12-240

In the
United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

v.

STAVROS M. GANIAS,

***Defendant-Appellant*.**

On Appeal from the United States District Court for the District of Connecticut

BRIEF OF DEFENDANT-APPELLANT STAVROS M. GANIAS

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STATEMENT OF JURISDICTION

The District Court had subject-matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. A judgment of conviction and sentence entered on January 18, 2012. *See* Special Appendix ("SA") 3–5. The defendant filed a timely notice of appeal that same day. Joint Appendix ("JA") 47. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Where a warrant authorized seizure of particular information on a computer, did the government exceed the bounds of the Fourth Amendment when it seized "mirror image" copies of every file on that computer, retained all of the files for two-and-a-half years without judicial approval, and then used the files seized outside the warrant's scope as the crucial evidence to convict the defendant on unrelated criminal charges?

2. When an empanelled juror contemplated "hang[ing]" the defendant on Facebook, received suggestions from "Facebook friends" for alternative punishments, and then allowed another juror to view these musings, was the defendant deprived of his Sixth Amendment right to an impartial jury?

STATEMENT OF THE CASE

In December 2009, the Government filed a superseding indictment charging defendant Stavros M. Ganias with tax evasion under 26 U.S.C. § 7201. JA45–46. As relevant here, the indictment alleged that Ganias willfully understated his and his wife's personal income on both their 2002 and 2003 tax returns. *Id.* (counts four and five). These allegations were based in large part on personal financial records that the Government had seized from Ganias's computers six years earlier (five years prior to the initial charges against Ganias) under a warrant that authorized seizure of files relating to two of Ganias's accounting clients.

Prior to trial, Ganias moved to suppress the evidence seized from his computers outside the scope of the warrant. The District Court (Thompson, J.) held a suppression hearing, and then denied the motion. JA11. An opinion setting out the court's findings of fact and conclusions of law followed. SA6–29.

The case proceeded to trial, and the jury rendered verdicts of guilty on both counts. 16 Tr. 244–47 (Apr. 1, 2011).[1] Before sentencing, Ganias moved for a

[1] "Tr." refers to the trial transcript. The number preceding the "Tr." is the volume number. Other identifying information will be included within the parenthetical following the pin cite.

new trial, *see* Fed. R. Crim. Proc. 33(a), based on newly discovered Facebook postings showing that a juror ("Juror X") had, on the eve of trial, been discussing whether to "hang" or "tort[ure]" Ganias. Motion for New Trial at 3–8 (Aug. 17, 2011). The District Court (Burns, J.) elected to have Juror X appear in court to discuss his activity on Facebook.[2] Not surprisingly, Juror X told the court that he was "just joking" in the posts and that he had remained impartial throughout the trial. JA612. The court accepted that explanation, denied Ganias's motion for a new trial, JA635–37, and denied a subsequently filed motion to reconsider. SA30–37. The court also rejected Ganias's request to have a second juror ("Juror Y")—who had become Facebook friends with Juror X during the trial—appear at a hearing to determine whether she viewed Juror X's inappropriate postings. SA35. In addition, the Court denied Ganias's request to "subpoena [the] Facebook records" of Jurors X and Y. *Id.*

The District Court sentenced Ganias to a 24-month term of incarceration. SA3. This appeal followed. JA47.

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[2] Before trial, this case was reassigned from Judge Thompson to Judge Burns. JA12.

STATEMENT OF FACTS

I. The Seizure and Indefinite Retention of Every File on Ganias's Computers.

On its website, the Internal Revenue Service ("IRS") touts its role in obtaining Stavros Ganias's tax-evasion convictions in this case.[3] But long before the IRS opened an investigation into Ganias, it was the U.S. Army's Criminal Investigation Command that copied and seized Ganias's personal financial records—along with everything else on his computers—while pursuing an unrelated procurement-fraud investigation against two of Ganias's clients.

A. The Army's Investigation and Seizure.

In August of 2003, Army special agents received a tip from a confidential source stating that officers and employees of Industrial Property Management, Inc. ("IPM"), a contractor responsible for maintenance and upkeep at a vacant Army facility in Connecticut, had committed various acts of theft and fraud. JA441–443. According to the tipster, IPM's owner, James McCarthy, had stolen "copper wire," "work benches," and other items from the facility. JA442. The source claimed that McCarthy and his wife had also "certified that the business was woman-owned," when in truth Mrs. McCarthy played no role in the "daily operations."

[3] Examples of General Fraud Investigations, Fiscal Year 2012, available at http://www.irs.gov/compliance/enforcement/article/0,,id=246534,00.html.

JA444. McCarthy was also fraudulently "charg[ing] the military for labor performed" on behalf of another one of his companies, American Boiler. JA443. Evidence of this misfeasance, the Army's sources stated, could be found at IPM and American Boiler's offices. In addition, a source claimed that all of IPM's "payroll records, receivables, payables, and government checks" were stored at the offices of "an individual named Steve Gainis [*sic*]," who "perform[ed] accounting work for IPM and American Boiler." JA445; *see* SA8.

Based on this information, Army investigators applied for and obtained a warrant to search the Wallingford, Connecticut office of Ganias's accounting business, Taxes International. SA8; *see* JA431. The warrant, dated November 17, 2003, authorized the "[s]eizure of all books, records, documents, materials, computer hardware[,] . . . software, and computer associated data relating to the business, financial, and accounting operations of [IPM] and American Boiler." JA433; SA8–9. Two days later, Army officials executed the warrant at Ganias's office.

On the day of the warrant's execution, Army computer specialists accompanied investigators to Ganias's office and helped with the collection of electronic files. As Special Agent Michael Conner had explained in his affidavit supporting the warrant application, searching for evidence on computers can be a

laborious process and often requires "specially trained" personnel. JA448–449. Moreover, Conner stated that because identification of relevant data "can take weeks or months," on-site review of "electronic storage devices" for files within the scope of a warrant is often infeasible. JA449. Anticipating this difficulty, the computer specialists who came to Ganias's office "chose to make mirror image" copies of every file on Ganias's three computers. SA9–10.[4]

By completing this "mirror imag[ing]," the Army seized vast quantities of information outside the warrant's scope. The mirror images captured not just IPM and American Boiler data, but also Ganias's own personal financial records, other personal information and files, and the financial records of all Ganias's accounting clients. SA8–9, JA427–28, JA464–65.

Ganias was present throughout the collection, and he expressed some concern about the scope of the Army's data extraction. JA385, JA428. In response, Special Agent John Latham "assured" Ganias that the Army was only looking for files relating to "American Boiler and IPM." JA428. Everything else, Latham explained, "would be purged once they completed their search" for relevant files. *Id.*

---

[4] The same protocol was followed at the offices of IPM and American Boiler, where similar warrants were executed the same day.

B. The Search for Files within the Scope of the Warrant.

Army computer specialists then copied Ganias's data (along with data taken from other locations) "onto two sets of 19 DVDs," which were "maintained as evidence." SA11.

In February 2004 (*2 ½ months post-seizure*), Special Agent Conner "sent one set of the 19 DVDs" to the Army Criminal Investigation Lab. SA11. The lab's task was to search through the imaged files and to identify documents within the scope of the warrant. SA11–12. The DVDs remained in the lab's queue for several months, but by "early June 2004" (*6 ½ months post-seizure*) a "[d]igital evidence examiner . . . was assigned to conduct the review." SA12, SA14.

Meanwhile, Army investigators working the case discovered evidence suggesting that a man named Wiliam DeLorenze had received regular payments from IPM, but had failed to report these payments as income. SA12–13. In light of this information, the Army decided to invite the IRS to "join the investigation" in May 2004. *Id.* The Army also gave the IRS copies of all the imaged hard drives that it had seized, and the IRS sent its copies to its own in-house "computer investigative specialist[s]" for review and analysis. SA13.

The two sets of computer analysts—one at the Army, one at the IRS—then proceeded, in parallel, to search the imaged hard drives for the IPM and American

Boiler files covered by the warrant. In late July 2004 (*8 months post-seizure*), an Army computer specialist completed his review and sent Army investigators "a CD" containing files potentially within the scope of the warrant. SA13–14. Similarly, by early October 2004 (*10 ½ months post-seizure*), an IRS computer specialist had isolated, "bookmark[ed]," and saved to a CD all files "that appeared to her to be within the scope of the warrant." SA15. It took the Army and IRS investigators working the case a couple of additional months to obtain the software needed to review these files, but by December 2004 (*13 months post-seizure*) they had the programs they needed to examine the extracted IPM and American Boiler files. SA16.

C. The Indefinite Retention of Ganias's Records.

Although it had taken 13 months, by December 2004 the Government had finished identifying and segregating data potentially responsive to the November 2003 warrant. No one, at that point, was under any misconception about the warrant's scope. The Army investigators on the case knew that they "could only look at IPM or American Boiler" files. JA320–21. The lead IRS agent, Special Agent Amy Hosney, understood that neither "Steve Ganias'" financial records nor those of his other clients were "listed on" the warrant among the "items to be seized." JA348. The only thing left to do, as Agent Latham had explained it to

Ganias, was to "purge[]" the vast quantities of information that were outside the warrant's reach. JA428.

But that is not what happened. Instead, the Government retained Ganias's files. From the Government's perspective, those records had all become "evidence," *see* SA11, and the agents on this case were not in the habit of "deleting evidence off of DVDs stored in [their] evidence room." JA122–24. As the Government explained, at some point in the future, after the investigation had closed, the Government would either "destroy" or "release" the data. JA122–24. Until then, Ganias's files and records would remain in the Government's hands, "protect[ed]" for potential use in the "future." JA122. The files may have been outside the scope of the November 2003 warrant, but they were the "government's property" now:

> [Counsel]: And once you do [a] search within a reasonable period of time, you're to return those items that don't pertain to your lawful authority to seize[,] . . . correct?
>
> [Agent Conner]: Yes, sir.
>
> [Counsel]: And you didn't do that in this case, correct?
>
> [Agent Conner]: That's correct. *We viewed the data as the government's property. Not Mr. Ganias's property.*

JA145–46 (emphasis added).

Ganias's private files thus remained with the agents working the case as the investigation into IPM and American Boiler proceeded. Then, on "July 28, 2005" (*21 months post-seizure*), "the IRS investigation was expanded to include Ganias." SA17.

D. The IRS's Investigation of Ganias and the April 2006 Warrant.

Their sights now set on Ganias, IRS agents subpoenaed his bank records, pulled his tax returns, and proceeded to analyze the data. This review revealed a discrepancy between the deposits into Ganias's business accounts and the "gross receipts" reported on his Schedule C. JA465–66.[5] In Special Agent Hosney's "estimat[ion]," Ganias had likely "underreported" his income by several hundred-thousand dollars between 1999 and 2003. JA467. In order to be sure, Hosney wanted to review Ganias's own personal financial records. *Id.* Fortunately for the Government, there just happened to be a copy waiting in the "evidence room."

Hosney had previously reviewed IPM and American Boiler data in the "mirror image" of "Ganias' QuickBooks program." JA463–64. While doing so, she had seen all of the "names of Ganias' QuickBooks files" listed in the program's directory. JA464. One of those files was entitled "Steve_ga.qbw."

[5] Schedule C is an attachment to Form 1040 used "to report income or loss from a business." IRS Website, Profit or Loss from Business, *available at* http://www.irs.gov/instructions/i1040sc/ar01.html.

JA467. It was "highly likely," in Hosney's view, that this file contained Ganias's personal financial information. *Id.* But Hosney also knew that this file was not one of the "items to be seized" listed in the November 2003 warrant. JA336, JA347–48. While that had not stopped the Government from seizing the file, and also had not stopped Hosney from retaining the file indefinitely, Hosney did not feel at liberty to just point, click, and have a look through the file. JA464, JA336, JA340, JA347–48.

Instead, the Government asked "Ganias and his attorney" to come in for a "proffer session" in February 2006 (*27 months post-seizure*). SA17. There, Ganias learned that, notwithstanding Agent Latham's previous assurances about "purg[ing]" irrelevant files, the Government still had his personal records and it wanted his "consent" to search them. SA17, JA428. When the Government did not hear back from Ganias on this request, Hosney elected to apply for a warrant to search the preserved images of Ganias's financial records. SA17. On April 24, 2006 (*29 months post-seizure*), the warrant issued, and Hosney proceeded to point, click, and have a look through the files on the mirror images that had been in the Government's possession for almost two-and-a-half years. SA17.[6]

[6] The Government did not seek a warrant to search or seize Ganias's actual files, as they existed in 2006. Nor would such a warrant have yielded the same information as the search of the imaged copies. Two days after the execution of

II. The Evidence at Trial.

The overbroad seizure and indefinite retention of Ganias's QuickBooks files paid dividends for the Government at trial. Those files became the centerpiece of the Government's claim that Ganias willfully underpaid his income taxes (by approximately $35,000 per year) in 2002 and 2003. In the QuickBooks files, "payments" received from Ganias's "customers" had often been recorded under "owner's contributions," which is an equity or non-income account. *E.g.*, 7 Tr. 43 (March 18, 2011, morning session). As the Government's QuickBooks expert explained, because "owner's contribution[s]" do not "post[]" as income, the "Profit & Loss Statement" produced by Ganias's QuickBooks program understated his actual profit. *E.g.*, 6 Tr. 148 (Mar. 17, 2001). Based on these entries, the Government claimed that Ganias—an accountant and former IRS agent—was simply too knowledgeable to have made a good-faith error. *E.g.*, 16 Tr. 117 (Apr. 1, 2011) (closing argument) ("They were recorded as owner's contribution. . . . That's pretty significant evidence of deliberate intent to evade tax."); *id.* at 176 (closing argument) ("[H]e is an accountant. . . . He is a person who has used

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the November 2003 warrant, Ganias reviewed his personal QuickBooks file and corrected over 90 errors in earlier journal entries. 15 Tr. 86–87 (Mar. 31, 2011, afternoon session).

QuickBooks for a long time.").[7] There was, however, much more to the story than that.

The truth was that Ganias, while a longtime accountant, was completely ignorant of the finer points of QuickBooks. And, as Ganias's own QuickBooks expert explained, while the program can be a "great tool" for someone who "know[s] how to use it," it can be "dangerous" when used by someone with a flawed understanding of its principles. 14 Tr. 13–14 (Mar. 30, 2011).

Ganias had just such a flawed understanding. In particular, he had no idea that, in order for QuickBooks to automatically register a customer payment as income, there must be an "outstanding statement charge" in the system "to which the payment c[an] apply." 14 Tr. 145–46 (Mar. 30, 2011). If there are "no outstanding statement charges available" for a customer, then any attempt by a user to "automatically app[ly]" the payment will fail and will not be "picked up as income." *Id.*

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[7] *See also id*. at 114 ("describing the "great deal" of evidence "about Mr. Ganias recording income into a non-income account, into owner's contribution"); *id.* at 129 ("see what happened to [six checks] in QuickBooks"); *id.* at 130 ("[at] about 5:10 in the evening he recorded an owner's contribution of $25,800"); *id*. at 182 ("[H]e did it himself. There was nobody else entering or making entries into the QuickBooks records.").

To Ganias, this was a completely foreign concept. Ganias was an old-school accountant, and he viewed it as a basic "accounting principle" that "whether you put the payment first" or the "statement charge" first, all that should matter is that "the two accounts . . . balance" at the end of the year. 14 Tr. 146 (Mar. 30, 2011).[8] Ganias believed that, so long as he went back and put in "all the statement charges" by the "end of the year," his previously entered customer payments would be "picked up" and automatically applied to income. 14 Tr. 146, 190 (Mar. 30, 2011).

This mistake produced disastrous consequences. Numerous entries that Ganias attempted to record as customer payments were, for want of a statement charge, defaulted to other accounts or mistakenly recorded by Ganias as owner's contributions. *Id.* The QuickBooks "profit and loss statement" thus substantially understated Ganias's income, and Ganias unwittingly perpetuated that error on his tax return. *Id.* at 150.

III. The Jury's Conduct.

Ganias had made serious bookkeeping errors, but he had engaged in no willful evasion, and he went to trial believing that the truth would come out.

[8] *See also* 14 Tr. 16 (Mar. 30, 2011) (testimony of Ganias's QuickBooks expert) (stating that, in a "manual system," it does not matter whether a statement charge is posted before or after receipt of payment).

Ganias expected to receive what every person put on trial for their liberty is entitled to receive—a fair hearing before a jury willing to carefully consider the evidence. Ganias expected, as the District Court put it during jury selection, that his fate would turn on the decision of 12 people willing to "judge [him] guilty or not guilty based upon the evidence," and without resort to "emotions" of "hostility" or "prejudice." JA526–27.

The jurors who served at Ganias's trial all agreed, on the day of jury selection, that they could and would faithfully discharge that trust. JA526–28. Following jury selection on March 8, 2011, the court then stood in recess for a one-day break before the start of evidence. It was during that day off, at around 9:30 in the evening, that Juror X logged in to his Facebook account and posted: "Jury duty 2morrow. I may get 2 hang someone… can't wait." JA550.

This post appeared on Juror X's "wall," which is an interactive "space" on Facebook where a user can "post and share" information with online "friends."[9] Juror X's comment prompted a fair number of responses from these friends. Several of them indicated that they "liked" what Juror X had to say. Others posted more specific thoughts:

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[9] See Facebook.com, Facebook Glossary, *available at* http://www.facebook.com/help/glossary.

[**Juror X:**]

Jury duty 2morrow. I may get 2 hang someone… can't wait..
March 9 at 9:34pm via Mobile Web

3 people like this.
. . . .

[**Facebook Friend 1:**] gettem while the're young!!!...lol
March 10 at 12:26am

[**Facebook Friend 2:**] [Juror X,] let's not be to hasty. Torcher first, then hang! Lol . . . .[10]
March 10 at 2:19pm

JA550.

Throughout the 16-day trial, Juror X continued to post thoughts on his jury service. His reactions ranged from frustration with the length of the trial ("Shit just told this case could last 2 weeks.. jury duty sucks!!"), to boredom ("Your honor i object! This is way too boring.. somebody get me outta here"), to contentment after his liquid lunch ("Guiness [*sic*] for lunch break. Jury duty ok today"). JA550,

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[10] The acronym "lol" is used on Facebook and other social-networking websites to mean "laughing out loud." *See Oxford English Dictionary Online* ("the initial letters of laughing out loud"), *available at* http://www.oed.com/view/Entry/291168.

JA551. After delivering Mr. Ganias his fate, Juror X shared the good news on Facebook: "GUILTY :)".[11] JA552.

During the trial's second week, Juror X also became "friends" with another member of the panel—Juror Y. JA551 ("Recent Activity . . . . [Juror X] is now friends with [Juror Y]."). This meant that Jurors X and Y could freely access one another's pages, walls, pictures, videos, and any other posted content.[12] As friends, Jurors X and Y were also able to engage in private "chats" using Facebook's instant-messaging service.[13]

Unlike Juror X, Juror Y has "privacy settings" in place on her Facebook profile that block public access. It is therefore unknown, on this record, whether and to what extent Juror Y discussed the case on her Facebook page. That said, Juror Y's behavior during trial did raise "concern[s]" about possible premature deliberation. 16 Tr. 185–86 (Apr. 1, 2011). On April 1, the last day of trial, Juror

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[11] The symbol ":)" indicates that the author is pleased; it is akin to a smiley face. *See generally Spanierman v. Hughes*, 576 F. Supp. 2d 292, 312 n.13 (D. Conn. 2008) ("'emoticons' . . . are symbols used to convey emotional content in written or message form (e.g., ':)' indicates 'smile' or 'happy,' and ':(' indicates 'frown' or 'sad')").

[12] Facebook Help Center, Friends, *available at* http://www.facebook.com/help/friends.

[13] Facebook.com, Facebook Glossary, *available at* http://www.facebook.com/help/friends.

Y came to the Clerk with a question: "'Would it be wrong if we came back with a verdict right away?'" 16 Tr. 184 (Apr. 1, 2011). This "trouble[d]" the District Court because the question "suggest[ed] that [Juror Y had] been talking about" the case with other members of the panel. *Id.* at 185–86. Juror Y, however, denied deliberating prematurely and stated that the jury's discussions had been purely logistical: "[P]eople 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." *Id.* at 189–90. Later that day, the jury did retire to deliberate. It took them about an hour to discuss 16 days' worth of evidence and to come back guilty on both counts. *Id.* at 244.

SUMMARY OF ARGUMENT

For most Americans today, the computer has become their "most private [of] spaces"—a central repository for sensitive correspondence, financial records, family photos, reading material, and much other "intimate information." *United States v. Andrus*, 483 F.3d 711, 718 (10th Cir. 2007) (citation omitted). At the same time, the computer is also a gateway to the Internet and to social-networking websites that allow users to share information and to communicate on a mass scale. These technological advances have greatly improved the convenience of modern life, but they have also placed strains on the basic guarantees of the Bill of Rights.

Cf. Kyllo v. United States, 533 U.S. 27, 34 (2001). In this case, two separate abuses of new technology—one by law enforcement, one by a juror—deprived defendant Stavros Ganias of his Fourth and Sixth Amendment rights.

First, government agents executing the warrant at Ganias's business premises turned what should have been "a limited search for particular information" about two of Ganias's accounting clients into a "general" and indefinite seizure of *every* document, every file, and every record stored on Ganias's computers. *See, e.g.*, *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1170 (9th Cir. 2010) (en banc). Among the reams of information seized by these officials outside the scope of their warrant were Ganias's own personal financial records, which (years later) the Government would use in this case to prosecute and convict Ganias on two counts of tax evasion in violation of 26 U.S.C. § 7201. Had the year been 1765 or 1965, courts would have quickly rejected such a blanket seizure and retention of "all the papers" in Ganias's office. *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K. B. 1765); *Stanford v. Texas*, 379 U.S. 476 (1965). But in the year 2011, the District Court decided to approve the Government's indefinite retention of all of Ganias's electronic documents as consistent with the Constitution.

If the promise of the Fourth Amendment is to endure in an increasingly paperless and digital era, that decision cannot stand. It may be true that, when law-enforcement officers execute a warrant for particular files on a computer, those files will often be "so intermingled" with other documents "that they cannot feasibly be sorted on site." *E.g.*, *United States v. Tamura*, 694 F.2d 591, 595–96 (9th Cir. 1982). But even if that is the case, the Fourth Amendment demands, at the very least, that the officers expeditiously complete their off-site search and then promptly return (or destroy) files outside the warrant's scope. *Id.* at 596–97 (six-month "delay in returning" documents outside scope of warrant was "an unreasonable and therefore unconstitutional manner of executing the warrant"); *United States v. Metter*, No. 10-CR-600, 2012 U.S. Dist. LEXIS 82762, at *28–30 (E.D.N.Y. May 17, 2012) (15-month delay without review or return of files on imaged hard drive held to be "blatant[ly]" unconstitutional); *see also United States v. Santarelli*, 778 F.2d 609, 615–16 (11th Cir. 1985) ("agents acted reasonably when they removed the documents to another location for subsequent examination, ... *so long as any items found not to be relevant were promptly returned*") (emphasis added). Here, the Government's blanket seizure and two-and-a-half year retention of every document on Ganias's computers clearly exceeded these minimum demands of reasonableness under the Fourth Amendment.

Because this conduct was both "flagrant" and "blatant" in its disregard of Ganias's Fourth Amendment rights, "blanket suppression" of all the records seized from Ganias's computers is warranted. *See United States v. Matias*, 836 F.2d 744, 747–48 (2d Cir. 1988). At the very least, this Court should order "suppression" of the vast quantities of information seized outside the scope of the original warrant. *Id.* ("when items outside the scope of a valid warrant are seized, the normal remedy is suppression and return of those items"). Either way, the District Court's judgment must be vacated and the case remanded.

Second, on the night before evidence began in this case, one of the jurors who would sit in judgment of Ganias took to Facebook to announce his views on his upcoming service ("I may get 2 hang someone. can't wait."), and then received encouragement from his friends ("Tor[ture] first, then hang!"). These postings showed both actual bias and an extraneous influence on the jury. Worse still, the posts were made available to a second juror just a few days later when the two became Facebook friends ("[Juror X] is now friends with [Juror Y]") while sitting together on the empanelled jury. The District Court's failure to order a new trial when these postings came to light provides a second, independent basis for vacating the judgment. In the alternative, this Court should at least remand for a full and more complete hearing on this issue.

ARGUMENT

I. The Government's Seizure and Two-and-a-half Year Retention of Every File on Ganias's Computers Violated the Fourth Amendment and Warrants Suppression.

A. Standard of Review.

Whether a seizure violates the Fourth Amendment and warrants suppression is a legal issue subject to de novo review. *United States v. Voustianiouk*, --- F.3d ---, No. 10-4420, 2012 U.S. App. LEXIS 14317, at *8 (2d Cir. July 12, 2012). The District Court's findings of fact in a suppression order are reviewed for "clear error," considering "the evidence in the light most favorable to the government." *Id.* (citation omitted).

B. The Fourth Amendment Prohibits Indiscriminate Seizure and Indefinite Retention of Electronic Files Outside of a Warrant's Scope.

1. The Fourth Amendment Forbids General Seizures.

The drafters and ratifiers of the Bill of Rights believed that a man's papers were "his dearest property," *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 Eng. Rep. 807 (K. B. 1765), and they knew, too well, the threat to liberty posed by "messengers of the King" sent to "seize . . . books and papers under the unbridled authority of a general warrant." *Stanford v. Texas*, 379 U.S. 476, 486 (1965); *see generally* William J. Stuntz, *The Substantive Origins of Criminal Procedure,* 105

Yale L.J. 393, 399–411 (1995) (discussing history of general warrants).[14] That is why the Fourth Amendment demands that all warrants recite a "'particular[] descri[ption]'" of the items authorized to be seized. *United States v. George*, 975 F.2d 72, 75 (2d Cir. 1992), quoting U.S. Const. amend. IV. It is also why officials must "confine[]" themselves, when they execute a warrant, "strictly within the bounds set" by that document. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 394 n.7 (1971). Officers searching for particular papers may need to take a "cursor[y]" look at many documents to "determine whether they are . . . among th[e] papers" that may be seized. *Andresen v. Maryland*. 427 U.S. 463, 482 n.11 (1976); *United States v. Riley*, 906 F.2d 841, 845 (2d Cir. 1990). But, having done that, the officers may seize what the warrant tells them they may seize, and no more. *United States v. Matias*, 836 F.2d 744, 747 (2d Cir. 1988) (seizure of items "outside the scope of a valid warrant" violates Fourth Amendment).

In the days before mass storage of electronic "papers," all of this was settled law. No official, in a pre-computer world, would have claimed a general right to engage in "wholesale seizure for later detailed examination of records not

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[14] *See also Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311–12 (1978) (noting that "[t]he particular offensiveness" of general warrants was "acutely felt by the merchants and businessmen whose premises and products were inspected" under them).

described in a warrant." *United States v. Tamura*, 694 F.2d 591, 595 (9th Cir. 1982); *see United States v. Abrams*, 615 F.2d 541, 543 (1st Cir. 1980) (indiscriminate seizure of documents "in order that a detailed examination could be made later" was "exactly the kind of investigatory dragnet that the fourth amendment was designed to prevent"). There were "rare instances," courts recognized, when documents within a warrant's scope might be "so intermingled" with other documents that the records could not "feasibly be sorted on site." *Tamura*, 694 F.2d at 595. But those "rare" cases were just that—"rare." Even then, courts demanded that officers expeditiously complete the off-site search *and* promptly return all documents outside the warrant's scope. *Id.* at 596–97 (six-month "delay in returning" documents outside warrant's scope, after having "locat[ed] the relevant documents," was "an unreasonable and therefore unconstitutional manner of executing the warrant"); *United States v. Santarelli*, 778 F.2d 609, 615–16 (11th Cir. 1985) ("agents acted reasonably when they removed the documents to another location for subsequent examination, ... *so long as any items found not to be relevant were promptly returned*") (emphasis added).[15]

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[15] *See also United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1169 (9th Cir. 2010) (en banc) (noting that *Tamura* "disapproved the wholesale seizure of the documents and particularly the government's failure to

2. The New Rule for Computer Warrants: Seize First, Search Later.

Today, the widespread use of computers and other electronic storage devices has put pressure on these traditional restraints. Even the most "inexpensive electronic storage media" can now "store the equivalent of millions of pages of information." *United States v. Comprehensive Drug Testing, Inc.* ("*CDT*"), 621 F.3d 1162, 1175 (9th Cir. 2010) (en banc). Review of all that data for files covered by a warrant may take time and "special[ized] train[ing]." *See, e.g.*, JA448–49. In light of these difficulties, the Government now takes the view that the "on-site search of a computer" will be "infeasible *in almost every case*."[16] Courts, for their part, have generally agreed, and have approved the wholesale seizure and "offsite

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return the materials that were not the object of the search once they had been segregated"); *United States v. Hargus*, 128 F.3d 1358, 1363 (10th Cir. 1997) (taking dim view of "the wholesale seizure of file cabinets and miscellaneous papers and property not specified in the search warrant," but denying suppression because, unlike this case, "[n]o item not specified in the warrant was admitted against Mr. Hargus at trial"); *Doane v. United States*, No. 08 Mag. 0017, 2009 U.S. Dist. LEXIS 61908, at *29 (S.D.N.Y. June 1, 2009) ("even where practical considerations permit the Government to seize items that are beyond the scope of the warrant," non-responsive items must be returned "once the fruits of the search are segregated into responsive and non-responsive groups").

[16] Exec. Office for U.S. Attorneys, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* 77 (2009) ("DOJ Manual") (emphasis added), *available at* http://www.justice.gov/criminal/cybercrime/docs/ssmanual2009.pdf.

review" of electronic data to determine which files "f[a]ll within" a warrant's "scope." *E.g.*, *United States v. Metter*, No. 10-CR-600, 2012 U.S. Dist. LEXIS 82762, at *25–26 (E.D.N.Y. May 17, 2012).

3. At a Minimum, the Fourth Amendment Requires Prompt Completion of an Off-site Review and Return of Files Outside the Warrant's Scope.

For better or worse, then, the era of "over-seiz[ure]" and offsite review of electronic data is now upon us. *CDT*, 621 F.3d at 1177. But make no mistake: It is not a small matter, under the Fourth Amendment, for a federal agent executing a warrant to indiscriminately seize every file and every paper stored in a person's "most private space[.]"[17] Fifty years ago, the police came to John Stanford's house, "gather[ed] up" his books and papers, and "hauled" them away in "14 cartons." *See Stanford v. Texas*, 379 U.S. 476, 479–80 (1965). Among the books, pamphlets, and papers taken were "his marriage certificate, his insurance policies, his household bills and receipts, and files of his personal correspondence." *Id.* at 480. The Supreme Court's judgment on that indiscriminate seizure was unequivocal: "[T]he Fourth and Fourteenth Amendments guarantee to John Stanford that no official of the State shall ransack his home and seize his books and papers under the unbridled authority of a general warrant." *Id.* at 486.

[17] *See United States v. Andrus*, 483 F.3d 711, 718 (10th Cir. 2007).

Back then, it took "five hours " of "ransack[ing]" in Stanford's home to find all of his books and pamphlets. *Id*. at 477, 486. If Stanford had lived in the present day, the police could have just as well imaged his electronic storage devices instead of rummaging through his file cabinets and bookshelves. There they would have likely found the "files of his personal correspondence" (his email), his "business" records (in QuickBooks, perhaps), and his "household bills and receipts" (in an Excel spreadsheet). *See id*. at 480. Stanford might well have saved a PDF of "his insurance policies" or his "marriage certificate." *Id.* His copies of works by "Karl Marx," "Jean Paul Sartre," "Fidel Castro," and "Pope John XXIII" would have all been stored on his Kindle or his iPad. *Id*. at 479–80. Today, when the Government seizes all the data off of a person's computers and electronic storage devices, it effectively seizes all the papers from that person's filing cabinet, library, diary, photo album, financial ledgers, and more. *See, e.g.*, *Andrus*, 483 F.3d at 718.

It may be that, as a pragmatic concession to the needs of law enforcement, these blanket seizures must now be tolerated, at least for the purpose of a brief off-site review. There comes a point, though, when enough is enough and when courts must enforce "limits . . . upon th[e] power of technology to shrink the realm of guaranteed privacy." *Kyllo v. United States*, 533 U.S. 27, 34 (2001). Careful

review under the Fourth Amendment of "the manner in which" warrants for electronic information are "executed" is both necessary and appropriate. *See Dalia v. United States*, 441 U.S. 238, 258 (1979).

One basic limit, which even the Government recognizes, is that the police must "complete [their off-site] review . . . within a 'reasonable' period of time." *Metter*, 2012 U.S. Dist. LEXIS 82762, at *28; *see* DOJ Manual, *supra* n.16, at 92 ("The Fourth Amendment does require that forensic analysis of a computer be conducted within a reasonable time."). Courts have regularly approved delays of weeks or a few months.[18] Even delays of as high as 10 months have been termed "lengthy," but still within the bounds of constitutional reasonableness.[19] Beyond that, however, a 15-month delay before review and sorting of "imaged evidence" was recently held to be a "flagrant[]" violation of the Fourth Amendment warranting "blanket suppression." *Metter*, 2012 U.S. Dist. LEXIS 82762, at *33 (without reasonably prompt completion of off-site review, "the Fourth Amendment

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[18] *United States v. Hernandez*, 183 F. Supp. 2d 468, 481 (D.P.R. 2004) (six weeks); *United States v. Grimmett*, No. 04-40005-01, 2004 U.S. Dist. LEXIS 26988, at *15 (D. Kan. Aug. 10, 2004) ("concluded within a few weeks of the execution of the warrant").

[19] *See United States v. Gorrell*, 360 F. Supp. 2d 48, 55 n.5 (D.D.C. 2004) ("lengthy"); *United States v. Burns*, No. 07 CR 556, 2008 WL 4542990, at *8–9 (N.D. Ill. Apr. 29, 2008) ("certainly lengthy").

would lose all force and meaning in the digital era and citizens will have no recourse as to the unlawful seizure of information that falls outside the scope of a search warrant"). In addition, magistrate judges have begun putting express mandates in warrants regarding the time for completing an off-site search.[20]

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[20] *E.g.*, *United States v. Brunette*, 76 F. Supp. 2d 30, 42 (D. Me. 1999) (suppressing evidence where government failed to "adhere" to search warrant's 60-day window for off-site computer search), *aff'd* 256 F.3d 14 (1st Cir. 2001); *In re Search of the Premises Known as 1406 N. 2nd Avenue*, 2006 WL 709036, at *7 (W.D. Mich. March 17, 2006) ("The Government will be permitted to search the computer seized . . . and is hereby ordered to conclude that search within 90 days of the date of this opinion and order"); *In re Application of the United States for a Search Warrant for [Business Premises]*, No. 05-mj-3113, slip op. at 12 (M.D. Fla. Jan. 30, 2006) ("[A]n additional extension of four months is a reasonable period of time to complete all aspects of the off-site search, ...[but] it is unlikely that I will grant any further enlargements of time to complete this search"); *United States v. Mutschelknaus*, 592 F.3d 826, 829–30 (8th Cir. 2010) (declining to suppress evidence where officials completed off-site computer search within a "sixty-day extension" of time granted by the magistrate judge); *see also* Fed. R. Crim. P. 41, adv. comm. notes, 2009 amendments (noting that the rule "does not prevent a judge from imposing a deadline for the return" of computers or electronic files "at the time the warrant is issued").

The Government does not approve of this practice and has claimed that "magistrate judges" should not "issue warrants that impose time limits on law enforcement's examination of seized evidence." DOJ Manual, *supra* n.16, at 93–94 ("Prosecutors should oppose such limitations."); *see also* Orin S. Kerr, *Ex Ante Regulation of Computer Search & Seizure*, 96 Va. L. Rev. 1241, 1246 (2010) ("*ex ante* regulation of computer warrants is both constitutionally unauthorized and unwise"). If the Government is right about that, then careful judicial review for reasonableness *ex post* is even more urgent and essential. *Id.* at 1247 ("whatever limitations courts impose on the execution of computer warrants, those limits should be developed and identified in *ex post* challenges").

A second, and even more fundamental requirement is that, whenever the Government does finish its review, it must at that point part ways with non-responsive information that "it ha[d] no probable cause to collect" in the first place. *E.g.*, *CDT*, 621 F.3d at 1177. Numerous decisions have recognized this common-sense limit. *Id.* at 1169, 1171; *Tamura*, 694 F.2d at 596–97 (retention of "documents not described in the warrant . . . . for at least six months after locating the relevant documents" appeared to be "an unreasonable and therefore unconstitutional manner of executing the warrant"); *supra*, at 25–26 n.15 (citing additional cases involving off-site review of paper files); *see also CDT*, 621 F.3d at 1180 (Kozinski, J., concurring) ("The government must destroy or, if the recipient may lawfully possess it, return non-responsive data."). Without this minimum safeguard, the practice of over-seizing for later offsite review would lead to indefinite retention of every file, every book, and every document stored on an electronic device. *See CDT*, 621 F.3d at 1176 (majority op.).

There is nothing novel or onerous about these minimum demands of "reasonableness" in the "execut[ion]" of warrants for electronic information. *See Dalia*, 441 U.S. at 258. They simply reflect a constitutional baseline that prevents the Government from using narrow, particularized warrants to effect general, long-term seizures of private information. Additional safeguards, such as limitations on

the plain-view doctrine, may also be appropriate. *E.g.*, *id.* at 1178 (Kozinski, J., concurring) ("magistrate judges should insist that the government forswear reliance on the plain view doctrine"). But this case does not require consideration of those bolder and more controversial rules. *Compare id.*, with *United States v. Mann*, 592 F.3d 779, 785 (7th Cir. 2010). The Court need only adopt a simple, basic standard—The Fourth Amendment does not permit officials executing a warrant for the seizure of *particular* data on a computer to seize and indefinitely retain *every file* on that computer. *CDT*, 621 F.3d at 1176–77; *Metter*, 2012 U.S. Dist. LEXIS 82762, at *22–30; *see also In re App. for a Search Warrant*, No. 05-mj-3113, slip op. at 14 (M.D. Fla. Jan. 30, 2006) ("Permitting the United States to retain information that is beyond the scope of the search warrant under the hope that, someday, it may have probable cause to support another search of the mirror images for additional information would contravene the Fourth Amendment prohibition against general searches and seizures.").

B. The Mass Seizure and Indefinite Retention of Ganias's Files Violated His Fourth Amendment Rights.

1. The Two-and-a-half Year Retention of Files Outside the November 2003 Warrant's Scope Was Unconstitutional.

In this case, the wholesale seizure and indefinite retention of every file on Ganias's computers was unreasonable under the Fourth Amendment.

The Army's November 2003 warrant was a narrow instrument that "limit[ed]" the files "to be seized" to "data . . . relating to the business, financial and accounting operations of" two of Ganias's clients: "IPM and [American Boiler]." SA27. What was actually seized, however, were "mirror image" copies of every file on all three of Ganias's computers. It is uncontroverted that the Army investigators copied Ganias's "personal" records and his private financial documents. JA428. They also copied the sensitive financial records of all of Ganias's other clients, including dozens of "pizza places, restaurants, diners, donut shops," and individuals. JA464–465. All of these private papers—plus everything else on the computers—were imaged, stored on an external hard drive, and carried away. SA9–10. Had Ganias been reading an eBook by "Marx," "Sartre," or the "Pope," *see Stanford*, 379 U.S. at 479–80, the Army would have undoubtedly taken those too. *See* JA449 (Aff. of Agent Conner) ("seizing information from computers often requires agents to seize most or all electronic storage devices (along with related peripherals) to be searched later").

The Government says that, in a digital world, this mass and indiscriminate seizure of Ganias's private information was necessary, just as it will be necessary "in almost every" other case. DOJ Manual, *supra* n.16, at 77; JA194. Maybe that is right, although the Government has never explained how, in this case, it took any

more than a few minutes to find the clearly labeled accounting records within the scope of the warrant. *See* JA464 (Aff. of Agent Hosney) ("American Boiler's QuickBooks file is denoted 'american.qbw'; IPM's QuickBooks file is identified as 'industri.qbw'."). But even assuming the initial blanket seizure was necessary here, the Fourth Amendment at least demanded that the Government promptly complete its offsite review, *see Metter*, 2012 U.S. Dist. LEXIS 82762, at *28, and then relinquish custody of the reams of papers and records outside the scope of its warrant, *see Tamura*, 694 F.2d at 596–97.

The Government did neither of these things here. Instead, it spent just under 11 months having two separate federal computer laboratories identify and segregate files within the scope of the warrant. SA14 (Army segregation completed "July 23, 2004"); SA15 (IRS segregation of files "that appeared [to the lab analyst] to be within the scope of the warrant" completed "beginning of October 2004"). The agents then spent another two months getting software lined up that would allow them to review the files. SA15–16.

At this point, the IRS and Army agents working this case had stepped to the edge—if they had not already gone over it—of "blatant" disregard for Ganias's privacy rights. *See Metter*, 2012 U.S. Dist. LEXIS 82762, at *26, *28–30 (15-month delay before reviewing 65 "computer hard drives" and "a snapshot of all"

the defendant's email activity held to be blatantly unconstitutional). Over a year out from the seizure of all of Ganias's electronic papers, the agents were well aware that the only "items to be seized" listed on the warrant were the files of IPM and American Boiler, JA347–348, and those files had (at long last) been segregated and made available for review, *see* SA16. Yet no one was doing anything to return or to destroy the vast quantities of records outside the warrant's scope. *See CDT*, 621 F.3d at 1176.

This was quite enough to demonstrate the agents' "disregard" for both the scope of their warrant and Ganias's constitutional rights. *See Metter*, 2012 U.S. Dist. LEXIS 82762, at *28–30. But it got much worse from there. Because at this stage—about 13 months post-seizure—the Government's conduct shifted from a "disturbing" case of unreasonable delay in conducting an off-site search, *see id.*, to blanket and indefinite retention of non-responsive files *after* the responsive records had been identified, *see Tamura*, 694 F.2d at 596. The Government's agents had searched Ganias's computers and identified responsive American Boiler and IPM records. SA16. They decided, however, that the files within their warrant were not enough. They wanted to keep "all the papers . . . without exception." *Compare Entick v. Carrington*, 19 How. St. Tr. 1029, 1064, 95 Eng. Rep. 807 (K. B. 1765). As far as the agents were concerned, all of the imaged files were the

"*government's property*" now. JA146–147 (Agent Conner) (emphasis added). Thus, all of the files—Ganias's own personal and financial documents, plus the sensitive records of "Star Pizza," the "Wethersfield Diner," "Mr. and Mrs. Lefkamaitis," and all of Ganias's other clients—were staying right where they were, in the "evidence room," JA122–124, to be "protect[ed]" for "future" use, JA117.

The Government undoubtedly "hope[d] that, someday, it m[ight] have probable cause to support another search of the mirror images for additional information." *In re App. for a Search Warrant*, No. 05-mj-3113, slip. op. at 14 (M.D. Fla. Jan. 30, 2006); *see* JA122 (Agent Conner: "[Y]ou never know what data you may need in the future."). And from the Government's point of view, it would be nice and convenient for law enforcement to be able to seize and retain papers on hope of future probable cause, and to maintain a vast digital "evidence room" filled with private records, frozen in time and available to be searched as needed. *See* SA24 (approving mass and indefinite retention of documents outside warrant's scope in light of "justifiabl[e] concern[s] about preservation of evidence"). The Fourth Amendment, however, does not reserve to the Government any power to retain private papers—which it had neither warrant nor "probable cause to collect" in the first place, *see CDT*, 621 F.3d at 1177—on the

"hope" that it might have grounds to search them in the future. *See In re App. for a Search Warrant*, *supra*, slip op. at 14.

The District Court nonetheless held that, even after the Government had finished segregating the responsive documents, its continued indefinite retention of non-responsive records was reasonable. *Contra Tamura*, 694 F.2d at 596–97 (retention of "documents not described in the warrant" for "six months after locating the relevant documents" unconstitutional). The implications of that decision are staggering. Here, the Army indiscriminately over-seized Ganias's private financial documents while executing a warrant for evidence of military procurement fraud by two of Ganias's clients. *See* JA430–434. It then retained Ganias's personal financial records without warrant or probable cause for 29 months—16 of which took place *after* it had already identified the records within the legitimate reach of its warrant—until the IRS obtained a second warrant to search the retained images for evidence of tax evasion by Ganias. JA457–459. If that was a reasonable manner of executing the November 2003 warrant, then why stop there? Perhaps the Commerce Department wants to look at some imaged records. Maybe in a couple of years the Labor Department or Immigration & Customs Enforcement will want to look at "Star Pizza's" documents. The many agencies of the Government could likely think of innumerable uses for the millions

of pages of documents taken off of Ganias's computers. Better yet, the Government could combine Ganias's files with the over-seized computer records from "almost every" other case, *see* DOJ Manual, *supra* n.16, at 77, and upload all of them to one big "evidence room" filled with "thousands" of people's indefinitely retained documents. *See* Paul Ohm, *The Fourth Amendment Right to Delete*, 119 Harv. L. Rev. F. 10 (2005).[21]

This frightening power would likely go a long way towards satisfying the Government's desires for maximum "preservation of evidence." SA24. But as long as the Fourth Amendment stands, federal agents still need a warrant and probable cause before they may take private papers, convert them into "government property," and indefinitely consign them to the evidence room. The mass seizure and indefinite retention of files outside the scope of the November 2003 warrant violated Ganias's Fourth Amendment rights. *Tamura*, 694 F.2d at 596–97; *see CDT*, 621 F.3d at 1169; *United States v. Santarelli*, 778 F.2d 609, 615–16 (11th Cir. 1985).

[21] *Cf. In re App. for a Search Warrant*, *supra*, slip op. at 14–15 (disapproving the "cavalier attitude" reflected in the "United States' representation in [its] motion . . . that 'for the last several years it has been the practice of [certain United States Attorneys' Offices] to copy the hard drives of computers taken during searches and to keep these images throughout the investigation or prosecution of the case.'").

2. The Seizure of Mirror-Image Copies of Ganias's Files, Rather than the Physical Hardware, Is Beside the Point.

The District Court's contrary decision rested in part on its conclusion that the Government's seizure of mirror images from Ganias's hard drives was "less intrusive" than "holding the computers themselves." SA24. That distinction, however, is one "without a difference." *Metter*, 2012 U.S. Dist. LEXIS 82762, at *29 (rejecting Governments' claim that "return[] of the original electronic documents and equipment" and retention of "only the imaged electronic documents" had any effect on the Fourth Amendment analysis); *see generally* Orin S. Kerr, *Fourth Amendment Seizures of Computer Data*, 119 Yale L.J. 700 (2010).

In a digital environment, whether a person "has access to a particular copy" of his electronic files has "much less significance than whether the government" has obtained that "data for possible . . . use in the future." *Id.* at 712. Most people today keep "multiple copies of their most valuable data," and "[h]ardware is increasingly fungible." *Id.* If the Government had taken Ganias's physical computers, he could have used a laptop while the agents looked for the responsive IPM and American Boiler documents. What matters for Fourth Amendment purposes is that the Government seized images of everything on the computers, which "fr[o]ze the scene" and brought all of Ganias's electronic papers and records "under the government's control." *Id.* at 710–11 ("[O]btaining the copy [of a

person's electronic data] serves the traditional function regulated by the seizure power: it freezes whatever information is copied, preserving it for future access by government investigators.").

Even if the distinction were a significant one, it would not justify the Government's conduct in this case. That Ganias lost "but one day of use of his computers" may have been, other things being equal, a good thing. JA400 (Government's argument). But it is hardly the point. The Government seized every file from Ganias's computers and decided that all of those private records had become "government[] property," *see* JA146, to be retained indefinitely in the evidence room. If giving up the hardware for a few months is what Ganias had to do to get the Government's hands off the vast quantities of records outside the scope of its warrant, Ganias would have taken that trade. Loss of hardware for a period would have been much "less intrusive" than retention of all Ganias's private papers and records for 8 years, 8 months, 12 days (and counting).

3. The April 2006 Warrant Does Not Excuse the Government's Unlawful Seizure.

The fact that the agents "obtain[ed] the 2006 warrant" before they actually *viewed* Ganias's personal financial records, *see* SA22, likewise does nothing to excuse the earlier unconstitutional *seizure* that gave the Government access to and control over Ganias's preserved papers. By the time the Government obtained its

second warrant—29 months post-seizure and 16 months post-identification of IPM and American Boiler documents—the violation of Ganias's Fourth Amendment rights was long since complete. *Tamura*, 694 F.2d at 596–97 ("six months after locating the relevant documents"); *Metter*, 2012 U.S. Dist. LEXIS 82762, at *28–30 (15-month delay without review or return of "evidence outside the scope of the warrants").

Moreover, the facts of this case illustrate why blanket and indefinite retention of computer records—outside of a warrant's scope and with no probable cause—itself presents an intolerable threat to privacy under the Fourth Amendment. As the District Court found, the agents in this case were able to freely "browse the files" on Ganias's computers as if they were "using those computers" on the day "the images were made." SA15–16; *see* JA319 (Agent Chowaniec) ("I could sit there and look at what Steve Ganias was looking at at the time."); JA363 (Agent Hosney) ("[E]verything in his computer. The [software] is like you're sitting at his terminal."). Agent Hosney had the program right in "her office." JA319. She could see, as she browsed through Ganias's QuickBooks program, the title of the file ("Steve_ga.qbw") containing his personal financial records, JA467, as well as similar files for all of Ganias's clients. Had she wanted to, she could have rummaged through all of them. Had she been curious, she could

have looked at everything on the computer. What kind of literature or music did Ganias have on there? What private photographs or health-related information? How about his web-browsing history? Nobody was watching, and all she had to do was click.[22]

To be sure, the District Court found that, when put to the test, Hosney looked at only the "IPM files" and "did not even review the [American Boiler] files." SA22. Fortunately, even if others were tempted, Hosney made sure that their eyes did not stray. JA320–321 ("Agent Hosney was very vehement that we could only look at IPM or American Boiler and that is it."). Not every government employee, however, is made of the same stuff as Hosney. That is why the Fourth Amendment does not give an "officer engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948), any power to indiscriminately seize and indefinitely retain documents outside the scope of a warrant.

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[22] *Cf. United States v. Gourde*, 440 F.3d 1065, 1077–78 (Kleinfeld, J., dissenting) ("There are just too many secrets on people's computers, most legal, some embarrassing, and some potentially tragic in their implications, for loose liberality in allowing search warrants. Emails and history links may show that someone is ordering medication for a disease being kept secret even from family members. Or they may show that someone's child is being counseled by parents for a serious problem that is none of anyone else's business. Or a married mother of three may be carrying on a steamy email correspondence with an old high school boyfriend.").

4. Rule 41(g) Does Not Estop a Criminal Defendant from Vindicating His Fourth Amendment Rights Through a Motion To Suppress.

The District Court was also wrong to suggest that Ganias's failure to file a pre-indictment motion "for return of property under [Federal Rule of Criminal Procedure] 41(g)" barred his post-indictment suppression motion. SA23–24. The court raised this issue *sua sponte* and without briefing, and its opinion does not cite any case that has ever imposed such a restriction on an otherwise timely suppression motion. *See* Fed. R. Crim. P 12(b) (motions to suppress "must be raised before trial"). But even assuming that this novel limitation is appropriate in some cases, it does not apply here because Ganias never had a meaningful opportunity to seek return of his imaged hard drives under Rule 41(g).

As the District Court noted, Ganias was "present" when the Army executed the November 2003 warrant at his business premises. SA23. The special agent on the scene, John Latham, explained to Ganias that the Army had a warrant to seize files "which related to American Boiler and IPM." JA428. Latham further explained that, while the Army "needed to take . . . mirror images" of Ganias's computers, files unrelated to "American Boiler and IPM" would be "purged." JA428. The District Court did not suggest that Ganias was under any obligation, at this point, to file a Rule 41(g) motion. Nor would imposing such an obligation

have made any sense, as there is no meaningful distinction between "purg[ing]" an imaged hard drive and destroying it. *See CDT*, 621 F.3d at 1180 (Kozinski, J., concurring).

Where the District Court found fault with Ganias was in his failure to seek Rule 41(g) relief in February 2006. It was then that Ganias learned, at a proffer session, "that the government was in possession of th[e] data [on his imaged hard drives] and wanted his permission to search it." SA23. "At that time," according to the court, "Ganias could have moved for return of the property," but he failed to do so. SA23.

The District Court's premise was incorrect. As the Government repeatedly stated in opposing Ganias's motion to suppress, Ganias had by February of 2006 (27 months post-seizure) become a target in an "ongoing grand jury investigation." Gov. Response to Motion to Suppress 24–25 (March 15, 2010); *see* JA401 ("there was an ongoing grand jury investigation through indictment on October the 31st, 2008"). District Courts throughout this Circuit have traditionally been "loathe to interfere with an ongoing grand jury investigation," and the majority approach remains to "defer[]" any "decision on a Rule 41([g]) motion" to a post-indictment motion to suppress. *In re Search Warrant*, No. M 18-65, 1995 U.S. Dist. LEXIS

9475, at *4–5 (S.D.N.Y. July 6, 1995).[23] If Ganias had brought a Rule 41(g) claim in February 2006, the Government and (in all likelihood) the court would have told him to wait for his suppression motion. *Id.* When Ganias filed his suppression motion, the court below told him he was too late. SA23–24. Surely there must be some paper that Ganias can file to vindicate his Fourth Amendment rights in a federal court. It was error for the District Court to erect this new and unwarranted procedural barrier.

C. Evidence Obtained by the Unconstitutional Seizure of Ganias's Electronic Files Must Be Suppressed.

The unconstitutional seizure of all of Ganias's electronic papers mandates suppression. This Court has long held that, "when items outside the scope of a

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[23] *Compare, e.g.*, *id.*, 1995 U.S. Dist. LEXIS 9475, at *5–6 ("[U]nless irreparable injury can be established, petitioner's claims are better resolved in the form of a motion to suppress if and when an indictment is filed . . . . A party can rarely, if ever, demonstrate that the seizure of business records or documents caused irreparable harm if the government either makes copies available or retains copies and returns the originals."), *and United States v. Douleh*, 220 F.R.D. 391, 397 (W.D.N.Y. 2003) (2003) ("If the grand jury should return an indictment against defendant, his unlawful seizure claim may be fully considered upon a motion to suppress. . . . Defendant thus has an adequate remedy at law regarding his unlawful seizure claim—a Rule 12 motion to suppress—and, therefore, his Rule 41(g) motion is not appropriately before this Court."), *with Doane v. United States*, No. 08 Mag. 0017, 2009 U.S. Dist. LEXIS 61908, at *21–23 (S.D.N.Y. June 1, 2009) (surveying the split and criticizing the deferral approach because, under a 1989 amendment, "the plain language of Rule 41([g]) does not permit a court to defer its decision or to engraft an irreparable harm requirement that is not set forth in the text").

valid warrant are seized, the normal remedy is suppression and return of those items." *See United States v. Matias*, 836 F.2d 744, 747–48 (2d Cir. 1988); *see Tamura*, 694 F.2d at 597 (same). A broader and more "drastic remedy" of blanket suppression is also available in certain cases. *Id.* Such "wholesale suppression" is "required only when" the officers executing the warrant both "effect a widespread seizure of items . . . not within [the warrant's] scope," and act in bad faith. *United States v. Liu*, 239 F.3d 138, 1140 (2d Cir. 2000) (citation omitted). Here, blanket suppression is in order. That said, reversal is also required under a more narrow remedy suppressing the items outside the warrant's scope.

As an initial matter, the seizure and indefinite retention of every file on Ganias's computers ought to result in blanket suppression of all the seized evidence. *See Metter*, 2012 U.S. Dist. LEXIS 82762, at *28–29 (ordering blanket suppression based on failure to begin review of mirror image hard drives 15 months post-seizure). There is no doubt that the officers executing the November 2003 warrant "effect[ed] [a] 'widespread seizure of items" outside its scope. *Matias*, 836 F.2d at 748. As the District Court stated, the warrant "limit[ed] the Taxes International data authorized to be seized to that relating to the business, financial and accounting operations of IPM and [American Boiler]." SA27. The agents working on this case understood the limited scope of their warrant. *E.g.*,

JA348. But that did not stop them from taking all the files on the computers and from keeping them indefinitely. Flagrant conduct such as that demands a "drastic" remedy. *Matias*, 836 F.2d at 747–48.

That said, the choice between blanket suppression and a more targeted order suppressing the "items outside the scope" of the warrant actually matters very little in this case. *See Matias*, 836 F.2d at 747–48. The only documents within the scope of the November 2003 warrant were those relating to the operations of IPM and American Boiler. SA27. The key pieces of evidence at Ganias's trial—the preserved images of his personal QuickBooks file—were undeniably outside the scope of that warrant. SA22 ("[I]n 2006, when the agents wished to view documents *outside the scope of the 2003 warrant*, the agents obtained authorization to do so by obtaining the 2006 warrant."); JA348 (Agent Hosney) ("we couldn't look at [Ganias's personal QuickBooks] file because it wasn't—Steve Ganias and Taxes International were not listed on the original Attachment B [to the November 2003 warrant], items to be seized"). It was Ganias's personal QuickBooks files that provided the Government with its evidence on the key element of willfulness. *E.g.*, 16 Tr. 117 (Apr. 1, 2011) (closing argument) ("They were recorded as owner's contribution. . . . That's pretty significant evidence of deliberate intent to evade tax."). Indeed, the QuickBooks records were so critical

at trial that both the Government and the defense retained and offered testimony from their own QuickBooks experts. At the very least, then, these key QuickBooks records must be suppressed. *See Matias*, 836 F.2d at 747–48. This Court should reverse the suppression order, and vacate the judgment.[24]

II. Juror Misconduct Violated Ganias's Sixth Amendment Rights and Requires a New Trial.

The jury's improper use of social media also mandates a new trial. On the night before evidence began in this case, one of the jurors charged with deciding Ganias's fate in his criminal trial—Juror X—logged on to Facebook, announced that he might "get [to] hang" Ganias, and then received suggestions from friends on alternative methods of punishment—"[t]or[ture] first, then hang!" JA550. The

[24] The District Court's opinion also contains a passing reference to "[t]he government" having "complied in good faith with the warrant issued by the magistrate judge." SA24; *see generally United States v. Leon*, 468 U.S. 897 (1984). That is incorrect, and the District Court itself pointed out why three pages later: The warrant "limit[ed] . . . the data authorized to be seized to that relating to the business, financial, and accounting operations of IPM and [American Boiler]." SA27. Whatever else the Government was doing, it clearly was not relying on the warrant. It may well be that the magistrate judge understood—when he issued the warrant—that "the data authorized to be seized m[ight] be intermingled with data that the government [was] not authorized to seize." *Id.* Having read Agent Conner's affidavit, the magistrate judge also may have understood that an off-site review was possible, and that this review might take a number of "weeks or months." JA448–449. But nothing in the warrant suggests that the magistrate judge granted the Government a secret, unwritten power to ignore the warrant's terms by seizing and indefinitely retaining every file and every record on the computers. When the Government did that, it was on its own.

District Court's failure to order a new trial in the face of this clear evidence of bias and extraneous influence was error and provides an independent ground for vacating the judgment. At the very least, a remand is in order for a full and more complete hearing on the extent to which Juror X's improper conduct affected his new Facebook friend, Juror Y.

A. Standard of Review.

This Court reviews a "trial judge's handling of alleged jury misconduct" or bias "for abuse of discretion." *United States v. Gaskin*, 364 F.3d 438, 463 (2d Cir. 2004). A trial court abuses its discretion when it commits an error of law, "base[s] its ruling on . . . a clearly erroneous assessment of the evidence," or renders a decision "that cannot be located within the range of permissible decisions." *Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008) (internal quotation marks and citations omitted).

B. Criminal Defendants Have a Constitutional Right to an Impartial Jury, and the Use of Social Media by Jurors Has Placed Strains on that Fundamental Protection.

1. The Sixth Amendment Guarantees the Right to an Impartial Jury.

A criminal defendant's "right to jury trial" consists, at a bare minimum, of a "fair" hearing before a "panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961), citing *Coke upon Littleton* 155b. The jury and the jury

alone holds the power to "strip a man of his liberty," *id.*, and its decision on "guilt or innocence" must be based solely "upon the evidence developed at the trial," *Turner v. Louisiana*, 379 U.S. 466, 472 (1965).

"Juror partiality" can "take various forms." *See United States v. Quinones*, 511 F.3d 289, 301 (2d Cir. 2007). The most obvious and, perhaps, the most pernicious is that of a juror who harbors an "actual bias" against the defendant and who has "express[ly]" revealed a "state of mind prejudicial to a party's interest." *United States v. Haynes*, 398 F.2d 980, 984 (2d Cir. 1968). Having such a juror sit in judgment of a criminal defendant is at odds with the basic "theory of the law . . . that a juror who has formed an opinion" and prejudged the defendant's case "cannot be impartial." *Irvin,* 366 U.S. at 722, quoting *Reynolds v. United States*, 98 U.S. 145, 155 (1878).

Equally fundamental is the defendant's right to a jury "unprejudiced by extraneous influence," *see United States v. Moten*, 582 F.2d 654, 664 (2d Cir. 1978), or "extrinsic information," *see United States v. Schwarz*, 283 F.3d 76, 97 (2d Cir. 2002). Any evidence of "private communication" or "contact" with a juror about a pending matter must be "deemed presumptively prejudicial," and the "burden rests heavily upon the Government to establish" that the extraneous influence "was harmless to the defendant." *Remmer v. United States*, 347 U.S.

227, 229 (1954); *see United States v. Farhane*, 634 F.3d 127, 169 (2d Cir. 2011) (assessing whether government has rebutted presumption requires consideration of "(1) the nature of the information or contact at issue, and (2) its probable effect on a hypothetical average jury").

2. Jury Impartiality in an Age of Social Networking.

This is all very old and well-settled law. In recent years, however, the bedrock constitutional guarantee of an "impartial jury" has come under "enormous" pressure as a result of "[t]he explosive growth of social networking." Hon. Amy J. St. Eve & Michael Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 Duke L. & Tech. Rev. 1, 2 (2012). The great benefit of social-networking websites like Facebook and Twitter is that they allow users to easily and efficiently communicate with others on a mass scale. Yet those very benefits also "exponentially increase[] the risk of prejudicial communication" with jurors and the "opportunities to exercise persuasion and [extraneous] influence" on them. *See, e.g.*, *United States v. Juror No. One*, No. 10-703, 2011 U.S. Dist. LEXIS 146768, at *25 (E.D. Penn. Dec. 21, 2011); *United States v. Fumo*, 655 F.3d 288, 331 (3d Cir. 2011) (Nygaard, J., concurring) ("The availability of the Internet and the abiding presence of social networking now dwarf the previously held concern that a juror may be exposed to a newspaper article or television program.").

Any juror with a Facebook or Twitter account, for example, can within seconds inform hundreds or thousands of people of his or her biases and prejudgment of a party's case. *E.g.*, *Facebooking Juror Kicked Off Murder Trial*, The Orange County Reg. (Dec. 2, 2011) (juror removed after posting, among other things, that defendant was "presumed guilty);[25] *Prospective Juror Tweets Self Out of Levy Murder Trial*, NBC WASHINGTON, Oct. 22, 2010 (juror removed after discovery of posts stating "[g]uilty, guilty . . . I will not be swayed. Practicing for jury duty");[26] Christina Hall, *Facebook Juror Gets Homework Assignment*, The Detroit Free Press, Sept. 2, 2010 (juror dismissed after posting "gonna be fun to tell the defendant they're GUILTY").[27] After a juror makes improper comments, the juror's Facebook "friends" or Twitter "followers" can then engage with the juror about the case, and exert their own extraneous influence on the process. *See Fumo*, 655 F.3d at 332 (Nygaard J., concurring) ("social networking sites . . . have simply made" juror misconduct "quicker and easier"); *State v. Dimas-Martinez*,

[25] *Available at* http://www.ocregister.com/articles/juror-329708-trial-judge.html.

[26] *Available at* http://www.nbcwashington.com/news/local/Prospective-Juror-Tweets-Self-Out-of-Levy-Murder-Trial-105553253.html.

[27] *Available at* http://www.jdnews.com/articles/judge-82207-assignment-juror.html.

2011 Ark. 515, at *15 (2011) ("Because of the very nature of Twitter as an on [*sic*] online social media site, Juror 2's tweets about the trial were very much public discussions."). This is to say nothing of improper social-media communications between two or more jurors, or between jurors and attorneys, or even between jurors and witnesses or parties.[28] The problem is only intensified by the widespread use of mobile smartphones, which allow jurors to post to Facebook or Twitter during breaks in the proceedings or even while actually sitting in the jury box or jury room. *Cf. Tapanes v. State*, 43 So. 3d 159, 160 (Fla. 2010) (reversing conviction "where a juror used a smartphone during a break in jury deliberations to look up the definition of . . . a term used in the jury instructions").

Faced with such challenges, courts have begun to react against these "recurring problem[s]." *City of New York v. ExxonMobil Corp.*, 739 F. Supp. 2d 576, 609 n.215 (S.D.N.Y. 2010). A number of courts have specifically endorsed or mandated pattern instructions that "caution . . . jurors on the use of social

[28] *E.g.*, *Juror No. One v. California*, No. 2:11-397, 2011 WL 567356, at *1 (E.D. Cal. Feb. 14, 2011) (discussing communication between jurors through Facebook during trial); *People v. Rios*, No. 1200/06, 2010 WL 625221, at *2 (N.Y. Sup. Ct. Feb. 23, 2010) (juror-witness communications); *Wilgus v. F/V Sirius, Inc.*, 665 F. Supp. 2d 23, 26 (D. Me. 2009) (juror email to counsel); *Tarrant County juror sentenced to community service for trying to 'friend' defendant on Facebook*, Fort Worth Star Telegram, Aug. 28, 2011 (juror "friend" request to defendant mid-trial), *available at* http://www.star-telegram.com/2011/08/28/3319796/juror-sentenced-to-community-service.html.

media" and stress the need to avoid "talk[ing] with anyone about the case" over these platforms. *Fumo*, 655 F.3d at 304–05.[29] At least one judge in this Circuit has required jurors to sign pledges not to engage in improper use of the Internet.[30] In what is perhaps the strongest response to date, the Arkansas Supreme Court recently reversed a capital murder conviction based on a juror's repeated use of Twitter to comment on the case in violation of the court's instructions. *Dimas-Martinez*, 2011 Ark. 515, at *14–15.

C. Juror X's Expression of Actual Bias and Exposure to Extraneous Influence Demand a New Trial.

1. Juror X's Facebook Communications Demand a New Trial.

The conduct of Juror X and his Facebook friends provides an object lesson on how the use of social networking has "exponentially" increased jurors' opportunities to engage in prejudicial communications. *See Juror No. One*, 2011

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[29] Citing *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case*, Judicial Conference Committee on Court Administration and Case Management, December 2009, *available at* http://www.uscourts.gov/uscourts/News/2010/docs/DIR10-018-Attachment.pdf.

[30] Judge Scheindlin recently imposed this restriction in a high-profile trial of an accused arms smuggler. *See NY Judge: No Web for Jurors at Soviet Arms Trial*, CBS News (Oct. 5, 2011), http://news.yahoo.com/ny-judge-no-jurors-soviet-arms-trial-025047790.html.

U.S. Dist. LEXIS 146768, at *25; *Fumo,* 655 F.3d at 331 (Nygaard, J., concurring). On the day of jury selection, the trial court explained—to Juror X and to all of the prospective jurors—that serving on Mr. Ganias's jury would come with the responsibility to "judge [him] guilty or not guilty based upon the evidence," and without any consideration of "emotions" such as "hostility" or "prejudice." JA526–527. Juror X did not express any reservation about his ability to perform this responsibility. Yet, the very next day, he decided to announce to his hundreds of Facebook friends that he had "[j]ury duty 2morrow," that he might "get 2 hang" the defendant in the case, and that he couldn't "wait" for this opportunity. JA550.

These posts displayed total disregard for the judge's admonition to consider only the "evidence" and to avoid rendering judgment based on "hostility," "prejudice," or other emotions. JA526–527; *see Dimas-Martinez*, 2011 Ark. 515, at *14–15 (reversing conviction based on juror's posting of messages on Twitter in defiance of court's instructions). More than that, Juror X's announcement that he could not wait for the opportunity to hang the defendant was a clear and "express" statement of "actual bias." *Haynes*, 398 F.2d at 984. Based on this comment alone, the District Court should have ordered a new trial. *Id.*; *see Irvin,* 366 U.S. at

722 (basic "theory of the law" is that "a juror who has formed an opinion" "cannot be impartial") (internal quotation marks and citations omitted).

It got much worse from there, however, as the interactive nature of Facebook allowed Juror X's friends to respond to the post and to exert their own guilt-presuming influence on him. *See Moten*, 582 F.2d at 664. Several of Juror X's friends "liked" the post, while others exhorted Juror X to "get" the defendant and to deliver an even harsher punishment than mere "hang[ing]." JA550 ("Tor[ture] first . . ."). These outside "communication[s]" to Juror X about the ultimate punishment to be meted out in this case exerted an "extraneous influence" on the jury and made the inference of partiality even more compelling. *See Remmer*, 347 U.S. at 229. Indeed, given 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.

The cascading effects of Juror X's misconduct on Facebook continued to spread from there. Just a few days later, Juror X became Facebook friends with another member of the panel, Juror Y, and Juror Y was then able to access and review the earlier musings of both Juror X and his friends on whether to "hang" or "tor[ture]" Ganias. JA550–51. This compounded the effects of both Juror X's improper statements and the extraneous influence brought to bear by Juror X's

friends. All told, the improprieties clearly compromised the jury's impartiality. A new trial is warranted.

2. It Was Error for the District Court To Accept Juror X's Post-Trial Claims of Impartiality.

When the District Court had Juror X appear in court to explain his conduct on Facebook, Juror X unsurprisingly denied "that he had . . . predetermined guilt" and claimed to have been "jok[ing]." JA612 ("Just joking, joking around. You never joked around? You don't have friends you joke around with?"). The District Court stated that it "found" these denials "credible" and "truthful." SA35. However, Juror X clearly "ha[d] an interest in concealing his own bias," and it is possible that he was not even consciously "[]aware" of it. *See Smith v. Phillips*, 455 U.S. 209, 221–22 (1982) (O'Connor, J., concurring); *see Sullivan v. Fogg*, 613 F.2d 465, 467 (2d Cir. 1980) ("[A] juror's statement that he remained impartial in the face of a potentially prejudicial influence is not conclusive."). In the face of "express" statements by Juror X announcing his own bias to his Facebook friends, *Haynes*, 398 F.2d at 984, it was clear error to rely on bare claims of impartiality after the fact.

Moreover, the District Court's credibility finding was based in part on its having applied a "presumpt[ion]" of "honesty" with respect to Juror X's testimony.

SA35–36. Precisely the opposite presumption should have applied here. *Remmer*, 347 U.S. at 229. The extraneous influence of Juror X's Facebook friends was "presumptively *prejudicial*," and it was the Government's "burden . . . to establish" that the influence "was harmless." *Id.* (emphasis added). That legal error fatally undermines the District Court's credibility finding.

D. At the Very Least, the Court Should Order a Broader and More Exhaustive Hearing.

Even if the Court does not vacate the judgment and order a new trial, it should at the very least remand for a full hearing on the effects of the juror misconduct in this case. Although a trial court has wide discretion in structuring its inquiry into claims of jury misconduct, *see United States v. Moon*, 718 F.2d 1210, 1233–35 (2d Cir. 1983), that discretion is not without limits. Where "reasonable grounds for investigation" of alleged improprieties "exist," the District Court must "permit the entire picture to be explored." *See United States v. Moten*, 582 F.2d 654, 667 (2d Cir. 1978). A record that leaves open "too many unanswered questions and too much room" for interpretation demands further inquiry. *United States v. Vitale*, 459 F.3d 190, 197–98 (2d Cir. 2006).

Here, the record leaves simply "too many . . . questions" open regarding the interactions between Jurors X and Y. *See id.* Although Juror X denied having any improper discussions with Juror Y, JA616–618, it is clear that Juror Y became

Facebook friends with Juror X during the trial and that Juror Y had access to Juror X's improper discussions about "hang[ing]" and "tor[turing]" Ganias. JA550. If Juror Y did indeed review these postings, that extraneous influence would give rise to a presumption of prejudice that the Government would bear the "heav[y]" burden of rebutting. *See Remmer*, 347 U.S. at 229 ("any private communication, contact, or tampering, *directly or indirectly*, with a juror . . . [should be] deemed presumptively prejudicial") (emphasis added). Moreover, Juror Y's question to the clerk shortly before deliberations began—"Would it be wrong if we came back with a verdict right away?'" 16 Tr. 183 (Apr. 1, 2011)—is yet another "unanswered" question that tends to support an inference of either premature deliberation or extraneous influence. *Vitale*, 459 F.3d at 197–98. That is without even knowing what, if any, posts about prejudging Ganias's guilt Juror Y made on Juror Y's own Facebook wall. At the very least, the full picture must be explored here, and Juror Y should be heard from regarding her interactions with Juror X on Facebook.

The Court also erred when it denied Ganias's request to subpoena the Facebook records of Jurors X and Y. Those Facebook records would have revealed the *entire* set of comments made in response to Juror X's posts, any private Facebook messages that Juror X sent relating to the case, and any improper

communications between Jurors X and Y. Courts have recognized that, although jurors may have a "privacy interest in [their] Facebook posts," those interests do not outweigh the interests of criminal defendants in fully investigating serious allegations of jury impropriety. *See Juror Number One v. Superior Court*, 206 Cal. App. 4th 854, 865 (2012) (upholding subpoena of Facebook records); *id.* at 874 (Mauro, J., concurring) ("the balance between Juror Number One's privacy concerns and defendants' right to a fair trial tips in favor of the defendant."). In sum, "further investigation is needed" here, *see Vitale*, 459 F.3d at 199–200, and that investigation should include a review of Facebook records.

CONCLUSION

The Court should reverse the order denying Ganias's motion to suppress, vacate his conviction, and remand the case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,752 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ John W. Cerreta
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date a copy of foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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