# 12-0240-cr

**United States Court of Appeals**
**for the Second Circuit**

Docket No. 12-0240-cr

UNITED STATES OF AMERICA,

Appellee,

-against-

JAMES L. McCARTHY, a/k/a "James McCarthy,"

Defendant,

STAVROS M. GANIAS,

Defendant-Appellant.

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

BRIEF ON REHEARING *EN BANC* FOR *AMICI CURIAE*
FEDERAL PUBLIC DEFENDERS WITHIN THE SECOND CIRCUIT
IN SUPPORT OF APPELLANT STAVROS M. GANIAS

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**

**OTHER AUTHORITIES**

## INTEREST OF THE AMICI CURIAE

Federal Defenders of New York, Inc., on behalf of its office and the other Federal Public Defender Offices of this Circuit, submits this brief in support of appellant, Stavros M. Ganias, in response to this Court's order dated June 17, 2014, to rehear the case *en banc*, and inviting *amicus curiae* briefs from interested parties. We ask the Court to affirm the holding of the panel that the seizure and indefinite retention of appellant's entire computer files, even after segregation of those files specified in the warrant, violated the Fourth Amendment and that the evidence contained in those files must be suppressed. See United States v. Ganias, 755 F.3d 125 (2d Cir. 2014). In its order, the Court posed two questions: 1) whether the government's actions violated the Fourth Amendment, and 2) "whether the government agents in this case acted reasonably and in good faith such that the files obtained from the cloned hard drives should not be suppressed." This amicus brief addresses the second question, the application of the exclusionary rule, assuming that the seizure and retention of the non-responsive files violated the Fourth Amendment.

Federal Defenders of New York, Inc., is the institutional public defender in the United States District Courts for the Southern and Eastern Districts of New York, and the United States Court of Appeals for the Second Circuit. The Federal Public Defenders joining this brief represent clients in all of the other

districts of this Circuit, and before this Court. All of our offices regularly advocate on behalf of the criminally accused in federal court, with a core mission of protecting the rights of our clients and safeguarding the integrity of the federal criminal justice system.

*Amici* have a strong interest in the issues presented in this case, pursuant to Fed. R. App. P. 29(b)(1), because we frequently represent clients who are prosecuted on the basis of computer evidence seized from their homes and businesses. Fourth Amendment limitations on government seizure of computer files and the deterrence of Fourth Amendment violations through suppression of evidence unlawfully seized are matters of great concern to the lawyers in our offices, our clients, and the criminal justice system as a whole.

Pursuant to Fed. R. App. P. 29(c)(5), *amici* state that no party's counsel authored this brief in whole or in part, and that no party or person other than the federal defender offices contributed money towards the preparation or filing of this brief.

## STATEMENT OF THE CASE

In the course of a fraud investigation of two related companies, Industrial Property Management, Inc. (IPM) and American Boiler, the government obtained a warrant to seize all of the "books, records, documents, materials, computer hardware ... software, and computer associated data relating to the business,

financial, and accounting operations of [IPM] and American Boiler" from the office of their accountant, Mr. Ganias. JA433, SA8-9.[1] Neither Mr. Ganias nor his business, Taxes International, were targets of the investigation; Mr. Ganias was a presumably innocent third party.

The search warrant affidavit set forth probable cause to seize only those documents relating to the two target businesses, but declared that "searching and seizing information from computers often requires agents to seize most or all electronic storage devices (along with related peripherals) to be searched later by a qualified computer expert in a laboratory or other controlled environment." JA 449-51. It swore that this process "can take weeks or months." The warrant itself rather cryptically included under the heading, "list of items to be seized":

> Computer(s), computer hardware, software, related documentation, passwords, data security devices (as described below), monitors and/or televisions, and data were instrumentalities of and will contain evidence related to these crimes.

JA 437.

Rather than identifying the computer files relating to the two target companies and seizing only those, government agents copied all three computer drives found at Mr. Ganias's office, which included his own personal files and the records of all of his other

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[1] "JA" and "SA" refer to the Joint Appendix and Special Appendix submitted by the parties.

clients, to review at a later time for the specific records authorized by the search warrant. Mr. Ganias expressed concern about the scope of the seizure and the agents assured him that they were only looking for files relating to American Boiler and IPM and that everything else would be purged after those records were identified. JA428.[2] Despite this representation, the agents kept the entire set of files it had copied and seized. Thirteen months later, the agents had finally segregated the documents authorized by the search warrant, but they still kept all the files seized. Agents knew from their review of the files that they contained Mr. Ganias's personal "QuickBooks files," and they knew that none of those records were authorized to be seized by the warrant. JA463-64, JA336, JA347-48.

Four months later, and 21 months after the seizure, the government expanded its investigation to include a tax case against Mr. Ganias. SA17. It obtained his tax records and subpoenaed his bank records. JA465-67. Still in unauthorized possession of all

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[2] The government disputes this fact and contends that the evidence must be viewed "in the light most favorable to the government." Reh. Pet. 9, 12-13. This is not the standard on review of a decision on a suppression motion. United States v. Bershansky, 788 F.3d 102, 108-10 (2d Cir. 2015). The district court's factual findings are reviewed for clear error, id., but the district court made no finding on whether this statement was made. The agents' representation in the warrant application that they "often" seized entire computer drives for the purpose of segregating the authorized records in their lab and that this could take weeks or months, demonstrates their knowledge that the seizure of copies of the entire files was at most permitted for a limited time for this limited purpose.

of his personal files 27 months after the initial seizure and 14 months after the authorized files were segregated, government agents asked Mr. Ganias to consent to the search of those files. SA17, JA428. When he refused, the government obtained a warrant to search through all those files, 29 months after they had been seized and *16 months after the authorized documents had been segregated*. SA17.

The undisputed factual scenario establishes a violation of the most fundamental Fourth Amendment guarantees: "the right of the people to be secure in their persons, houses, papers, and effects," and that "no Warrants shall issue, but ... particularly describing ... the things to be seized." Indeed, it is exactly what the framers meant to prevent by prohibiting general warrants: government agents, armed with a small justification to conduct a limited search, seize all of a man's private records while they turn his life upside down until they find grounds to use those records against him. If these were paper documents, there would be no doubt of the Fourth Amendment violation and the required suppression of the evidence that was beyond the scope of the warrant. Andresen v. Maryland, 427 U.S. 463, 482 n.11 (1976); Stanford v. Texas, 379 U.S. 476, 485-86 (1965); United States v. Matias, 836 F.2d 744, 747 (2d Cir. 1988); United States v. Tamura, 694 F.2d 591, 595-97 (9th Cir. 1982). The contention that this should be allowed somehow -- either on a "good faith" theory or

because it did not even violate the Fourth Amendment to seize and keep records that were not authorized by the warrant -- is based solely on the fact that these are electronic records. But as the Supreme Court recently reaffirmed, in the age of advanced electronic capabilities, "we must 'assur[e] preservation of that degree of privacy that existed when the Fourth Amendment was adopted.'" United States v. Jones, 132 S.Ct. 945, 950, and 958 (Alito, J., concurring) (2012) (citation omitted). Fourth Amendment protections cannot fall to technological advance, and only the exclusionary rule ensures that they will not.

## SUMMARY OF ARGUMENT

The purpose of the Fourth Amendment was to prevent the "indiscriminate searches and seizures" conducted by the British "under the authority of 'general warrants.'" Payton v. New York, 445 U.S. 573, 883 (1980); see also Riley v. California, 134 S.Ct. 2473, 2494 (2014) (Fourth Amendment was "the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era"). Thus, the Fourth Amendment requires warrants to be based upon probable cause and "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Constitution, Amend. IV. Any search must be confined "strictly within the bounds of the warrant." Bivens v. Six Unknown Named Agents, 403 U.S. 388, 394 n.7 (1971). A search or seizure that exceeds the scope of the warrant violates the

Fourth Amendment and the fruits of that seizure must be suppressed. Elkins v. United States, 364 U.S. 206 (1960) (exclusionary rule applies to evidence seized beyond the scope of the warrant).

In this case, government agents copied and seized all of the computer files in Mr. Ganias's office, although the warrant -- and the probable cause on which it was based -- was limited to those files relating to two of his clients, American Boiler and IPM. While agents may have been authorized to copy the entire contents of all of appellant's computers in order to segregate those files within the scope of the warrant, they were not authorized to retain copies of all of appellant's files after they had completed the segregation. The warrant affidavit swore that it could be necessary to seize entire computer devices only to search them for the authorized files, which could take "weeks or months." At least by the time segregation was complete -- already 13 months after the seizure -- agents were required to either return the hard drive copies to Mr. Ganias or destroy them. United States v. Comprehensive Drug Testing, 621 F.3d 1162, 1170-71 (9th Cir. 2010); United States v. Tamura, 694 F.2d at 596-97.

For all the reasons set forth in the panel opinion, appellant's brief, and the brief of other amici on behalf of appellant, retention of the files past that point was a seizure far beyond the scope of the warrant, in violation of the Fourth Amendment. This violation requires suppression of all evidence

found in those files. See Elkins, 364 U.S. at 206. The argument here will focus on the application of the exclusionary rule.

There is no good faith exception to the exclusionary rule that applies to this case. The "good faith" exception is limited to established categories of police action undertaken in reliance on a neutral, official authority, such as a facially valid warrant subsequently declared invalid, United States v. Leon, 468 U.S. 897 (1984) a subsequently overturned statute, Illinois v. Krull, 480 U.S. 340 (1987), a subsequently recalled warrant, Herring v. United States, 555 U.S. 135 (2009), or binding appellate precedent that is later reversed, United States v. Davis, 131 S.Ct. 2419 (2011). In this case, government agents did not seize and retain all of Mr. Ganias's computer files in reliance on the warrant; the warrant authorized only the seizure of records relating to the businesses of IPM and American Boiler. Nor did the agents rely on any statutory authority or binding appellate precedent to authorize the indefinite retention of copies of the entire hard drives. Contrary to the government's argument, Davis explicitly does not apply to a seizure made in reliance on unsettled law or the fact that there is no authority specifically prohibiting the seizure. 131 S.Ct. at 2433-35.

Outside these delineated categories of authority upon which a government agent may be found to have relied in good faith, there is no general good faith exception to suppression of evidence

seized in violation of the Fourth Amendment. Nor should there be. The rationale for the good faith exception limits its application to those categories of Fourth Amendment violations that would not be deterred by the exclusionary rule, actions based on specific authorization from an unimpeachable and official source. Davis, 131 S.Ct. at 2429; Krull, 480 U.S. 340; Leon, 468 U.S. 897. Conversely, where there was no such specific authorization and where suppression would deter the kind of violation at issue, the good faith exception is inappropriate. Law enforcement has a natural incentive to seize and retain for future use as much information as it can. Moreover, technological advances have made it so easy for the government to amass vast troves of data about its citizens that its ability and incentive to collect and store such information has exponentially increased. See Riley, 134 S.Ct. at 2490; Jones, 132 S.Ct. at 963-64. Deterrence is therefore more necessary than ever to protect the privacy rights at the core of the Fourth Amendment.

Finally, the government's unlawful retention of copies of all of appellant's computer files is not cured by the second warrant. The Leon exception does not apply to a warrant that is based on prior unlawful police conduct.

## ARGUMENT

### THERE IS NO GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE THAT APPLIES TO THIS SEIZURE.

#### 1. There is No General Good Faith Exception to the Exclusionary Rule Outside of the Categories Delineated by the Supreme Court

In United States v. Leon, 468 U.S. 897 (1984), the Supreme Court established an exception to the exclusionary rule for cases where the police seized evidence pursuant to a facially valid warrant that was subsequently held invalid. Leon's rationale was that the exclusionary rule is meant to deter the police from violating the Fourth Amendment and that exclusion of evidence obtained with what reasonably appeared to be a valid warrant would not further that deterrent purpose. Id. at 918-21. The cost of allowing the alleged criminal to go free was thought to be too high without an offsetting deterrent effect. Id. at 922. The Leon exception to exclusion requires the government to establish "good faith" in the particular case, that is, that the police acted in objectively reasonable reliance on a warrant. Id. at 922-24.

In the 30 years following Leon, the Supreme Court has expanded the good faith exception to a handful of situations, which all involve police reliance on some kind of specific authorization for their conduct such that suppression of the evidence would do nothing to deter police violations. In Illinois v. Krull, 480 U.S. 340 (1987), the good faith exception was applied to a search authorized by a statute that was subsequently overturned. Arizona

v. Evans, 514 U.S. 1 (1995), and Herring v. United States, 555 U.S. 135 (2009), applied the exception to objectively reasonable reliance on an erroneous warrant entry in a court database and reliance on a subsequently recalled warrant, respectively. Most recently, the Supreme Court applied the good faith exception to an unlawful search authorized by binding appellate precedent that was later overturned. Davis v. United States, 131 S.Ct. 2419 (2011). In deciding whether the good faith exception should apply to a particular Fourth Amendment violation in one of these established categories, courts must determine 1) that the police reliance on the particular authority for the search or seizure was objectively reasonable and 2) that any potential benefits of deterring police conduct are outweighed by the costs of suppression. See Davis, 131 S.Ct. at 2428 (where search was "in strict compliance with then-binding circuit law," no deterrent value to suppression). Herring, 555 U.S. at 146 (suppression had marginal deterrent value where police reasonably relied on a warrant in a data base that was in error).

Beyond these categories identified by the Supreme Court, there is no general good faith rule that can be applied *ad hoc* by courts in any case involving a Fourth Amendment violation. Following Davis, the Circuits have generally limited application of the good faith exception to cases in which agents relied on appellate precedent authorizing warrantless GPS surveillance before the

Supreme Court's contrary holding in United States v. Jones, 132 S.Ct. 945 (2012), e.g., United States v. Taylor, 776 F.3d 513 (7th Cir. 2015); United States v. Stephens, 764 F.3d 327 (4th Cir. 2014); United States v. Fisher, 745 F.3d 200 (6th Cir.), *cert. denied*, 135 S.Ct. 676 (2014); United States v. Smith, 741 F.3d 1211 (11th Cir. 2013), *cert. denied*, 135 S.Ct. 704 (2014); United States v. Aguilar, 737 F.3d 251 (2d Cir. 2013), *cert denied*, 135 S.Ct. 400 (2014); United States v. Sparks, 711 F.3d 58 (1st Cir. 2013); United States v. Andres, 703 F.3d 828 (5th Cir. 2013), or relied on precedent authorizing seizure of cellphones incident to lawful arrest before the Supreme Court's contrary holding in Riley v. California, 134 S.Ct. 2473 (2014). United States v. Gary, __ F.3d ___, 2015 WL 38146117 (7th Cir. 2015).

The Third Circuit alone, in a sharply split decision, has relied on Davis *dicta* to hold that there is a "general good faith" exception to the exclusionary rule in addition to the delineated exceptions. United States v. Katzin, 469 F.3d 163, 173 (3rd Cir. 2014) (en banc), *cert. denied*, 135 S.Ct. 1448 (2015). Katzin held that agents' warrantless use of a GPS device before Jones was undertaken in good faith reliance on binding appellate precedent and, in the alternative, with "a good faith belief in the lawfulness of their conduct." Id. This alternative holding is wrong and should not be followed. Katzin's expansion of the good faith exception is not supported by the circumscribed holding in

Davis: "[W]e hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." Id. at 2423-24, 2434. Indeed, Justice Alito explained the limitations of the Davis exception in response to the dissent's concern that it would stunt the development of Fourth Amendment law: the exception only applies to searches specifically authorized by binding appellate precedent and not where the question remained open in a given jurisdiction. Id. at 2433. Justice Sotomayor concurred to emphasize that Davis applied only where "binding appellate precedent specifically authorize[d] a particular police practice" and did not present the "markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled." Id. at 2435 (Sotomayor, J., concurring).

Nor do the prior Supreme Court good faith cases provide authority for a general good faith exception applicable to any Fourth Amendment violation based only on a balancing of deterrent value against the cost of suppression in the individual case. In each case establishing a good faith exception to the exclusionary rule, the Supreme Court has determined that a particular type of specific authorization for the search or seizure appears so reliable that ordinary, good police work would require acting upon it. E.g., Davis, 131 S.Ct. at 2429 (where agents relied on binding appellate precedent "all that exclusion would deter in this case is

conscientious police work"); Leon, 468 U.S. at 920 (where agents relied on a facially valid warrant, exclusion would only make an agent "less willing to do his duty"). In each case, the application of the good faith exception has been limited to the particular category of authorization. Davis, 131 S.Ct. at 2434 ("We hold that where the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply."); Herring, 555 U.S. at 146 (deterrent benefits are too marginal to justify exclusion "when evidence is obtained in objectively reasonable reliance on a subsequently recalled warrant"). See United States v. Katzin, 769 F.3d at 189-90 (Greenaway, J., dissenting, joined by McKee, Ambro, Fuentes, and Smith, JJ.) (good faith exception is limited to situations delineated by the Supreme Court, "where law enforcement personnel have acted in objectively reasonable reliance on seemingly immutable authority or information that justifies their course of action").

This requisite of official authorization that is so specific it would not be doubted or second-guessed precludes application of the good faith exception to the government's seizure and indefinite retention of records clearly outside the scope of the warrant. The government did not rely on binding precedent to support its open-ended retention of documents not authorized by the warrant, because there was none. The law was, and still is, unsettled on the

question of how long the government may take to review computer hard drives or their copies to extract those limited files authorized by the warrant. Some courts impose strict limits on the time period for reviewing seized computer drives, see United States v. Comprehensive Drug Testing, 621 F.3d 1162, 1168-69 (9th Cir. 2010) (government ordered to return unauthorized data within 60 days of the seizure); United States v. Brunette, 76 F. Supp. 2d 30, 42 (D. Me. 1999), aff'd, 256 F.3d 14 (1st Cir. 2001) (suppressing evidence based on government's failure to adhere to the warrant's 60-day time limit for off-site segregation), while others have upheld delays of several months, e.g., United States v. Burns, 2008 WL 4542990 (N.D. Ill. Apr. 29, 2008) (10-month delay before forensic analysis began); United States v. Gorrell, 360 F. Supp. 2d 48, 55 n.5 (D.D.C. 2004).

But no precedent has ever allowed open-ended retention of non-authorized files even after the forensic analysis is accomplished. See, e.g., Comprehensive Drug Testing, 621 F.3d at 1171 (requiring the return or sealing of all computer files after segregation of responsive files); United States v. Santarelli, 778 F.2d 609, 616 (11th Cir. 1985) (where complexity of paper documents required offsite review, search must be completed quickly and the files not authorized by the warrant returned "promptly"); United States v. Tamura, 694 F.2d at 596-97 (where offsite review was required by the volume and intermingling of the files, the government's failure

to return the non-responsive documents after segregating them was unreasonable).

The rationale of the Ganias panel dissent for non-suppression in this case is the general absence of "bad faith" on the government's part, based on its "mistaken" view that all of the files it seized (even those far beyond those authorized by the warrant) were now government property, and the lack of case law "to indicate that the government could not hold onto the non-responsive documents in the way it did." Ganias, 755 F.3d at 142 (Hall, J., dissenting). Likewise, the government's rehearing petition relies on the lack of clear precedent prohibiting the open-ended retention of all of appellant's files. Reh. Pet. at 10. But Davis does not allow the police to do whatever is not prohibited; the good faith exception only applies to police reliance on an official source that "specifically *authorizes* a police practice." Davis, 131 S.Ct. at 2429 (emphasis in original). Nor should the good faith exception be expanded to allow the police to interpret unsettled law and decide that the lack of clear prohibition allows them to seize more.

**2. The Value of Deterring the Seizure and Indefinite Retention of Entire Computer Files Is Too Substantial to Allow Ad Hoc Legal Interpretations by Police Through Expansion of the Good Faith Exception.**

The Supreme Court recently emphasized the need for "clear guidance to law enforcement through categorical rules" regarding the search of digital devices:

> "[I]f police are to have workable rules, the balancing of the competing interests ... 'must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers.'"

Riley v. California, 134 S.Ct. at 2491-92, quoting Michigan v. Summers 452 U.S. 692, 705 n.19 (1981). Nowhere is this more necessary than in the area of computer searches, where changing technology has greatly expanded the risks to privacy.

This case demonstrates the good sense of clear categorical rules and the imprudence of extending the good faith exception to police interpretations of unsettled law: law enforcement has a natural incentive to interpret the law in such a way as to maximize the evidence it collects, not to protect the privacy of individuals. See Riley, 134 S.Ct. at 2492 (noting the ingenuity with which police may justify virtually any warrantless search of a cellphone for potential evidence of an offense); Comprehensive Drug Testing, 621 F.3d at 1170-71 (noting government's powerful incentive to seize more rather than less data). Government claims relating to the challenges of analyzing electronic files have been employed for more than 15 years to expand its ability to seize and review at its leisure computer files well beyond the scope of warrants. See Comprehensive Drug Testing, 621 F.3d at 1175-77, and at 1178-79 (Kozinski, J., concurring); United States v. Grimmett, 439 F.3d 1263, 1269 (10th Cir. 2006); United States v. Balon, 384 F.3d 38, 48-49 (2d Cir. 2004); United States v. Hay, 231 F.3d 630,

637 (9th Cir. 2000); United States v. Upham, 168 F.3d 532, 535 (1st Cir. 1999). As the agent here put it, after segregating copies of the files authorized by the warrant, they did not delete copies of unauthorized files because "you never know what you might need in the future." JA122.

Agents simply have no reason to give up electronic records they have seized unless the courts make them do so. Since the very purpose of the exclusionary rule is to compel compliance with the Fourth Amendment, its application here furthers that fundamental goal. See Elkins v. United States, 364 U.S. at 217 (purpose of the exclusionary rule is "to deter — to compel respect for the constitutional guaranty ... by removing the incentive to disregard it"). Expansion of the good faith exception to the retention of seized computer files far beyond the scope of the warrant would only encourage the indefinite storage of electronic records of a person's entire life and work -- even, as in this case, the records of third parties who are not suspects at the time of the seizure.

As the Supreme Court and this Court have recognized, the nature of electronic record keeping and the government's ability to seize and search the entire record of a person's life calls for more vigilance, not less, to preserve the privacy rights at the core of the Fourth Amendment. Riley, 134 S.Ct. at 2490 (fact that the typical cell phone contains "a digital record of nearly every aspect" of the owner's life requires more privacy protection

against a warrantless search incident to arrest); United States v. Galpin, 720 F.3d 436 (2d Cir. 2013) (the nature of digital storage and the way it is searched greatly expands the "risk that every warrant for electronic information will become, in effect, a general warrant, rendering the Fourth Amendment irrelevant"), quoting, Comprehensive Drug Testing, 621 F.3d at 1176-77 (the storage of virtually all private information on computers combined with "the reality that over-seizing is an inherent part of the electronic search process . . . calls for greater vigilance on the part of the judiciary"). See also Jones, 132 S.Ct. at 963-64 (technological change has made open-ended electronic surveillance so easy that more privacy protection is needed). But law enforcement's inclinations lean in the opposite direction: nothing would make life easier for government agents than the maintenance of electronic dossiers on all manner of persons and businesses to be later mined for evidence.[3]

In fact, the Department of Justice encourages agents and prosecutors to take their time and advises them that there is no specific time limit on the forensic analysis of entire computer

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[3] This is the purpose of, and the fundamental Fourth Amendment problem with, the massive NSA collection of "a vast trove of records of metadata concerning the financial transactions or telephone calls of ordinary Americans to be held in reserve in a data bank, to be searched if and when at some hypothetical future time the records might become relevant to a criminal investigation." ACLU v. Clapper, 785 F.3d 787, 815 (2d Cir. 2015) (holding the program unauthorized by statute, and therefore not reaching the Fourth Amendment issue).

hard drives to segregate files authorized by the warrant, citing district court decisions upholding delays in even *beginning* the forensic analysis for as long as ten months. Exec. Office for U.S. Attorneys, Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations 91-92 (2009) ("DOJ Manual") (emphasis added), available at http://www.justice.gov/criminal/cybercrime/docs/ssmanual2009.pdf. The DOJ instructs prosecutors to oppose any time limitations to be imposed by magistrate judges granting warrants and to leave litigation of the constitutional issues to later:

> Some magistrate judges have imposed time limits as short as seven days, and several have imposed specific time limits when agents apply for a warrant to seize computers from operating businesses. In support of these limitations, a few magistrate judges have expressed their concern that it might be constitutionally "unreasonable" under the Fourth Amendment for the government to deprive individuals of their computers for more than a short period of time.
>
> *Prosecutors should oppose such limitations.* The law does not expressly authorize magistrate judges to issue warrants that impose time limits on law enforcement's examination of seized evidence, and the authority of magistrates to impose such limits is open to question, especially in light of the forthcoming amendment to Rule 41 stating that the time for executing a warrant "refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review." As the Supreme Court suggested in one early case, the proper course is for the magistrate to issue the warrant so long as probable cause exists, and then to permit the parties to litigate the

> constitutional issues afterwards.

Id. at 93-94 (emphasis added)(citation omitted).

This advice reflects law enforcement's natural incentive to retain documents for as long as possible, even if the stated reason for prolonged retention is a "careful and deliberate" analysis of the files. Id. at 91-92. This is not a matter of bad faith in the subjective, malicious sense, but is in the nature of the government's law enforcement role.[4] The Founders recognized this incentive and meant to check government power with the Fourth Amendment.

In sum, suppression of the evidence seized and retained for more than a year after the authorized files were segregated would provide a significant deterrent to open-ended retention of files outside the scope of the warrant. A Fourth Amendment violation that would be deterred by suppression of the evidence is not the type of violation that should be subject to the good faith exception. See Leon, 468 U.S. 897; Davis, 131 S. Ct. 2419. Moreover, the costs of suppressing unlawfully retained files are minimal, both in general and in this case. Where agents have probable cause to suspect computer files contain evidence of a crime, nothing advanced here would prevent them from obtaining a

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[4] Justice Roberts noted in Herring, 555 U.S. at 142, that "good faith" was a confusing term because the standard is objectively reasonable reliance, which does not include subjective motives of individual officers, citing Leon, 468 U.S. at 923 n.23.

warrant to seize those files. In this case, the agents could have obtained a warrant to seize appellant's computer files in 2006 to search for tax fraud, and used evidence found therein. The only evidence they could not use is that which was seized years before without a warrant.

**3. The *Leon* Exception Does Not Apply To the Second Warrant Because It was Based on the Fourth Amendment Violation.**

The Leon good-faith exception applies when officers rely on "a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." United States v. Leon, 468 U.S. at 900. The exception is based on the recognition that when police do not violate the law, suppression of the evidence has no appreciable deterrent effect on police misconduct. Id. at 908. After all, the exclusionary rule is intended to "deter police misconduct rather than to punish the errors of judges and magistrates." Id. at 916.

It follows that the good-faith exception for reliance on a warrant does not apply to shield government agents from their own overreaching. See United States v. Reilly, 76 F.3d 1271, 1280 (2d Cir. 1996) ("Good faith is not a magic lamp for police officers to rub whenever they find themselves in trouble."). It applies to determinations of probable cause and the particularity requirement, questions for the magistrate. Leon, 468 U.S. at 922; Massachusetts v. Sheppard, 468 U.S. 981 (1984). It does not apply to the officer's execution of the warrant. Leon, 468 U.S. at 918 n.19; 1

Wayne R. LaFave, Search and Seizure § 1.3(f) (5th ed.) (outlining execution issues not covered by *Leon* and collecting cases). Because of the need to deter police conduct, Leon expressly held the good-faith exception inapplicable where, *inter alia*: (1) the government agent has misled the magistrate with information in an affidavit that was knowingly or recklessly false, (2) the warrant is based "on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,'" or (3) the warrant is "so facially deficient -- i.e., in failing to particularize the place to be searched or the things to be seized -- that the executing officers cannot reasonably presume it to be valid." Leon, 468 U.S. at 923 (citations omitted).

The reasoning of Leon and its progeny precludes application of the good faith exception to a warrant based on a prior Fourth Amendment violation by the police. Several courts have recognized this and refused to apply the good faith exception to warrants secured after a Fourth Amendment violation by the police. For example, in United States v. Scales, 903 F.2d 765, 768 (10th Cir. 1990), the Tenth Circuit held that the Leon exception did not apply where the officers unlawfully seized a suitcase and held it for 24 hours before obtaining a warrant to search it. The Court reasoned that the Leon rationale did not apply because "the illegality was not a function of the agents' good faith reliance on a

presumptively valid warrant." Id. Rather, the illegal conduct preceded the warrant. Id. Likewise, in United States v. Reilly, 76 F.3d 1271, 1281 (2d Cir. 1996), this Court held that the police misconduct underlying the warrant application precluded application of the Leon exception. See also United States v. Vasey, 834 F.2d 782, 789 (9th Cir. 1987); United States v. McGough, 412 F.3d 1232 (11th Cir. 2005).

In Reilly, as in Vasey and McGough, the probable cause determination for the warrant was based in part on material found in the first illegal search. 76 F.3d at 1280-81. However, that is not the only way in which a warrant can be tainted by a prior illegality. Just as in Scales, if the agents here had not unlawfully retained the entire record of appellant's life and work for more than a year after any authorization to do so, they could not have applied for a warrant to search that record. While the probable cause determination in this case was not based on an illegal search, the entire warrant was based on the illegal seizure and retention of files. Since the rationale of Leon is strictly tied to whether suppression will deter constitutional violations by the police, what matters is whether the warrant followed from the illegal conduct of the police:

> "The constitutional error was made by the [agents] in this case, not by the magistrate as in Leon. The Leon Court made it very clear that the exclusionary rule should apply (i.e. the good faith exception should not apply) if the exclusion of evidence would alter the

> behavior of individual law enforcement officers or the policies of their department."

Vasey, 834 F.2d at 789.

Some Circuits, including this one, have applied the good faith exception where the affidavit relied for probable cause on some information obtained unlawfully but disclosed those circumstances fully to the magistrate. See United States v. Thomas, 757 F.2d 1359, 1368 (2d Cir. 1985); United States v. McClain, 444 F.3d 556, 566 (6th Cir. 2005); United States v. Fletcher, 91 F.3d 48, 52 (8th Cir. 1996); United States v. Thornton, 746 F.2d 39, 49 (D.C. Cir. 1984); United States v. Diehl, 276 F.3d 32, 43 (1st Cir. 2002); cf. Reilly, 76 F.3d 1271 (2d Cir.) (distinguishing Thomas on that ground). The theory that disclosure of the predicate illegality in the warrant affidavit cures the underlying illegality has been much criticized on the ground that the magistrate evaluating probable cause is not called upon to pass upon the legality of a prior search. See United States v. O'Neal, 17 F.3d 239, 242 n.6 (8th Cir. 1994); Vasey, 834 F.2d at 789-90. See also, LaFave at § 1.3(f) (5th ed. 2014) (a magistrate does "not endorse past activity; he only authorize[s] future activity. The function of the magistrate is to determine 'whether a particular affidavit established probable cause,' not whether the methods used to obtain the information in that affidavit were legal.")

Cases allowing disclosure to purge prior illegality require full disclosure of "all potentially adverse informative" to the

magistrate. Reilly, 76 F.3d at 1280. In this case, agents only disclosed generally that the computer images had been seized pursuant to a warrant and did not specify that appellant's personal files were not within the scope of that warrant, but had been retained since 2003.

Moreover, cursory disclosure of the prior warrant had even less consequence because it did not relate to the probable cause determination. At least in making the probable cause determination, the magistrate might scrutinize the source of the evidence supporting probable cause. In this case, disclosure of the mere fact that the government had copies of the evidence to be searched from execution of a prior warrant risked no such scrutiny. The magistrate here had no reason to evaluate the propriety of the original seizure, but had only to determine whether probable cause now existed to search those copies.

Finally, the exclusionary rule has significant deterrent value to enforce compliance with basic Fourth Amendment protections in this context. If the government can sanitize its unlawful retention of the entire record of appellant's life and work -- a third party who was not even a suspect -- until more than a year later it found some reason to search it and obtain a warrant, nothing will prevent this from occurring on a routine basis. Allowing the government to benefit from its unlawful seizure will encourage the ever-expanding scope of its seizures of computer

records. The seizure of all the records of an accounting firm on a warrant to search for the files of a single client contains a potential mother lode of evidence against all sorts of future targets. The exclusionary rule counters the government's incentive to collect and retain such a store of records. See *ante* at 17-21.

The deterrent value of the exclusionary rule is clear in this case. This is not a case, like Thomas, where there was "nothing more the officer[s] could have or should have done" to be sure their conduct was lawful. 757 F.2d at 1368. In Thomas, there was no reason for the police to believe in the first place that a canine sniff outside an apartment door was unlawful and they immediately sought a warrant, in which they told the magistrate that the evidence had been obtained with the canine sniff. In contrast, nothing in the 2003 warrant or the affidavit in support thereof could reasonably have led the agents here to believe that they were authorized to retain mirror image copies of all of the hard drives seized from appellant's office indefinitely -- or at all past the point where they had extracted the authorized files. If, after segregating the authorized files, the agents believed that they had some ground to retain their entire copy of appellant's files, they were obligated to return to the magistrate at that point, not take it upon themselves to keep the files for

more than a year until they found grounds to search them.[5]

The agents' decision to retain all the files, despite no authorization to do so, was deliberate; they "viewed the data as the government's property" (JA145-46) and retained it because "you never know what you might need in the future." JA122. The exclusionary rule is meant to deter deliberate action of law enforcement that violates the Fourth Amendment, the kind of conduct at issue here. See Davis, 131 S.Ct. at 2427 (exclusionary rule is warranted to deter deliberate, reckless, or grossly negligent conduct, not conscientious police work in reliance on binding authority). And the cost of suppressing this kind of evidence is not so great that it outweighs its substantial deterrent value. The government already had evidence of tax fraud; it only sought to confirm it with the search of unlawfully seized files. Agents could have achieved that purpose by obtaining a warrant for appellant's current files, rather than the unlawfully retained files.

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[5] The government's reliance (Reh. Pet. 11) on United States v. Carey, 172 F.3d 1268, 1274-76 (10th Cir. 1999) and United States v. Riley, 906 F.2d 841, 845 (2d Cir. 2d Cir. 1990), for the proposition that agents must seek a second warrant when they discover evidence of a second crime in a search pursuant to a warrant for a specific crime, is misplaced here. Contrary to the government's contention, that was not "the precise course taken by the agents here." Rather, the agents kept all of the records for more than one year after the search, without seeking a warrant and with no probable cause for a warrant.

*  *  *

In sum, there is no "good faith exception" that applies to the government's unlawful seizure of all of appellant's files for more than one year after any authorization to keep them. For the reasons set forth, the exception should not be expanded by this Court to apply to this case.

## CONCLUSION

For the foregoing reasons, *amicus curiae* Federal Defenders of New York, Inc., respectfully requests this Court to affirm the panel's order granting a new trial.

Dated: New York, New York
July 29, 2015

Respectfully submitted,

FEDERAL DEFENDERS OF NEW YORK, INC.
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**CERTIFICATE OF SERVICE**

I hereby certify that on July 29, 2015 I electronically filed the foregoing with the court's CM/ECF system, which will send notification of such filing to the counsel for all parties in these cases.

Dated: New York, New York
July 29, 2015

/s/
**COLLEEN P. CASSIDY**

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 29(b) & 32(a)

(1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) & 29(b) because this brief contains 6,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

(2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using this brief has been prepared in a monospaced typeface using **Corel WordPerfect 9** with **10 characters per inch in courier new** type style.

Dated: New York, New York
July 29, 2015

/s/
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