motion for a new trial after it held a full evidentiary hearing regarding a juror's Facebook posts and found that the juror was credible and had not been partial during the trial or deliberations.

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## BRIEF FOR THE UNITED STATES OF AMERICA

### Preliminary Statement

Stavros Ganias is a former IRS agent and accountant who was convicted of willfully evading more than $160,000 of income tax owed to the federal government. Ganias perpetrated his crimes by, among other things, manipulating a computer accounting system to reflect improper and fraudulent entries and failing to report income he received from companies owned by his co-defendant, a former client of his who pleaded

guilty to assisting in the presentation of false tax returns.

On appeal, Ganias argues (1) that his Fourth Amendment rights were violated through the government's searches and seizures of his computer data; and (2) that the district court abused its discretion in denying his new trial motion based on alleged juror misconduct, after holding an evidentiary hearing to investigate the misconduct and determining that the juror at issue was credible. Neither claim supports reversal.

## Statement of the Case

On October 31, 2008, a federal grand jury returned an indictment against James McCarthy and Stavros Ganias. Government's Supplemental Appendix 9-24 ("GA__"). Ganias was McCarthy's personal accountant and also the accountant for two of McCarthy's companies, American Boiler and Industrial Property Management ("IPM"). The indictment alleged one count of conspiracy against both defendants, two counts of tax evasion against McCarthy, and two counts of tax evasion against Ganias. GA10-24.

The grand jury returned a superseding indictment against McCarthy and Ganias on December 21, 2009. JA8. It alleged one count of conspiracy, one count of tax evasion against both defendants for evading McCarthy's taxes, one count of tax evasion against McCarthy for evading his own taxes, and two counts of tax evasion

against Ganias for evading his own taxes. *See* JA29-46. Initially, the case was assigned to Chief Judge Alvin Thompson of the District of Connecticut.

In late February 2010, Ganias filed a motion to suppress evidence seized from the computers of his accounting business, Taxes International, which maintained records for American Boiler and IPM. JA10. Judge Thompson held a two-day hearing on the motion, JA11, and denied it on April 14, 2010. JA12. The case was later transferred to Judge Ellen Bree Burns for trial. JA12. In May 2010, Judge Burns severed the charges against Ganias alone from the other charges. JA13.

Jury selection for Ganias's trial on counts four and five of the superseding indictment began on March 8, 2011.[1] JA16. Evidence began two days later, and the trial completed on April 1, 2011. JA16-18. The jury rendered a verdict of guilty on both counts. JA18. On the eve of sentencing, Ganias filed a Rule 33 motion arguing that juror misconduct required a new trial. JA22-24. Judge Burns denied the motion after holding a hearing to examine the juror. Special Appendix 30-37 ("SA__"); JA595-639.

On January 5, 2012, the district court sentenced Ganias to 24 months' imprisonment, followed by three years of supervised release.

[1] All the other counts were later dismissed.

JA25-26. Ganias's voluntary surrender date has been stayed pending resolution of this appeal.[2]

## Statement of Facts and Proceedings Relevant to this Appeal

### A. The Offense Conduct

Before he left to start his own accounting business, Ganias worked for the IRS for 14 years as a "decorated and oft-promoted" IRS Revenue Agent and then an International Examiner. GA5; Presentence Report ("PSR")) ¶ 5. As a Revenue Agent, he was responsible for auditing Fortune 1000 companies in Connecticut. PSR ¶ 5. Armed with his "extensive experience" in tax preparation and "specialized knowledge" of the American tax system, he opened Taxes International, an accounting, bookkeeping, and tax preparation business in Wallingford, Connecticut, in the 1980s. GA5; PSR ¶ 5.

For several years, most of Ganias's accounting clients were individuals or small businesses who paid small monthly fees. PSR ¶ 6. But in late 1998, Ganias met McCarthy, who engaged Ganias as the accountant for his family; his industrial boiler business, American Boiler; and IPM. PSR ¶¶ 6, 19-26. IPM regularly paid Ganias as much as $11,150 in monthly fees. PSR ¶ 6.

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[2] Ganias's motion for release pending appeal was not opposed. *See* JA26. He remains released on an unsecured bond.

The government's investigation into Ganias and McCarthy began with a tip made to Army Criminal Investigative Command ("CID") from a confidential source in August 2003. JA58-59. IPM had been hired under a government contract to maintain and provide security for the defunct Stratford Army Engine Plant in Stratford, Connecticut. JA56, 59. The source made various allegations of improper conduct by McCarthy, including that McCarthy billed work performed by IPM employees to the Army, when in fact the employees were performing work for American Boiler. JA59-60.

The investigation revealed that, between 1999 and 2003, McCarthy and Ganias diverted American Boiler income to IPM. *See* PSR ¶ 20. Ganias prepared the federal corporate tax returns for American Boiler. PSR ¶ 21. For each tax year from 1999 to 2002, the American Boiler corporate income tax returns did not report as income the money that was diverted to IPM. PSR ¶ 21. Additionally, between 2000 and 2003, Ganias issued IPM checks to pay for McCarthy's personal expenses, including the purchase of a helicopter, investments, and property-related transactions. PSR ¶ 24. Although these were payments for McCarthy's personal expenses, they were neither recorded as income to McCarthy nor reported on his 2000-2003 returns, which Ganias prepared. PSR ¶¶ 24-25.

Just as Ganias hid income for McCarthy, he also hid his own income from the IRS. The evidence at trial demonstrated that Ganias had significantly underreported the gross receipts of Taxes International on his income tax returns. PSR ¶ 9. Ganias used various mechanisms to conceal his income in the books of Taxes International and IPM, and he did not issue Forms 1099 informing the IRS how much IPM paid him. PSR ¶¶ 7-10. The evidence at trial also showed that Ganias issued payments to himself from IPM under two different names, resulting in overpayment to him. PSR ¶ 12. Ganias also would prepare bank deposit slips that attempted to hide income he received from IPM. PSR ¶ 14. In total, Ganias underpaid the government by approximately $164,351 for tax years 1999 through 2003. PSR ¶ 9.

At trial and on appeal, Ganias claims that the mistakes in his books were unintentional oversights. JA350-51; Defendant's Brief ("Def. Br.") at 14-15. But Ganias's history as a former IRS agent; the repetitive nature of the false entries; and the fact that he did not make "unintentional" errors that inured to his financial detriment belied his explanation, and the jury eventually convicted him of two counts of tax evasion. Indeed, in its ruling on Ganias's motion for acquittal, the district court recognized that Ganias "was hardly a neophyte with regard to the use of QuickBooks, bookkeeping principles generally,

or the tax laws of the United States," and rejected Ganias's good faith defense. GA6-7.

### B. The Computer Searches[3]

During the investigation of this case, four warrants—none of which Ganias contests as improperly obtained—authorized the search and seizure of certain material belonging to McCarthy and Ganias. A set of three warrants, obtained at the outset of the investigation into IPM and American Boiler in November 2003, authorized the seizure of evidence and instrumentalities of a crime, including computer equipment and data related to possible fraud by McCarthy and others. At that point, the investigation involved American Boiler, IPM, and a third company that was a vendor for IPM, Industrial Mechanical Services.[4] GA101. The investigation

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[3] Additional facts are set forth below as necessary.

[4] Industrial Mechanical Services, owned by William DeLorenze, acted as a subcontractor for IPM for IPM's government contract. JA328-29, JA333-34. The government's investigation revealed that Industrial Mechanical Services would inflate invoices for IPM that IPM would then submit to the government, resulting in overpayment to IPM. *See* JA333-34; GA51-52, GA96-97. DeLorenze eventually pleaded guilty to making a false tax return. GA87-93. As explained below, the investigation and prosecution of DeLorenze prolonged the investigation into McCarthy and Ganias.

was focused on possible fraud under the government contract through which IPM was receiving payments from the Army; Ganias had been responsible for submitting reimbursement requests to the Army for IPM. JA343.

The first three warrants ("the November 2003 warrants") authorized searches at the offices of American Boiler, IPM, and Taxes International, where Ganias did the accounting work for IPM and American Boiler, and where he kept related records.[5] *See* JA430-453. During these searches, agents did not seize computers from the Taxes International offices. Rather, identical copies of the computers' hard drives, or forensic mirror images, were created during the search. JA79.

Until April 2006, government agents reviewed only the data authorized by the November 2003 warrants; as Ganias admits, the government did not search any Taxes International data that did not pertain to IPM or American Boiler until after another warrant authorized it to do so. JA227-28, JA248-49, JA292, JA299, JA314-15, JA340, JA348, JA370, JA378-79; Def. Br. at 42.

By the end of 2005, however, through the examination of the material lawfully seized in November 2003, in combination with other investigative methods, the government developed prob-

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[5] Of the November 2003 warrants, Ganias challenges only the Taxes International warrant.

able cause to believe that Ganias had evaded income taxes, including his own. JA345-46. After attempting to obtain Ganias's consent to search the records Ganias kept for Taxes International and Ganias's personal tax records (both of which were located on the mirror images of the Taxes International computers seized in November 2003), JA346-48, JA420, the government obtained a second warrant. That warrant, dated April 2006, authorized the government to search the Taxes International records and Ganias's personal records that were copied during the earlier search. JA347-48, JA454-72.

In late February 2010, Ganias moved to suppress evidence obtained from the Taxes International computers through both the November 2003 and April 2006 warrants. JA10. Judge Thompson denied the motion and the case proceeded to trial. SA6-29; JA12, JA16.

### C. The Trial

Jury selection took place on March 8, 2011, with testimony to begin March 10, 2011. JA16. Late on the evening of March 9, one of the jurors, Juror X, posted a comment on his Facebook page pertaining to jury duty starting the following day, on which his Facebook "friends" commented.[6] JA550. During the trial, Juror X posted

[6] Facebook is a social networking website through which individuals with accounts can invite other individuals to become online "friends." Once a "friend"

five other observations about the trial on Facebook and, at some point, became Facebook friends with another juror, Juror Y. JA551-52.

After Ganias was convicted, he sought a new trial on the ground that Juror X's Facebook posts evinced partiality against Ganias. GA102-10. Ganias also claimed that Juror Y was possibly exposed to the Facebook comments of Juror X and his friends, and therefore asked that both jurors be examined by the court and their Facebook records subpoenaed. GA102-10. The district court examined Juror X in an evidentiary proceeding and found credible his explanation that he and his friends were joking. JA626-27. The court also found that Juror X had abided by his obligation to consider only the evidence presented during trial while deliberating. SA35-36. Following the hearing, the court offered Ganias time to supplement the record, but he presented no new evidence of misconduct. JA638; GA111-23. Thus, the district court denied Ganias's motion for a new trial and for a further evidentiary hearing regarding Juror Y. SA30-37. The court also denied Ganias's motion to subpoena Juror X's and Juror Y's Facebook records. SA30-37.

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invitation is accepted, the individuals can share information and communicate with one another through their Facebook pages (subject to privacy setting set by each user).

## Summary of Argument

I. The district court properly denied Ganias's motion to suppress the Taxes International evidence seized pursuant to the November 2003 and April 2006 warrants. Ganias's main complaint is that the government took too long to conduct its investigation and, consequently, maintained the Taxes International data for too long. But the warrant under which the data was seized did not set a deadline by which the mirror images had to be analyzed. Absent such a limitation, the government need only conduct its analysis within a reasonable time—which it clearly did here—given its limited resources and the complicated and expanding nature of this investigation. Further, even if there were some violation, suppression is not warranted because the government's conduct was reasonable and exclusion of the evidence would serve no deterrent purpose.

II. Ganias's juror misconduct argument is also flawed. The Court found Juror X to be credible and impartial in its evidentiary hearing. This court requires "clear, strong, substantial, and incontrovertible evidence" that a "specific, nonspeculative impropriety has occurred" to justify post-trial inquiry of a juror. Given this standard, the district court did more than enough here and appropriately denied Ganias's motion for a new trial.

## Argument

### I. The district court properly admitted the evidence seized pursuant to valid search warrants.

#### A. Relevant facts

In late February 2010, Ganias moved to suppress evidence obtained from the Taxes International computers through both the November 2003 and April 2006 warrants. JA10.

On April 9 and 13, 2010, Judge Thompson held two lengthy hearings on Ganias's motion to suppress. JA11. Nine witnesses testified at the hearing; as detailed below, Judge Thompson made many findings of fact in a 24-page detailed opinion denying the motion to suppress.

The investigation into Ganias and McCarthy began with a tip from an anonymous caller, who reported misconduct by McCarthy and IPM in connection with IPM's maintenance and security of a decommissioned Army plant. SA6-7; JA54, JA58-60. The source stated that Taxes International, Ganias's accounting firm, performed accounting services for IPM. SA8; JA64. The source also alleged IPM employees were charging the Army for work they were actually performing for American Boiler. JA60.

On November 17, 2003, a magistrate judge signed three search warrants: (1) for the defunct Army plant; (2) for the Taxes International of-

fice; and (3) for American Boiler's office. SA8; JA72-73. The warrant for Taxes International authorized the seizure of "[c]omputer(s), computer hardware, software, related documentation, passwords, data security devices . . . monitors and/or televisions," that were evidence of the crime of theft of government property. JA432-34. It also authorized the seizure of "[a]ll books, records, documents, materials, computer hardware and software and computer associated data relating to the business, financial and accounting operations" of IPM and American Boiler, as well as other items. JA433.

Agents from Army CID and its specialized Computer Crimes Investigative Unit executed the warrants on November 19, 2003. SA9; JA73, JA76. At each location, including Taxes International, the computer specialists made forensic mirror images of the computers; in all, they made images of 11 hard drives, including three from Taxes International computers.[7] SA9; JA79.

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[7] As the district court explained, a mirror image of a computer is an exact copy of the data contained in a particular digital storage unit, such as a computer hard drive. Computer code is a series of zeroes and ones, each of which is called a bit; to make a mirror image, each zero or one is copied in sequence, "bit by bit." SA9, n.1; JA154-55. The computer specialists used a "write-blocker" to prevent the data from being altered in the process of making the mirror image.

No government agents present during the searches recalled telling or hearing someone else tell Ganias that any seized information would be "purged" if it did not fall within the scope of the warrant. JA166-67, JA197. The only evidence Ganias produced to support that contention was a self-serving affidavit signed by him stating that one of the agents present at the search "assured [Ganias] that those materials and files not authorized under the warrant and not belonging to American Boiler and IPM would be purged once they completed their search." JA428.

The computer specialists made mirror images of the computers because a full onsite search would have taken months to complete, for several reasons. SA10; JA181-82. Computer processing speed was substantially slower in 2003, which would have resulted in a very long onsite process. SA10. In addition, the agents did not have the proprietary software needed to access much of the data (and in fact would not get such access for more than a year). SA11; JA177, JA185-86. Finally, as with many computer

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JA154-56, JA192-93. To ensure that the original and the mirror image are forensically identical, a computer program calculates a unique number, or "hash value" for the original and, later, for the image. SA9-10, n.1; JA158-59. The hash value for the original here was identical to the hash value for the mirror image, reflecting that the image was identical to the original. SA9-10, n.1; JA159-60.

searches, there was a possibility that data within the scope of the warrant could have been hidden or disguised through encryption, which made onsite searching infeasible. SA10-11; JA162, JA182, JA194-96.

The mirror images from the 11 computers were compressed onto one external hard drive by the computer specialists. JA84-85, JA161-62. The computer specialists made two sets of copies of the external hard drive's contents; each set consisted of 19 DVDs. SA11; JA85-86. After the DVDs were created, all data on the external hard drive was permanently deleted. JA165.

In February 2004, the Army CID case agent sent one set of the 19 DVDs he received to the Army's forensic crime lab in Georgia for analysis and retained the other set in evidence. SA11; JA86-87. He testified that the Army typically does not delete data from DVDs stored in evidence for an ongoing investigation. JA122, JA137-38, JA147. In early June 2004, a forensic computer examiner in Georgia was assigned to analyze the 19 DVDs, including by searching for key words provided by the case agent. SA14; JA88, JA90-91, JA208-09. In the meantime, a new Army CID case agent was assigned. JA89. On July 1, the forensic examiner reported that the keyword search had resulted in more than 17,000 hits. JA211-12. After discussion with the new case agent, the examiner performed another search and copied several files, including

QuickBooks files and Turbo Tax files,[8] onto a separate DVD. SA14; JA213-15. These files were received by the Army CID agent around July 23, 2004. SA14; JA223, JA292.

In the meantime, Army CID case agents began to investigate whether Industrial Mechanical Services, the IPM subcontractor owned by William DeLorenze, had overcharged the Army by inflating invoices. JA328-29, JA333-34. This review was conducted using, among other things, government reimbursement vouchers seized at Taxes International. JA328-29, JA333-34. The investigation into DeLorenze, who initially implicated McCarthy in the invoice inflation scheme and later recanted, proceeded through 2005. JA342-43.

In May 2004, the IRS was brought into the investigation. JA416. IRS agents took the second set of 19 DVDs from the Army agent and gave it to an IRS computer specialist on June 30, 2004. JA240-41. That specialist bookmarked and extracted files from the 19 DVDs, including Turbo Tax and QuickBooks files. JA245-46. The specialist noted that, when she received the DVDs, there was a note referencing Taxes International stating: "(Return preparer) do not search." SA15; JA248. She did not search any files that were not covered under the warrant. JA248. She gave

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[8] Turbo Tax and QuickBooks are computer software programs used for accounting and tax purposes.

the extracted files to IRS agents in October 2004. JA253, JA418. In November 2004, the IRS computer specialist also performed a restoration of the computers seized at Taxes International;[9] she provided these restorations to IRS agents on November 30, 2004. SA15-16; JA251-53, JA338.

Between June and October 2004, the case agents were busy tracking down other leads in the investigation of McCarthy, IPM, DeLorenze, and American Boiler. JA294-95. In October 2004, the Army CID and IRS agents got together to review computer files sent to them by their respective computer specialists, but they could not view any Turbo Tax or QuickBooks files because their computers did not have the appropriate software. SA16; JA293-94. In November 2004, the Army CID agent finally was able to access QuickBooks files, but she only reviewed IPM QuickBooks files. SA16; JA295-96, JA314-15. It was not until late November 2004, after the IRS computer specialist had sent the restorations of the computers seized at Taxes International, that the agents could access the IPM and American Boiler files that they had lawfully seized under the warrant. SA16; JA296-98. At all times, the agents knew they were to look only for files related to American Boiler and IPM and

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[9] A restoration allows the user to review an imaged computer "as though they are sitting in front of one of the imaged computers running as it had been at the time of the image." JA252.

did not review Ganias's files, other than those relating to American Boiler and IPM. SA14-16; JA298, JA340, JA378-79.

Around the end of November 2004, an auditor told the IRS case agent that paper documents seized from Taxes International included checks from American Boiler's clients that were deposited into IPM's bank accounts with a notation that these payments were "loans" to IPM from American Boiler. SA16-17; JA338-39. After reconciling these records with subpoenaed bank records and the American Boiler and IPM files from the seized computers (which took significant time because of the complexity of the records and the fraud scheme), the agents began to question whether American Boiler's income was being reported properly on the tax returns prepared by Ganias. JA339. Further investigation showed that Ganias was not properly reporting income on behalf of American Boiler and IPM, and the agents developed suspicion in 2005 and early 2006 that Ganias was also underreporting his own income. SA16-17; JA341-46. Specifically, they noticed that Ganias had signed, on behalf of IPM, more than $1 million in IPM checks naming himself as the payee between 1999 and 2003. This income was not reported on his tax returns. JA346.

After the investigation was expanded to include Ganias, the government met with him in a proffer session in February 2006. SA17; JA346-

47. The government asked Ganias and his attorney for consent to access the QuickBooks files Ganias kept for himself and Taxes International. JA347. At that time, Ganias was told that the government still possessed the Taxes International data that was seized in November 2003. SA23; JA347-48.

Although the government did not know it at that time, the Taxes International data that it had seized in November 2003 *only* existed on the discs that it had in its possession. As the investigation subsequently revealed, and as Ganias admits, had the government not retained a copy of the Taxes International data from 2003 and been forced to seize the files as they existed in 2006, the original data (which showed the fraud) would have been irretrievable, as Ganias "corrected" at least 93 "errors" in his QuickBooks file just two days after execution of the November 2003 search warrant. Def. Br. at 12-13, n.6; GA99-100.

After learning in February 2006 that the government still had the Taxes International data seized in November 2003, Ganias neither asked the government to return or destroy that data nor filed a Rule 41(g) motion for return of property. SA23. Furthermore, Ganias did not respond to the government's request for consent to search his files. JA347-48, JA372.

In the absence of consent from Ganias, the government obtained a new warrant in April

2006, authorizing it to search the Taxes International hard drives seized in November 2003 for the "business, financial, and accounting activities" of Ganias and Taxes International. SA17; JA454-56. After that search, the agents determined that Ganias was manipulating QuickBooks to minimize his taxable income, including by improperly recording payments made to him by IPM as "owner's contributions," *i.e.*, infusions of personal capital into his accounting business, and by failing to apply payments received from clients to open invoices, thus causing the payments not to be recognized as income by the program. JA349-50.

After making these extensive factual findings, Judge Thompson denied Ganias's motion to suppress the data that was seized in November 2003 and searched pursuant to the April 2006 warrant. SA6-29. The court rejected Ganias's claim that the government should have abided by the Ninth Circuit's 2010 holding in *United States v. Comprehensive Drug Testing*, 579 F.3d 989, 1006-07 (9th Cir. 2010) (en banc) ("*CDT*"), which held that the government should return or destroy seized property that is beyond the scope of a search warrant. SA18-20. Instead, the district court applied the earlier precedent of *United States v. Tamura*, 694 F.2d 591 (9th Cir. 1982) and held that the government's actions were reasonable because it had followed valid search protocol, examined the computers within

any limitations imposed by the warrant, and obtained the April 2006 warrant when it wished to expand its investigation. SA20-25. Additionally, the court noted that Ganias had not sought return of his property by filing a Rule 41(g) motion. SA23-25. On these bases, the court denied the suppression motion.

### B. Governing law and standard of review

#### 1. Offsite searches must only be performed within a reasonable time.

The hallmark requirement of the Fourth Amendment is that searches and seizures must not be unreasonable. U.S. Const., amend. IV; *Skinner v. Railway Labor Execs. Ass'n,* 489 U.S. 602, 619 (1989). What is reasonable "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Roe v. Marcotte*, 193 F.3d 72, 77 (2d Cir. 1999) (internal quotations omitted).

Courts have long held that where the volume of material to be reviewed and seized is extraordinarily large or other practical considerations would render onsite review difficult, it is reasonable for government agents to seize the materials for later offsite review. *See United States v. Hargus,* 128 F.3d 1358, 1363 (10th Cir. 1997) (upholding seizure of an entire file cabinet when such seizure was motivated by the impracticability of onsite sorting); *Tamura,* 694 F.2d at 595-

96 (noting that agents may apply for specific authorization to remove material where onsite sorting is "infeasible"). Indeed, if government agents were to stay on the premises for several days—the time it might take to analyze a voluminous collection of material—that intrusion would likely be deemed unreasonable. *See United States v. Santarelli*, 778 F.2d 609, 616 (11th Cir. 1985) (where onsite examination of paper documents would have taken several days, agents acted reasonably in seizing documents for offsite review); *see also United States v. Schandl*, 947 F.2d 462, 465-66 (11th Cir. 1991) (had agents searched each document on site, the time required would have "substantially increase[d] . . . thereby aggravating the intrusiveness of the search" (internal quotation omitted)).

Offsite review is increasingly common for computer searches. Indeed, the current version of Rule 41 specifically provides that a warrant seeking electronically stored information "authorizes a later review of the media or information consistent with the warrant," unless otherwise provided. Fed. R. Crim. P. 41(e)(2)(B).[10]

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[10] This provision was added to the Rules in 2009. Prior to 2009, the Rules did not speak explicitly on seizure, copying, or review of electronically stored information. The 2009 Advisory Committee Notes explain that "consideration was given to a presumptive national or uniform time period within which any subsequent off-site copying or review" of elec-

The allowance for subsequent offsite review is necessary because, as courts have recognized, "[s]earching a computer for evidence of a crime 'can be as much an art as a science.'" *United States v. Vilar,* No. S305CR621KMK, 2007 WL 1075041, *38 (S.D.N.Y. Apr. 4, 2007) (quoting *United States v. Brooks*, 427 F.3d 1246, 1252 (10th Cir. 2005)). Moreover, computers can store millions of documents that require technical expertise to search, organize, and review.

In light of these practical considerations, many courts have authorized removal of computers for offsite review pursuant to search warrants. *See, e.g., United States v. Evers,* 669 F.3d 645, 652 (6th Cir. 2012) ("The federal courts are in agreement that a warrant authorizing the seizure of a defendant's home computer equipment…for a subsequent off-site electronic search

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tronic data would be necessary, but the Committee found that "the practical reality is that there is no basis for a 'one size fits all' presumptive period." The Committee recognized that a "substantial amount of time can be involved in the forensic imaging and review of information…due to the sheer size of the storage capacity of media, difficulties created by encryption and booby traps, and the workload of computer labs." Notably, the Committee stated that it was "not the intent of the amendment to leave the property owner without…a remedy" and explained that a "person aggrieved" by government seizure of property could file a Rule 41(g) motion.

is not unreasonable or overbroad" as long as there is a "sufficient chance of finding some needles in the computer haystack") (internal quotation omitted); *United States v. Grimmett*, 439 F.3d 1263, 1269 (10th Cir. 2006) ("[W]e have adopted a somewhat forgiving stance when faced with a 'particularity' challenge to a warrant authorizing the seizure of computers."); *United States v. Balon,* 384 F.3d 38, 48-49 (2d Cir. 2004) (recognizing, in the context of a condition of supervised release requiring review of a defendant's computer, that offsite review may allow for more comprehensive searches than onsite review); *Guest v. Leis*, 255 F.3d 325, 335 (6th Cir. 2001) ("Because of the technical difficulties of conducting a computer search in a suspect's home, the seizure of the computers, including their content, was reasonable in these cases to allow police to locate the offending files."); *United States v. Hay*, 231 F.3d 630, 637 (9th Cir. 2000) (seizure of entire computer reasonable where affidavit "justified taking the entire system off site because of the time, expertise, and controlled environment required for a proper analysis"); *United States v. Upham*, 168 F.3d 532, 535 (1st Cir. 1999) (the "narrowest definable search and seizure reasonably likely to obtain" the evidence described in a warrant is, in most instances, "the seizure and subsequent off-

premises search of the computer and all available disks").[11]

Under Rule 41, the government may retain a copy of any electronically stored data that was seized or copied. *See* Fed. R. Crim. P. 41(f)(1)(B). Rule 41 recognizes that the time period for executing the warrant refers only to "the on-site copying of the media or information, and not to any later off-site copying or review." Fed. R. Crim. P. 41(e)(2)(B).

Consistent with these provisions and the practicalities of reviewing voluminous computer data, courts have recognized that computer searches are not subject to strict time limits. *See, e.g., United States v. Triumph Capital Group, Inc.,* 211 F.R.D. 31, 66 (D. Conn. 2002)

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[11] The advent of technology to create a "mirror image" of a computer's hard drive—which was just becoming popular at the time of the 2003 search in this case—has mitigated the inconveniences associated with seizure of computers. With this technology, agents can create and keep an identical duplicate of a target computer, with "every bit and byte on the target drive including all files…[and] metadata [appearing] in exactly the order they appear on the original" computer, see *Vilar*, 2007 WL 1075041 at *35, n.22 (quoting Orin S. Kerr, Searches and Seizures in a Digital World, 119 Harv. L. Rev. 531 (2005)), without removing the target computer from the search premises, thus minimizing the intrusion on the computer owner.

("[C]omputer searches are not, and cannot be subject to any rigid time limit because they may involve much more information than an ordinary document search, more preparation and a greater degree of care in their execution."); *United States v. Mutschelknaus*, 564 F. Supp. 2d 1072, 1076 (D.N.D. 2008) ("The Fourth Amendment only requires that the subsequent search of the computer be made within a reasonable time."), *aff'd*, 592 F.3d 826 (8th Cir. 2010) (upholding 60-day extension for forensic review); *United States v. Hernandez*, 183 F. Supp. 2d 468, 480 (D.P.R. 2002) ("Neither Fed.R.Crim.P. 41 nor the Fourth Amendment provides for a specific time limit in which a computer may undergo a government forensic examination after it has been seized pursuant to a search warrant."); *see also United States v. Grimmett*, No. 04-40005-01-RDR, 2004 WL 3171788, *5 (D. Kan. Aug. 20, 2004) (similar), *aff'd on other grounds*, 439 F.3d 1263 (10th Cir. 2006).

Recognizing that law enforcement needs flexibility to search and review voluminous computer data, courts have upheld long periods of time for offsite review as "reasonable." For instance, in *United States v. Gorrell*, 360 F. Supp. 2d 48, 55, n.5 (D.D.C. 2004), the court acknowledged that the warrant did not specify a deadline for offsite review and held that a ten-month delay in processing did not make the search unreasonable. In so holding, the court noted that the

"prophylactic constraint" of a deadline for offsite review need not be imposed on law enforcement. *Id.* Likewise, a ten-month delay was upheld in *United States v. Burns*, No. 07 CR 556, 2008 WL 4542990, at *8-*9 (N.D. Ill. Apr. 29, 2008), because there is "no constitutional upper limit on reasonableness." *See also United States v. Brewer*, 588 F.3d 1165, 1172-73 (8th Cir. 2009) (upholding delay of several months in searching computers); *United States v. Syphers*, 426 F.3d 461, 469 (1st Cir. 2005) (one year court-issued extension to search computer because of investigation backlog was reasonable, absent a showing of prejudice resulting from the delay); *United States v. Winther*, No. 11-212, 2011 WL 5837083, *10-*12 (E.D. Pa. Nov. 18, 2011) (collecting cases finding delays in forensic searches reasonable).

This Court has also held, in an unpublished opinion, that a magistrate's order that did not set a time limit for review and "permitted the government to retain" computers "without temporal limitation" did not violate the Fourth Amendment. *United States v. Anson*, 304 Fed. Appx. 1, 3 (2d Cir. 2008) ("The claim that the inspection of the computers and CD-ROMs was untimely is contradicted by the [order amending the search warrant], which permitted the government to retain the 'computers and computer-related equipment' without temporal limitation. Accordingly, Anson's Fourth Amendment claims are without merit."). In the sole case Ganias

cites where a delay in offsite review was held unconstitutional, the government had not even commenced review within fifteen months, despite being directed by the court to do so multiple times. *See United States v. Metter*, 860 F. Supp. 2d 205, 215-16 (E.D.N.Y. 2012). In any event, the government has appealed that decision, and that appeal is currently pending before this Court. *See United States v. Metter*, No. 12-2423.

**2. Suppression**

The mere fact that a search may be unreasonable does not necessarily mean that the exclusionary rule applies. *See Herring v. United States*, 555 U.S. 135, 140 (2009); *see also United States v. Julius*, 610 F.3d 60, 66 (2d Cir. 2010) (noting that "a search that is found to be violative of the Fourth Amendment does not trigger automatic application of the exclusionary rule"). In particular, the exclusionary rule only applies where it "results in appreciable deterrence" to improper police conduct. *Herring*, 555 U.S. at 141 (internal punctuation omitted) (quoting *United States v. Leon*, 468 U.S. 897 (1984)); *Julius*, 610 F.3d at 66. In deciding whether to suppress evidence, the "flagrancy of the police misconduct constitutes an important step in the calculus." *Leon*, 468 U.S. at 911. In particular, where an officer's conduct is objectively reasonable,

> excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that...the officer is acting as a reasonable officer would and should act in similar circumstances.

*Illinois v. Krull*, 480 U.S. 340, 349 (1987). Furthermore, the benefit of deterring police misconduct must be weighed against the "substantial" costs of excluding evidence, including the cost of "letting guilty and possibly dangerous defendants go free . . . ." *Julius*, 610 F.3d at 66 (internal quotations omitted). Accordingly, "a court should order exclusion only after it has satisfied itself that 'the benefits of deterrence . . . outweigh the costs.'" *Id.* (quoting *Herring*, 555 U.S. at 141).

### 3. Standard of Review

On review of the denial of a motion to suppress, this Court reviews the district court's factual findings for clear error, viewing the evidence in the light most favorable to the government, and its conclusions of law *de novo*. *United States v. Ramos*, 685 F.3d 120, 128 (2d Cir. 2012), *pet'n for cert. filed*, No. 12-6551 (Sept. 28, 2012). A factual finding is clearly erroneous only when this Court has a "definite and firm conviction" that a mistake has been committed. *United States v. Sash*, 396 F.3d 515, 521 (2d Cir. 2005) (internal quotations omitted). "[W]here there are

two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Id.* (internal quotations omitted).

### C. Discussion

#### 1. The government's actions were reasonable and did not violate the Fourth Amendment.

The government's actions during this multi-year, multi-agency, multi-defendant evolving investigation met the reasonableness standard of the Fourth Amendment. As noted above, when reviewing whether the government's conduct was reasonable for purposes of the Fourth Amendment, all of the facts and circumstances must be considered. *Roe*, 193 F.3d at 77. It is clear here that, at each and every point in the investigation, the government respected Ganias's Fourth Amendment rights.

First, the November 2003 warrant did not include *any* restrictions concerning the time period for review and analysis of the images. Where the warrant does not specify a time period in which the review must be conducted—like the November 2003 warrant—this Court has allowed the government to retain computer material indefinitely and "without temporal limitation." *Anson*, 304 Fed. Appx. at 3. Ganias cannot impose a time limit on the government after the fact,

when the magistrate judge did not do so while approving the warrant.[12]

Second, the government's review of the data from the Taxes International computers occurred within a reasonable time, given the government's resources and its diligent investigation into the complicated frauds perpetrated by Ganias, McCarthy, and others. *See Gorrell*, 360 F. Supp. 2d at 55, n.5; *Burns*, 2008 WL 4542990, at *8-9; *Triumph Capital Group, Inc.,* 211 F.R.D. at 66; *Mutschelknaus*, 564 F. Supp. 2d 1072, at 1076; *Hernandez*, 183 F. Supp. 2d at 480. As the district court made clear, the government was unable to view the Turbo Tax and QuickBooks files—the files that were crucial to understanding the manner in which the frauds were perpetrated—for more than a year after the November 2003 seizure because the government's computers did not have the required proprietary software. SA11; JA177, JA185-86. All the while, both IRS and Army computer specialists worked diligently to pinpoint relevant files amongst the thousands on the seized computers and make

[12] Ganias cites a number of cases in which magistrate judges have ordered that review of seized computer equipment occur within a specified period of time. Def. Br. at 30, n.20. Those cases are simply inapposite here, where there were no such time constraints. Had the magistrate judge imposed a deadline here, the government would have complied with its requirements or sought extensions as necessary.

them accessible to the case agents. The government was also carefully pursuing leads that first led them to investigate IPM, then American Boiler, then William DeLorenze, and finally Ganias. The delay in the investigation was neither intentional nor improperly motivated—it was simply the result of limited resources and the complicated and expanding nature of the investigation.

Third, as the district court found, the government agents executed the November 2003 warrant in the least intrusive manner possible by making images of the computers, rather than seizing the computers themselves. SA24. After the warrants were executed, Ganias was allowed to conduct his business uninterrupted and he was not deprived of his business's computers for more than a few hours.

Fourth, Ganias does not (and cannot) dispute that the government agents who investigated him "scrupulously avoided viewing files they were not entitled to review." SA25. By confining their searches to documents authorized by the November 2003, warrant, the agents meticulously safeguarded Ganias's rights and policed themselves so that they would not view files that they were not authorized to review. JA298, JA340, JA378-79. The district court's factual findings on this point, which are unequivocal, can be reversed only if clearly erroneous. SA14-16, SA25. Ganias makes no claim that the court's finding

were clearly erroneous; in fact, he concedes that the agents' eyes "did not stray." Def. Br. at 42.

Fifth, when the agents developed probable cause to believe that Ganias may be evading taxes himself, they first offered Ganias the opportunity to consent to the search. After he failed to respond, the government sought a new warrant to search the accounting data of Taxes International and Ganias's personal spreadsheets. JA454-72. All of the data that Ganias seeks to suppress was reviewed under authority of the April 2006 warrant—a warrant Ganias has not challenged on any ground. And, as Ganias admits, if the government had not preserved that data from the November 2003 seizure, it would have been lost forever because Ganias "corrected" 93 errors in his books two days after the warrant was executed. Def. Br. at 12-13, n.6.

In sum, the facts and circumstances here demonstrate that the government acted reasonably in its investigation of McCarthy and Ganias. During the investigation, the government made efforts to minimize the intrusion on Ganias and to safeguard his Fourth Amendment rights. Although the investigation was prolonged due to a lack of resources and the complexity of the case, the agents diligently pursued many leads and abided by the Fourth Amendment's requirement that their searches and seizures be reasonable.

### 2. Ganias has not established that the government's actions were unreasonable.

Ganias's arguments that the government's seizure and review of data pursuant to the 2003 warrant was unreasonable are unpersuasive.

To begin, Ganias's proposed rule requiring return or destruction of all non-responsive computer data—during the course of an ongoing criminal investigation—is entirely impractical, given the government's need to maintain the evidentiary integrity of the mirror image in order for any data from the image to be admissible in court. That evidentiary integrity is a result of the identical match between the "hash value" of the original computer and the "hash value" of the mirror image. *See infra*, n.7; Kerr, 119 Harv. L. Rev. at 541. If the data on the image copy were altered even just slightly (as it would be if the government destroyed some of the data), the mirror image's hash value would change, and the government would no longer be able to prove that the image copy was identical to the original computer on the day of the search—an element required to authenticate computer evidence in any proceeding. *See* Richard P. Salgado, "Fourth Amendment Search and the Power of the Hash," 119 Harv. L. Rev. F. 38, 38 (2005) ("hashing is employed to confirm that data analysis does not alter the evidence itself"; "[i]f one altered [a file] by changing so little as one bit, the hash value of

the [file] would be different as well," and there "is more than reasonable assurance" that the altered file and the original "will not have the same hash value"); *see also* JA137-38, JA193, JA220 (agents would not delete evidence in an ongoing investigation, in order to "protect the integrity of the evidence"); JA124 (data on the mirror images was not segregable); *In the Matter of the Application of the USA For a Search Warrant for [Business Premises]*, No. 05-mj-03113-KRS (M.D. Fla. Jan. 30, 2006); GA131 (forensic analyst testified that if any data on the image was changed, the hash value would also change and the data could not be authenticated). As Professor Salgado notes:

> Generating the hash value of the image serves the purpose of allowing the analysis of a massive quantity of data to proceed with great confidence that the data were collected correctly and will not be tainted by the forensic process. A defendant can hardly be heard to claim a constitutional right to a lesser standard of evidence handling.

119 Harv. L. Rev. F. at 42-43. Were the government to alter a mirror image, it would open itself to criticism of its evidence handling techniques. Thus, Ganias's request that the government delete or return to him certain files from the image copy—during an ongoing investigation—is simply unworkable.

Next, Ganias argues that this Court should apply the rules announced in *CDT*. But that decision, which postdates the activity at issue here by seven years, and which has not escaped criticism,[13] is simply inapplicable to this case.

*CDT* involved the government's seizure of the drug testing records of *all* Major League Baseball players at certain facilities that collected drug testing specimens, when the government's evidence had shown that only ten players had tested positive for drug use. *See* 621 F.3d at 1166. The Ninth Circuit, in an en banc *per curiam* decision, affirmed a decision granting a motion to return property under Rule 41(g) and upheld quashal of a subpoena that sought all drug testing records and specimens. *Id.* at 1177.

*CDT* is distinguishable from the present case on several grounds, including that it dealt in part with a Rule 41(g) motion for return of property, which Ganias did not file here. *See supra,* pages 39-42. Rule 41(g), unlike suppression, is not intended to deter law enforcement from un-

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[13] *See, e.g., United States v. Stabile*, 633 F.3d 219, 241 n.16 (3d Cir. 2011) (noting that a "measured" approach based on the facts of each specific case is more desirable than the rigid rule announced in *CDT*). An earlier en banc opinion in *CDT*, which was withdrawn, was also criticized by other circuits. *See United States v. Mann*, 592 F.3d 779, 785-86 (7th Cir. 2010).

lawful seizure; instead, it is "concerned with those whose property or privacy interests are impaired by the seizure." *CDT*, 621 F.3d at 1173; *see also id.* at 1172 (method for curing government's "overreaching" is a Rule 41(g) motion); 2009 Adv. Comm. Notes to Fed. Rule of Crim. P. 41(e)(2)(B) (noting that although the rule does not set a deadline by which computer data must be reviewed, the aggrieved person has a remedy under Rule 41(g)).

In addition, *CDT*, which was published in September 2010, explicitly stated that it was setting forth guidance only "for the future," which the district court recognized. SA19 (quoting *CDT*, 621 F.3d at 1180). The government cannot reasonably be held to an out-of-circuit standard that did not exist until nearly seven years after its actions.

Perhaps recognizing this point, Ganias also cites *Tamura*, which was the relevant Ninth Circuit precedent at the time of the seizures here. *Tamura* involved a motion to suppress boxes and drawers of files that were seized for offsite review. 694 F.2d at 595. Although the court chastised the government for seizing documents that may have been outside of the scope of the warrant, it acknowledged that there could be instances where offsite review was necessary. *Id.* In addition, despite the fact that the government kept the material for six months, the court held that the government's actions were "motivated

by considerations of practicality rather than by a desire to engage in indiscriminate 'fishing,'" and affirmed the district court's decision denying the suppression motion. *Id.* at 597. Likewise, here, the government's motive in seizing the images was a practical one, and review was completed as quickly as possible under the circumstances.[14]

Ganias also relies heavily on *Metter*, a May 2012 district court opinion currently on appeal to this Court, to argue that a delay of fifteen months in review of computer data is presumptively unconstitutional. *Metter* involved the seizure of image copies of computers at the defendant's home and business. 860 F. Supp. 2d at 208-11. Again, this opinion postdates the events at issue here by several years (and also postdates the district court's opinion in this case). But even if it were applicable here, *Metter* involved more egregious government conduct, as the government had retained the documents "with no plans whatsoever to begin" review of the data. *Id.* at 214-15. The government not only failed to start the review in fifteen months, but also disregard-

[14] Ganias makes passing references to *Santarelli*, which notes that offsite review of seized documents was not problematic, "so long as any items found not to be relevant were promptly returned." 778 F.2d at 616. But the return of documents was not central in *Santarelli*, given that it was mentioned only briefly and that the court did not specify which, if any, documents needed to be returned to the defendant.

ed multiple requests from defense counsel and the court that it begin its review. *Id.* at 216. The court noted that the government's actions were "unreasonable and disturbing." *Id.* at 215.

*Metter*'s facts could hardly be more unlike those here. The district court here recognized that the government had been diligent, careful, and "scrupulously" respectful of Ganias's Fourth Amendment rights. SA14-15, SA25. The government did not disregard any requests by the court or defense counsel concerning the review. Indeed, Ganias did not protest when he learned of the government's retention of the files in February 2006. Here, the government did everything it should have, and Ganias has not shown that his Fourth Amendment rights were violated.[15]

Finally, Ganias's purported concern about government over-reaching through the creation of a vast "digital evidence room" with "private

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[15] Ganias also cites *In the Matter of the Application of the USA For a Search Warrant for [Business Premises]*, GA124-39, as support for his argument that the government cannot retain information on the "hope" that it may later have probable cause to conduct another search of the information. But there, the government requested that it be allowed to retain the imaged copies "in *toto*," after requesting several extensions of its deadline to review the data. GA125-27, GA136. Here, the warrant did not set a deadline for review of the seized material.

records, frozen in time and available to be searched as needed," Def. Br. at 36-37, is fully addressed by the provisions of Rule 41(g)—an avenue of relief that Ganias has never pursued.

Rule 41(g) provides that "[a] person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. . . . If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings."

There are no time limits on Rule 41(g) motions, and the movant need show that he is entitled to lawful possession of the property only by a preponderance of the evidence. *United States v. U.S. Currency Amounting to Sum of $20,294.00 or Less*, 495 F. Supp. 147, 150 (E.D.N.Y. 1980).

At no time to date, including before the April 2006 warrant was obtained, has Ganias made a motion for return of the Taxes International computer data seized in November 2003. The district court found that Ganias was aware that the government still had the data in February 2006, after the proffer session, and could have filed a Rule 41(g) motion at that time. SA23, SA25. Had he done so, the district court could have evaluated the government's "justifiabl[e] concern[]" about the preservation of evidence, SA24, and determined "whether the govern-

ment's interest could be served by an alternative to retaining the property." *In re Smith*, 888 F.3d 167, 168 (D.C. Cir. 1989).

In particular, had Ganias filed a Rule 41(g) motion, the court would have had the opportunity to consider at least two important questions. First, the court could have examined whether it would be feasible for the government to return or destroy portions of the mirror images, as Ganias now requests. *See infra*, pages 34-35. Second, the court could have evaluated the reasonableness of the government's progress in searching the data on the mirror images. For instance, if Ganias had filed a motion in early 2006 when he learned that the government had retained his files, the district court could have engaged in fact finding regarding the speed of the forensic analysis and, if appropriate, placed deadlines on the government for completing the work. In other words, had Ganias filed a Rule 41(g) motion, the district court could have balanced Ganias's privacy interests against the government's continued need for the data.

Ganias responds that, had he filed a Rule 41(g) motion, the district court likely would have deferred decision until a suppression hearing. Def. Br. at 45. But as he acknowledges, the deferral approach has been criticized, *see Doane v. United States*, No. 08 Mag. 0017(HBP), 2009 WL 1619642, *8 (S.D.N.Y. June 5, 2009), and he cannot speculate as to what the district court

would have done had he filed the motion. Indeed, the district court's analysis of the issue in its suppression decision suggests that the court may have ruled favorably upon a timely motion. SA23-24. Thus, although Ganias laments that "[s]urely there must be some paper that [he] can file to vindicate his Fourth Amendment rights in a federal court," Def. Br. at 45, the Federal Rules expressly provide for such relief under Rule 41(g).

**3. Suppression is inappropriate here.**

Even if this Court were to find a Fourth Amendment violation, on the facts of this case, there would be no basis for applying the exclusionary rule. The Supreme Court has long held that the purpose of the exclusionary rule is deterrence of illegal activity by law enforcement officers. *See, e.g., Elkins v. United States*, 364 U.S. 206, 217 (1960) ("The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guarantee in the only effectively available way—by removing the incentive to disregard it."). Where suppression of evidence would not "result in appreciable deterrence," its use is "unwarranted." *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 363 (1998); *see also Herring*, 555 U.S. at 140; *Julius*, 610 F.3d at 66; *United States v. Ajlouny*, 629 F.3d 830, 840 (2d Cir. 1980) (noting that the Supreme Court has "refused to apply the [exclusionary] rule to situa-

tions where it would achieve little or no deterrence").

The government's "scrupulous[]" adherence to the terms of the November 2003 warrants, SA25, its effort to obtain the April 2006 warrant when Ganias did not answer its request for consent, and its other reasonable actions throughout this investigation are not acts that require deterrence. As set forth above, the government acted reasonably at every turn. In such a case, the cost of suppression—"letting [a] guilty" individual "go free"—would "offend[] basic concepts of the criminal justice system." *Herring*, 555 U.S. at 141 (quoting *Leon*, 468 U.S. at 908).

Ganias has also argued for the "'extreme'" remedy of blanket suppression, which is utilized only in the "'most extraordinary'" of cases. *United States v. Liu*, 239 F.3d 138, 142 (2d Cir. 2000) (quoting *United States v. Foster*, 100 F.3d 846, 852 (10th Cir. 1996)). Even if Ganias could establish that the government effected a widespread seizure of items not within the scope of the warrant, he has not attempted to argue that the government acted in bad faith, the second element required for this "drastic" remedy. *See* Def. Br. at 45-48; *United States v. Matias*, 836 F.2d 744, 748 (2d Cir. 1988).

In sum, Ganias has not stated a Fourth Amendment violation, and has not shown that suppression is warranted in this case in any

event. The district court's denial of his motion to suppress should be affirmed.

## II. The district court did not abuse its discretion in denying Ganias's new trial motion based on alleged juror misconduct.

### A. Relevant facts

On March 8, 2011, the court empaneled the trial jury, which included Juror X. During voir dire, the court asked if any potential member of the jury, "could not consider a fair and impartial verdict in this case, based solely on the evidence presented and the law as given to you by the court." JA528. No potential jurors responded. JA528. Once the jury was empaneled, the court informed them that trial was going to begin on March 10. The court also instructed: "In the meantime you don't know anything about the case and you should not try to learn any more about it, because you're going to base your verdict solely on the evidence that you listen to in this courtroom." JA547.

Juror X is a bar tender who claimed to have about 1,800 friends on the social networking site Facebook, many of whom he befriended in order to encourage business at his bar. JA617. On the evening of March 9, Juror X posted the following comment on his Facebook page from his mobile phone: "Jury duty 2morrow. I may get 2 hang

someone . . . can't wait . . . . " JA550. Two friends added "comments" to Juror X's post: (1) "gettem (sic.) while the're (sic.) young !!!...lol"; and (2) "[Juror X], let's not be to (sic.) hasty. Torcher (sic.) first, then hang! Lol." JA550.

Sometime during the trial, it appears that Juror X became Facebook friends with Juror Y. JA551. Juror X posted the following comments on his Facebook page at various points during and shortly after the trial: (a) "Sh*t just told this case could last 2 weeks.. jury duty sucks!!"; (b) "Your honor I object! This is way too boring.. somebody get me outta here."; (c) "Guiness (sic.) for lunch break. Jury duty ok today."; (d) "GUILTY:)"; (e) "I spent the whole month of March in court. I do believe justice prevailed! It was no cake walk getting to the end! I am glad it is over and I have a new experience under my belt!" JA550-52.

The trial lasted 16 days, with the jury returning its guilty verdict on April 1, 2011. Sentencing was scheduled to take place on August 18, 2011. JA22. On August 17, Ganias filed a sealed motion for a new trial, alleging potential juror misconduct. JA23-24; GA102-110. The court held a conference on the motion and decided to hold an evidentiary hearing to question Juror X about his Facebook posts and his online friendship with Juror Y.

On August 30, 2011, the district court held a full evidentiary hearing to investigate the poten-

tial misconduct. JA595-639. Juror X testified at the hearing that he had recently cancelled his Facebook account because "it was taking too much time."[16] JA607. When asked about his pretrial comment about jury duty beginning the following day, Juror X unequivocally renounced any partiality and emphasized that his remarks, and his friends' remarks, were jokes. JA609. He stated:

> This is a joke, all friend stuff. I can tell you right now, if this is what you think, I had joked around with some of these friends that—this guy [name] is a customer in the bar, other ones are just friends. But when it came to the end of the trial, I had no mindset up. It was actually fascinating going through the whole thing. I was tired through a lot of it, but Mr. Ganias here seemed like a good guy, had a great family. My mind was not made up until the end.

JA609. When asked about his friend's use of the phrase "torcher (sic.) first then hang," Juror X stated that "it's her words" and that he "[didn't] know what she was talking about." JA611. He

[16] The account was already cancelled when the government received Ganias's motion. Thus, the government could not access the Facebook page and relied solely on the printed copies supplied by defense counsel, which appear to have been printed from Ganias's daughter's Facebook account. JA550-55.

later reiterated that he was impartial throughout the trial: "This [referencing his March 9 posting] is way in the beginning, and my mind, like I said, wasn't made up until we went into that room. In fact, I was pulling for him." JA611. When he was asked why he made his pre-trial comment, he said: "Just joking, joking around. You never joked around? You don't have friends you joke around with? It was just joking around." JA612. Juror X stated he was "absolutely" an "impartial and fair juror" and that he "maintained that [Ganias] was not guilty until we sat down in deliberation." JA622.

Regarding his online friendship with Juror Y, Juror X noted that all of the jurors had become friendly during the trial and had even held a reunion picnic after the trial completed. JA607-08. He acknowledged that he had become Facebook friends with Juror Y during the trial, primarily because he wanted to play golf with her fiancé. JA608, JA613-14, JA617. He did not remember whether he corresponded with Juror Y through Facebook, although he said that would have been unlikely because his wife also used the Facebook account and conversing with another woman through the account would have been "like hiding or sneaking, and [he] wouldn't do that." JA617-18. Juror X denied having any premature deliberations with Juror Y about the case. JA621. Finally, he noted that he did not have any discussions with Juror Y about his Fa-

cebook post referring to the trial being "way too boring." JA620-21.

Based on Juror X's responses and his demeanor, the district court found him credible: "I think we should end the inquiry at this point, I really do. You had the opportunity to question him with respect to this remark. He had satisfied me, maybe not you, but has satisfied me, as to the reasons for it, and I found him a very credible person." JA626. The court noted the substantial privacy interests jurors have after they complete their service, and stated that there was nothing regarding Juror Y "that suggests to me that we should make further inquiry." JA634. Nonetheless, the court gave defense counsel an additional week to raise any new evidence that could justify questioning Juror Y or requesting Juror X's and Y's Facebook records. JA638.

After Ganias did not produce any new evidence, GA115-23, the court issued a written ruling denying his motion for a new trial, SA30-37. The court noted the strict standard for inquiring into juror misconduct and held that the post-verdict examination of Juror X was an "appropriate and adequate response" to Ganias's initial claims of juror bias and misconduct. SA35-36. Ganias's claims, the court held, were "purely speculative and unsubstantiated," given Juror X's answers, and Ganias had not offered any evidence that "would cause the Court to question its credibility determination or to rebut the pre-

sumption that Juror X remained true to his oath and conscientiously observed the Court's instructions." SA35-36. The court concluded: "Simply put, the Court is satisfied that Juror X kept an open mind throughout the trial and participated in deliberations in good faith. Ganias has failed to demonstrate[] any juror bias or misconduct, let alone any prejudice." SA36. In light of the court's evaluation of Juror X's credibility, the court also denied Ganias's requests to subpoena Juror X's Facebook records and to interview Juror Y. SA35.

### B. Governing law and standard of review

"The sanctity of jury deliberations is a basic tenet of our system of criminal justice." *United States v. Schwarz,* 283 F.3d 76, 97 (2d Cir. 2002) (internal quotation omitted). That sanctity is pierced when a court "haul[s] jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences." *Id.* (quoting *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989) (quoting *United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983))). In particular, *Ianniello* recognized:

> [P]ost-verdict inquiries may lead to evil consequences: subjecting juries to harassment, inhibiting juryroom deliberation, burdening courts with meritless applica-

> tions, increasing temptation for jury tampering and creating uncertainty in jury verdicts. This court has consistently refused to allow a defendant to investigate jurors merely to conduct a fishing expedition.

866 F.2d at 543 (internal quotations and citations omitted).

Because of these risks, this Court has developed a stringent standard for justifying post-verdict investigation into juror conduct: there must be "clear, strong, substantial and incontrovertible evidence" that a "specific, nonspeculative impropriety has occurred which could have prejudiced the trial . . . ." *Moon*, 718 F.2d at 1234. Absent such a showing, no inquiry is necessary.

When a district court determines that investigation is warranted, the court is accorded much flexibility in designing—and curtailing—the inquiry. As *Moon* put it, "[w]hile the breadth of questioning should be sufficient to permit the entire picture to be explored, . . . that picture is painted on a canvas[] with finite boundaries." *Id.* Thus, "when and if it becomes apparent that the above-described reasonable grounds to suspect prejudicial jury impropriety do not exist, the inquiry should end." *Id.*

This Court reviews for an abuse of discretion the district court's denial of Ganias's motion for

a new trial and its handling of alleged juror misconduct. *United States v. Farhane*, 634 F.3d 127, 168 (2d Cir.), *cert. denied*, 132 S. Ct. 833 (2011). A district court abuses its discretion only "when its decision rests on an error of law or a clearly erroneous factual finding, or when its decision . . . cannot be located within the range of permissible decisions." *United States v. Gonzalez*, 647 F.3d 41, 57 (2d Cir. 2011). With respect to juror misconduct specifically, a trial judge has "'broad flexibility' in responding to allegations of such misconduct, particularly when the incidents relate to statements made by the jurors themselves, rather than to outside influences." *United States v. Sabhnani*, 599 F.3d 215, 250 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1000 (2011) (quoting *United States v. Thai*, 29 F.3d 785, 803 (2d Cir. 1994)).

**C. Discussion**

Ganias contends that the court erred in its handling of allegations of juror misconduct. Much of Ganias's brief is devoted to law review and news articles, and cases from other jurisdictions, regarding general principles of jury impartiality and juror conduct in the age of social networking. *See* Def. Br. at 48-54. That discussion is inconsequential to the issues presented here.[17]

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[17] For instance, Ganias's citation to *Dimas-Martinez v. State*, 2011 Ark. 515 (2011) is inapposite because the juror there admitted to disregarding the court's

With respect to the facts of this case, Ganias has raised three alleged instances of juror misconduct, none of which rise to the level of "clear, strong, substantial, and incontrovertible" evidence of impropriety: (1) Juror X's own Facebook posts; (2) the Facebook posts of Juror X's friends; and (3) Juror X's Facebook "friendship" with Juror Y. As the district court properly found, none of these purported instances of misconduct justify a new trial.

### 1. Juror X's Facebook Posts

The district court's decision to deny a new trial based on Juror X's Facebook posts was entirely proper. Ganias filed his motion for a new trial the day before sentencing was scheduled. The next day, the court held a chambers conference with counsel to determine whether inquiry of any juror would be appropriate. JA556-94. During that conference, the court acknowledged that Juror X's March 9 Facebook post could have been an "off-the-cuff remark," but was "trouble-

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repeated instructions that he not post comments on Twitter during trial, demonstrating contempt for the court's instructions that prejudiced the defendant. *Id.* at *16. In *Tapanes v. State*, 43 So. 3d 159, 162-63 (Fla. App. 2010), a juror used his cellular phone to look up a definition of a term in the jury instructions. Neither of these extreme types of misconduct is present here.

some." JA583. As a result, the court scheduled a hearing with Juror X. *See* JA595-639.

After the hearing, the district court determined that Juror X had posted his comments in jest and was not improperly influenced heading into deliberations. SA35-36; JA611-12, JA622, JA626. The court specifically found that Juror X was "unequivocal" in his testimony that he "had not predetermined guilt, did not harbor any pro-government bias and kept an open mind throughout the trial." SA35. The court also noted that Juror X "adequately and credibly explained that he was just 'joking around'" with his friends through his Facebook posts. SA35.

Those factual findings were not clearly erroneous. They were based on the district court's firsthand interactions with Juror X throughout the trial and the post-trial interview, which the trial court was uniquely positioned to evaluate. *See Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (noting that determinations of a juror's credibility and demeanor lie "peculiarly within a trial judge's province") (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991)); *United States v. Cox*, 324 F.3d 77, 87 (2d Cir. 2003) (district court's handling of juror misconduct reviewed for abuse of discretion "precisely because" the district court is "best situated to evaluate jurors' credibility"). At the very least, the district court's evaluation of Juror X's credibility

was not clearly erroneous, which it must be to mandate reversal.

Accordingly, Ganias's argument that the Juror X's March 9 Facebook posting was an "express statement of actual bias," Def. Br. at 55, is flawed, in light of the district court's assessment that Juror X's comment was a joke.[18] *See, e.g.*, *United States v. Greer*, 285 F.3d 158, 171 (2d Cir. 2002) (district court's determination of actual bias reviewed for abuse of discretion). Ganias relies on *United States v. Haynes*, 398 F.2d 980 (2d Cir. 1968) to support his argument of actual bias, but *Haynes* itself found no actual bias where the defendant "had the duty to raise a contention of bias from the realm of speculation to the realm of fact" and could not do so. *Id.* at 984. Likewise, here, Ganias's claim of bias was mere speculation before the evidentiary hearing; after it, the only conclusion in the "realm of fact" was that Juror X's remarks were jokes that were not to be taken seriously.

Ganias also mistakenly relies on cases in which trial courts failed to hold any hearing at all into the potential misconduct, resulting in

[18] Ganias also raises the possibility that Juror X may not have been "consciously []aware" of any possible bias. Def. Br. at 57. But hypothetical unawareness of potential bias is speculative by nature and cannot constitute "clear, strong, substantial and incontrovertible" evidence of juror impropriety. *See Moon*, 718 F.2d at 1234.

subsequent reversal or remand—which is not the situation here. For instance, in *Sullivan v. Fogg*, 613 F.2d 465, 467 (2d Cir. 1980), the juror allegedly heard voices during jury deliberations telling him to acquit the defendant, and the state trial court did not hold a hearing to inquire into the juror's competence. This Court remanded with instructions to hold a hearing on competence. *Id.* at 468. Similarly, in *United States v. Moten*, 582 F.2d 654, 664-67 (2d Cir. 1978), remand was ordered where the district court failed to hold a hearing after allegations arose of improper juror contact with a defendant's family member. *See also United States v. Vitale*, 459 F.3d 190, 197-200 (2d Cir. 2006) (remanding where no hearing held on possible connection between prosecutor's husband and juror). Here, on the other hand, the district court already has held a full evidentiary hearing and has determined that Juror X was truthful and remained impartial throughout trial. SA35-36; JA611-12, JA622, JA626. Thus, Ganias's cases are inapposite.

Moreover, the court properly stopped the inquiry after hearing Juror X's testimony. *See Moon,* 718 F.2d at 1234 (if reasonable grounds to suspect impropriety do not exist, inquiry should end); *United States v. Stewart*, 433 F.3d 273, 302 (2d Cir. 2006) (same); *Sabhnani*, 599 F.3d at 250 (recognizing trial court's "broad flexibility" in responding to allegations of juror misconduct).

Having found credible Juror X's explanations about the postings and his statements of impartiality, there was no need for the court to subject Juror Y to a speculative examination about her potential exposure to Juror X's Facebook comments or to intrude upon both Juror X's and Y's privacy by seeking their records from Facebook. *See Moon*, 718 F.2d at 1234-35 (affirming denial of new trial motion where district court had not required juror who had experienced unrelated BB gunshot during trial to be interviewed post-trial); *Sabhnani*, 599 F.3d at 248-50 (affirming denial of new trial motion where district court conducted interview of reporter who allegedly heard jurors say "guilty, guilty" in parking lot after a day of trial, but did not bring jurors in for questioning); *Stewart*, 433 F.3d at 306 (even where this Court "might have ruled differently in the hearing request in the first instance," district court did not abuse its discretion in deciding not to hold evidentiary hearing on potential misconduct).

These cases demonstrate the district court's wide latitude in inquiring into juror misconduct and its authority to stop the inquiry after it determines that no reasonable grounds exist to continue. That latitude is especially appropriate here, where the court gave Ganias additional time after the evidentiary hearing to submit additional evidence of alleged improprieties, and he produced none. *See* GA111-23. The court's find-

ing that Ganias did not show "clear, strong, substantial and incontrovertible evidence" of a "specific, nonspeculative impropriety" should not be disturbed.

### 2. Juror X's Facebook Friends' Posts

Ganias next challenges the Facebook posts that Juror X's friends made in response to Juror X's March 9 comment, claiming that these comments were an "extraneous influence" that was "presumptively prejudicial" under *Remmer v. United States*, 347 U.S. 227, 229 (1954). Not only are *Remmer*'s facts far more extreme—a third party tried to bribe the jury foreman during trial—but Juror X's Facebook friends' joking comments cannot plausibly be characterized as the type of severe jury tampering that *Remmer* requires for a presumption of prejudice to attach. First, and most importantly, the trial court believed Juror X's explanation that his friends were joking and that he remained impartial throughout the trial.[19] JA622, JA626. Where the trial court has made a finding of fact that de-

[19] Ganias himself recognizes the speculative nature of his argument: "[G]iven the favorable reaction to Juror X's boastings, *he may have* felt compelled to follow through on his comments by voting to convict Ganias no matter what the evidence showed." Def. Br. at 56 (emphasis added). Such speculation does not meet this Court's strict standard for invading the sanctity of the jury process.

feats any inference of partiality, a presumption of prejudice should not arise.

Next, even if the comments were deemed presumptively prejudicial (which they were not), the contact was harmless, given Juror X's credible explanation about how he interpreted the comments and the court's judgment that he had been fair and impartial. *See Remmer*, 347 U.S. at 229 (showing of harmlessness rebuts presumption of prejudice). The district court engaged in an objective analysis, considering the nature of the extrinsic information and all of the circumstances surrounding the introduction of the information, in determining that the comments were intended to be jokes and were actually interpreted that way by Juror X. *See Greer*, 285 F.3d at 173 (noting that court must objectively determine extra-record prejudice); *see also Farhane*, 634 F.3d at 169 (questioning of jurors and confirmation of jurors' ability to follow instructions can indicate lack of harm from potential misconduct); *United States v. Fumo*, 655 F.3d 288, 299, 304-06 (3d Cir. 2011) (juror's "harmless ramblings" about a trial on Facebook and Twitter were not prejudicial, where district court found that juror was "trustworthy" and there was no evidence that postings had been prejudicial).

Just as the district court dismissed the allegations of prejudice in *Fumo,* the Facebook postings at issue here, too, were not prejudicial. The

district court here allowed counsel to probe whether the Facebook posts impacted Juror X's ability to be fair and impartial and determined, that they had not: "Simply put, the Court is satisfied that Juror X kept an open mind throughout trial and participated in deliberations in good faith." SA35-36; *see also* JA621-22, JA626. Given these findings, furthermore, the district court was justified in stopping the inquiry with Juror X, rather than also examining Juror Y.

Moreover, the district court properly presumed that Juror X was being honest and was faithful to his oath. *See United States v. Cox*, 324 F.3d 77, 87 (2d Cir. 2003) ("[W]e presume that jurors remain true to their oath and conscientiously observe the instructions and admonitions of the court.") (quoting *United States v. Rosario*, 111 F.3d 293, 300 (2d Cir. 1997)). As discussed above, the *Remmer* presumption should not apply here, where the district court interacted with Juror X not only over the course of the 16-day trial, but also in the post-trial evidentiary hearing, and determined that he was credible.

*Sullivan v. Fogg*, on which Ganias relies to support his argument that the court should not have credited Juror X's explanations, presents extreme example that cannot fairly be applied here. 613 F.2d at 467. There, as discussed above, the juror claimed to have heard voices during jury deliberations that told him to acquit the defendant. *Id.* at 467. This Court noted that the ju-

ror's statement that he had remained impartial was not conclusive, given the "evidence of [the juror's] psychological instability." *Id.* Here, Ganias has not suggested that Juror X was psychologically unstable, and the district court found him credible. After that evaluation of Juror X, the court was entitled to end its inquiry.

### 3. Juror X's Facebook Friendship with Juror Y

Finally, in perhaps the most speculative of his claims, Ganias argues that Juror Y, after becoming Facebook friends with Juror X during trial, *may* have been exposed to Juror X's earlier posts and *may* have had discussions with Juror X about the case through Facebook or otherwise—despite the fact that Juror X denied having any inappropriate discussions about the case with Juror Y. JA616-18, JA623. Ganias has offered nothing to substantiate these allegations except a copy of Juror X's Facebook page stating that, among other "Recent Activity," on Facebook, Juror X had become "friends" with Juror Y. JA551. The rest of his argument is pure conjecture that relies on hypothetical conversations that *might* have gone on through Facebook's online messaging system, even though Juror X specifically testified that if Ganias were to have subpoenaed Juror X's Facebook records, the records would show no conversations with Juror Y. JA623.

To support his argument for further inquiry of Juror Y, Ganias references a question the courtroom clerk overheard Juror Y discuss on the last day of trial. In particular, Juror Y had asked about the timing of a jury verdict. JA630-31. Ganias omits, however, the full colloquy that occurred after the clerk's observation. That colloquy is as follows:

> THE CLERK: A little while ago, when you were in line, you had asked, I think it was you, that had asked, "If we came back with a jury verdict right away, would that be okay?"
>
> THE JUROR: Oh, yeah. I wasn't sure if there was a time. We had been asking if there was, like—we were wondering time frames on things because people were wondering—people wanted to know what the time frame was for deliberations, like, if we had to go over a certain amount of time. We just didn't know the time frame.
>
> THE COURT: The jury can take all the time it needs to come to their conclusion. You understand that?
>
> THE JUROR: Yes.
>
> THE COURT: We were wondering was there a general discussion about this?
>
> THE WITNESS: No, no, not at all. No, not at all. We were asking questions like if

> we're getting charged in here; do we go in your office.
>
> …
>
> THE COURT: Has there been any discussion among you about what the ultimate verdict should be?
>
> THE WITNESS: No, no absolutely not, no, no. … I apologize if we gave off that impression.
>
> …
>
> THE COURT: But we just wanted to be sure that there hadn't been any premature discussion.
>
> THE WITNESS: Oh, no, absolutely not.

JA630-32.

Although Ganias would have this Court read much into Juror Y's initial question, the colloquy demonstrates that Juror Y was inquiring about logistical issues and was unequivocal that there had been no premature deliberation. The court gave defense counsel the opportunity to ask additional questions of Juror Y, but he asked none. JA632. Based on Juror Y's answers and the district court's evaluation of her tone and demeanor, the court closed the issue and charged the jury. On this record, Ganias's claim of premature deliberation or extraneous influence on Juror Y is unsupportable, and

additional inquiry of the jurors would have resulted in unnecessary harassment of them after their service. *See Ianniello*, 866 F.2d at 543.

In fact, a Massachusetts appellate court rejected a juror misconduct argument involving more extreme Facebook postings than those at issue here. In *Commonwealth v. Werner*, 967 N.E.2d 159, 162, 166-67 (Mass. App. Ct. 2012), Juror A posted: "[I] had jury duty today and was selected for the jury…Bleh! Stupid jury duty!" *Id.* at 162. One of her Facebook friends responded: "Throw the book at 'em." *Id.* Juror C, who had become Facebook friends with Juror A during trial, responded to a comment by Juror A about the length of the trial with: "[H]opefully it will end on [M]onday." *Id.* During jury empanelment, Juror B posted on Facebook: "Waiting to be selected for jury duty. I don't feel impartial." *Id.* A friend responded: "Tell them 'BOY HOWDIE, I KNOW THEM GUILTY ONES!." *Id.* After Juror B had been empaneled, his wife posted: "Nothing like sticking it to the jury confidentiality clause on Facebook … Anyway, just send her to Framingham [the location of a correctional institution] so you can be home for dinner on time." *Id.* Another Facebook friend responded: "I'm with [your wife]…tell them that you asked all your F[ace] B[ook] friends and they think GUILTY." *Id.*

After examining the jurors, but before receiving their subpoenaed Facebook records, the trial court found them credible and decided that there was no extraneous influence requiring a new trial. That ruling was upheld on appeal, where the court described the jurors' comments as simple "attitudinal expositions" on jury service that "fell far short of the prohibition against extraneous influence." *Id.* at 698. Here, as in *Werner*, the district court properly declined to inquire further into the matter after determining that there was no basis to the allegations of juror misconduct.

In sum, the district court's careful handling of the alleged juror misconduct here was entirely reasonable, and was well within the court's "sound discretion." *See Thai*, 29 F.3d at 803. There is no basis for reversal or for remand for a fuller evidentiary hearing, as the district court did not abuse its discretion in denying Ganias's motion for a new trial and an expanded hearing.

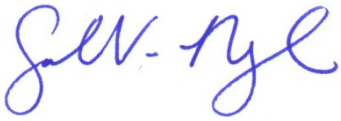
## Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: November 5, 2012

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



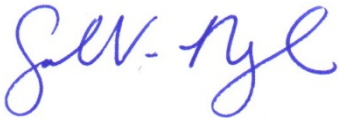
SARALA V. NAGALA
ASSISTANT U.S. ATTORNEY

ANASTASIA E. KING
ASSISTANT U.S. ATTORNEY

Sandra S. Glover
Assistant United States Attorney (of counsel)

**Federal Rule of Appellate Procedure 32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 14,000 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.



SARALA V. NAGALA
ASSISTANT U.S. ATTORNEY

# Addendum

**Federal Rule of Criminal Procedure 41(e)(2)(B) (2009)**: "**Warrant Seeking Electronically Stored Information.** A warrant under Rule 41(e)(2)(A) may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant in Rule 41(e)(2)(A) and (f)(1)(A) refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review."

* * *

**Federal Rule of Criminal Procedure 41(f)(1)(B) (2009):** "**Inventory.** An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person. In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to describing the physical storage media that were

seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied.

* * *

**Federal Rule of Criminal Procedure 41(g) (2009): "Motion to Return Property.** A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings."