No. 14-10283

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellant,

v.

ANDREW B. KATAKIS,
Defendant - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
Honorable William B. Shubb
District Court No. 2:11-cr-00511-WBS-2

REPLY BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTE

INTRODUCTION

We may never know exactly how many emails and other electronic documents Andrew Katakis managed to make unavailable in his effort to obstruct the bid-rigging investigation. But the evidence that was available and admitted at trial proved beyond a reasonable doubt exactly what the indictment charged, that "[i]n or about September 2010" and with the intent to "influence an investigation," Katakis "knowingly . . . destroyed [or] concealed . . . electronic records and documents" in two distinct ways. ER463. "Specifically," he (1) "deleted . . . electronic records and documents" and (2) "also installed and used . . . a software program that overwrote deleted electronic records and documents." ER463-64. Katakis's fatal-variance argument is therefore meritless.

Likewise, his sufficiency argument fails. This is the rare prosecution for obstruction of justice with eyewitness evidence of one way the defendant obstructed—here, manually deleting electronic documents—and forensic evidence of another way—using scrubbing software. The eyewitness, Steve Swanger, literally stood next to Katakis and watched him delete electronic documents, and the forensic

expert, Agent Medlin, tried in vain to uncover any trace, remnant, or record of ten incriminating emails on multiple computers at Katakis's office—residue that would have remained if not for "user action." *See* ER198-99, 288-89.

The basic account of Katakis's obstruction campaign that emerges from their combined testimony is not in dispute. On a Friday night, two days after his bank informed him that his bank records had been subpoenaed, Katakis (1) purchased DriveScrubber scrubbing software, (2) installed it on his and other work computers, (3) summoned Swanger to the office over the weekend, (4) searched Swanger's computers for the names of Katakis's co-conspirators, and (5) proceeded to click, move, and delete emails and files on those computers. Both sides agree that no trace of ten incriminating emails was found on any computer other than Swanger's Dell, where they had been dumped into the "Deleted Items" folder, and that Swanger returned to work the following Monday to find almost all of his emails, plus other files, missing from his computers.

The jury reasonably could conclude that the explanation for the missing electronic documents is that Katakis managed to destroy or

conceal them. And yet the district court ruled that no rational jury could have found Katakis guilty of obstruction because the evidence of destruction or concealment was lacking. That ruling was erroneous, and nothing in Katakis's brief demonstrates otherwise.

Lastly, Katakis's prosecutorial-misconduct argument fails because there was no misconduct in the closing—the government permissibly asked the jury to draw the inference that Katakis deleted emails—and even if there were, it would not warrant acquittal. Any misconduct was not prejudicial, but regardless, the proper remedy would be to grant a new trial, a motion for which is pending in the district court, and not to affirm the grant of a motion for acquittal on the alternative misconduct ground.

ARGUMENT

I. Several Evidentiary Bases Supported the Guilty Verdict

The evidence of Katakis's obstruction is compelling and thorough, providing three sufficient bases for finding guilt, any one of which is enough to sustain the jury's verdict. *See Griffin v. United States*, 502 U.S. 46, 56, 59-60 (1991). When Katakis attempts to poke holes in the ample, independent evidentiary bases for the verdict, he either

misreads the record, the government's position, or the reviewing standard, which requires this Court to view the evidence collectively and in the light most favorable to the government before deciding whether *any* rational jury could find guilt beyond a reasonable doubt. The jury here saw this case for what it is: a paradigmatic and well-proved example of obstruction of justice in the digital age.

A. DriveScrubber Had Its Intended Effect

This case can be resolved very simply in light of straightforward testimony from the government's expert, Agent Medlin. Agent Medlin testified that transaction logs recording the exchange of emails on a server—including the emails' headers, senders, recipients, and contents—enter the free space of a computer, ER198, where DriveScrubber can reach them, ER271. Because those logs were missing, he was steadfast in his considered opinion that Katakis had successfully used DriveScrubber to erase electronic records of the emails, removing every trace of their existence. ER198-99. Even Vilfer, the defense expert, agreed that it was "suspicious" that no remnants of the emails were left. ER202. The jury was entitled to arrive at its verdict based on that evidence alone, which the district court did not

discuss or even cite in its order granting Katakis's Rule 29 motion, ER1-17.

Katakis asserts that the logs were out of DriveScrubber's reach, saying that "Agent Medlin admitted that log files are eliminated automatically" and therefore "would have been eliminated as a matter of course *without* DriveScrubber." Appellee Br. 42-43. But the testimony Katakis relies on undermines his assertion.

Katakis quotes Agent Medlin testifying that, when they are created, the "'logs are not inside the Exchange Database, they reside outside the Exchange Database.'" *Id.* at 43 (quoting ER198). That testimony supports the government's explanation. The logs are not created in the Exchange Database, where they would be safe from DriveScrubber, ER225. Rather, they initially reside elsewhere on the "Exchange *server*," ER198 (emphasis added), also known in this case as the "GD mail server," FER10. The GD mail server is the email server at Katakis's office and was one of the four office computers that Agent Medlin examined. ER300-01. It did not contain logs of the ten incriminating emails. ER205-10, 286.

The logs' apparent absence from the server might have been routine, but only if they were present in the server's free space instead. Katakis quotes Agent Medlin explaining that "'after a certain length of time'" in the Exchange server, "'those logs will start to fall off and be deleted *into the free space*.'" Appellee Br. 43 (emphasis added) (quoting ER198). That is why Agent Medlin "expect[ed] to find remnants of those e-mails in the free space," ER199, and why Vilfer similarly thought he would "find some sort of a remnant had these e-mails passed through the server," ER202. Neither did.

DriveScrubber, of course, operates in the free space, so the regularly scheduled elimination that consigns the logs there does not preempt DriveScrubber's function in overwriting them, as Katakis contends on appeal, Appellee Br. 36-37, 42-44. Automatic elimination and elimination-by-DriveScrubber are in no way mutually exclusive. Rather, they work in tandem: the former tees up the latter by placing the logs in the free space.

Accordingly, when the email logs were nowhere to be found, automatic elimination was not a sufficient explanation. If automatic elimination was all that had occurred, Agent Medlin and Vilfer would

have been able to find and recover the logs from the free space. They were not there. That is why Agent Medlin remained convinced that DriveScrubber had operated successfully to remove them. ER198-99. This was the clear-cut explanation he presented to the jurors, and it was their well-recognized prerogative to credit it.

Katakis's only response to this explanation is to speculate that the emails never existed and were after-the-fact fabrications by Swanger. *See* Appellee Br. 21-22, 40. But that speculation has no evidentiary basis. Katakis points to testimony from Vilfer raising the possibility of fabrication, *id.* at 21 & n.49 (citing ER201-02), but Vilfer admitted in his next sentence that he had no evidence to support a fabrication theory. ER202. Agent Medlin gave his expert opinion that the emails were authentic, ER284, which the jury was entitled to find credible.

Importantly, the emails included metadata, ER283-84, and both experts agreed that fabricating metadata is no simple task, ER285; SER185-87; FER13, especially not for someone like Swanger, who described himself as "computer illiterate," FER7. Moreover, two of the emails were authenticated at trial by one of their recipients, Katakis's business partner Bob Florsheim. ER357-69. And a jury

understandably might struggle to understand why Swanger would fabricate personally incriminating emails, complete with attachments, and plant them in the "Deleted Items" folder of his computer before turning it over to authorities. A jury rationally could subscribe to the simpler and more plausible explanation that the emails were real and that Katakis's use of DriveScrubber is the reason that records of them are missing.

B. Katakis Manually Erased Electronic Documents

Katakis's subordinate Steve Swanger offered an eyewitness account of Katakis's rampage through computer files on an unusual Saturday in the office, three days after Katakis learned that a federal investigation existed and was seeking his bank records.[1] ER316. Katakis led Swanger into the office that day and took a seat in

[1] In a footnote, Katakis argues that "[t]he record contains no evidence that Katakis ever personally saw the [bank] letter," Appellee Br. 12 n.18, but "[a]rguments raised only in footnotes . . . are generally deemed waived," *Estate of Saunders v. Comm'r*, 745 F.3d 953, 962 n.8 (9th Cir. 2014). In any event, a rational jury readily could infer that Katakis saw the letter from the evidence that it was addressed to him at his business address, ER183, 251, 254, was sent via certified mail with a return receipt, ER184, 253, and was received and signed for on Wednesday, September 1, 2010, ER184, 254, almost immediately prior to his efforts to destroy and conceal electronic records related to the conspiracy, *see* Appellant Br. 5-7.

Swanger's chair while Swanger stood over him. ER313-14, 317, 319. Swanger looked on as Katakis searched the names of his co-conspirators, pulling up "a bunch of documents and e-mails." ER318-19. Swanger watched as Katakis proceeded to click, move, and delete incriminating emails and other documents. ER313-14, 319-21. And when Swanger returned to work the following Monday, both of his computers were missing "a lot" of emails and files—having either been destroyed or, at the very least, successfully concealed from Swanger. ER321.

Swanger's testimony provided a rich foundation for the jury's conclusion that Katakis had obstructed the FBI investigation. The district court and Katakis fault it, however, by zeroing in on one detail: the date on which the ten emails identified by the FBI were double-deleted from Katakis's computer, Swanger's ASUS computer, and the office email server.[2] *Contra United States v. Rosales*, 516 F.3d 749, 752 (9th Cir. 2008) ("Evidence at trial must be considered as a whole.").

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[2] For an explanation of double- versus single-deletion, see Appellant Br. 9. The government does not contend that the ten incriminating emails were double-deleted on Swanger's Dell, where they were found, single-deleted, in the "Deleted Items" folder. *See id.* at 27 n.6. *But see* Appellee Br. 23, 46-51.

They sweep past Swanger's direct testimony that on September 4, 2010, three days after the bank letter arrived, Katakis deleted not only emails, but also documents and other files, from both of Swanger's computers. Afterward, Swanger could not find "a lot" of emails and files. ER321. That testimony alone, even without regard to the ten incriminating emails or to DriveScrubber, is enough to support the jury's verdict.

Katakis questions Swanger's testimony that Katakis checked and unchecked boxes as he was deleting emails on Swanger's Dell computer because "the government submitted no evidence that Outlook employs check-boxes for that purpose—and anyone who has used Outlook would confirm that it doesn't." Appellee Br. 50. But nothing about Swanger's testimony is inconsistent with other record evidence. And even though Katakis now "suggest[s an] inconsistenc[y] in [Swanger]'s testimony, the jury had an opportunity to hear [Swanger]'s inflections and witness his demeanor, and it had the right to credit some parts of his testimony"—that Katakis deleted emails, for example—while believing other parts were mistaken—such as the specific strokes Katakis used—

"based on these observations." *United States v. Ponticelli*, 622 F.2d 985, 988 (9th Cir. 1980).

Katakis also contends, more generally, that a manual double-deletion should not count toward an obstruction offense at all because it does not immediately destroy an email irreversibly. Appellee Br. 45 & n.93. He observes that Agent Medlin, a computer forensic expert, was able to retrieve double-deleted emails, *id.*, but he overlooks testimony that doing so generally requires "specialized tools and training," ER294. Moreover, the testimony that Katakis cites describes how, in a Microsoft Exchange system, a double-deleted email is marked as "hidden," and is no longer displayed, before being overwritten. ER215-16. Making an email invisible must at the very least count as concealment for purposes of 18 U.S.C. § 1519. The district court accepted that double-deletions are obstructive, ER9, and Katakis offers no reason to question that commonsense conclusion on appeal.

C. Single-Deleted Emails Were Destroyed or Concealed

The third independent ground for the jury's obstruction verdict is the discovery of the ten incriminating emails on Swanger's Dell computer, single-deleted and residing in the "Deleted Items" folder.

Swanger, who never deleted his emails himself, ER314, 320, watched Katakis delete them from Swanger's Dell computer that portentous Saturday in September 2010.

To counter this evidentiary basis, Katakis looks not to the record, but to the word "conceal," which he defines as "making something harder to find." Appellee Br. 53 (emphasis removed). He cites no dictionary or other authority for his definition, but he says it is "confirm[ed]" by the dictionary definitions and court decisions that the government cited in its opening brief. *Id.* at 53 n.110, 55-56 (citing Appellant Br. 31).

The definition of "conceal" is not so limited, however. Although making something harder for an active searcher to find certainly falls within its ambit, so too does anything that makes something harder for a casual onlooker to see, observe, or notice. *See* Appellant Br. 31 (providing definitions from precedent, *Webster's*, and *Black's Law Dictionary*); *see also, e.g.*, *United States v. Wallace*, 800 F.2d 1509, 1513-14 (9th Cir. 1986) (defendant carried a "concealed" weapon onto an aircraft, in violation of 49 U.S.C. § 1472(*l*) (1982), when he "boarded the

aircraft with a dangerous weapon about his person that was hidden from view").

That somewhat more encompassing notion of concealment squares better with Section 1519, which focuses on the perpetrator's conduct (*e.g.*, hiding) rather than the investigator's (*e.g.*, finding). And any concern that this definition might reach innocent conduct is eliminated by Section 1519's specific intent requirement that the defendant conceal "with the intent to impede, obstruct, or influence the investigation or proper administration of" certain federal matters or cases. 18 U.S.C. § 1519. Moreover, emphasizing the difficulty of finding hidden evidence, as Katakis's definition does, comes close to the unacceptable Catch-22 explained in the opening brief—that if hidden evidence is found, it cannot have been concealed. Appellant Br. 32. Thus, defining "conceal" in terms of making something less perceptible to the human senses—most commonly sight—better matches the obstruction statute itself, legal and common-use dictionaries, and relevant judicial decisions.

Regardless, even under Katakis's narrower definition, he concealed electronic records by single-deleting emails because that act

removed them from the inbox—their ordinary place of storage, the place "where all e-mails arrive," Appellee Br. 53 n.11, and the default Outlook display—and stashed them with emails deemed useless and obsolete in the "Deleted Items" folder, the digital equivalent of a trash receptacle. *See* Appellant Br. 30. Absent a suspicion of obstruction, no one approaching someone else's email account is going to begin her search for a significant email in the "Deleted Items" folder. *See generally* Appellee Br. 54-55 (acknowledging that folder names are relevant).

II. The Obstruction Evidence Matched the Indictment's Allegations

A fatal variance occurs only when "the evidence offered at trial proves facts materially different from those alleged in the indictment" and the variance affects the defendant's "substantial rights." *United States v. Von Stoll*, 726 F.2d 584, 586-87 (9th Cir. 1984). "Because proof at trial need not, indeed cannot, be a precise replica of the charges contained in an indictment, this court has consistently permitted significant flexibility in proof, provided that the defendant was given notice of the 'core of criminality' to be proven at trial." *United States v. Heimann*, 705 F.2d 662, 666 (2d Cir. 1983).

Katakis contends that a variance existed because the government led the defense to believe that it was prosecuting Katakis for using DriveScrubber, but then at trial, the government also argued that emails were double- and single-deleted without the use of DriveScrubber. Appellee Br. 59-60. Katakis's argument does not meet either of the requirements for a fatal variance.

First, the evidence of double- and single-deletions was not materially different from what was alleged in the indictment. The Superseding Indictment that charged Katakis with obstruction of justice was not limited to the use of DriveScrubber. The critical charging paragraph began with a general allegation of obstruction of justice that identified who committed the offense, where and when he committed it, what matter it was in connection with, and what the offense was, tracking Section 1519's relevant statutory language. That is, "[i]n or about September 2010, in the Eastern District of California, defendant ANDREW KATAKIS knowingly altered, destroyed, concealed, and covered up electronic records and documents related to the conspiracies with the intent to impede, obstruct, and influence an

investigation within the jurisdiction of the United States Department of Justice and the Federal Bureau of Investigation." ER463.

The paragraph then further specified two distinct ways in which Katakis committed the offense. "Specifically, defendant KATAKIS deleted and caused others to delete electronic records and documents." ER463-64. And second, he "*also* installed and used and caused others to install and use a software program that overwrote deleted electronic records and documents so that they could not be viewed or recovered." ER464 (emphasis added).

The indictment separates Katakis's deletion of records and documents from his use of DriveScrubber by using distinct sentences and the word "also" to indicate that two different means of obstruction are alleged. Katakis's claim that this is "uninformative boilerplate" or is somehow misleading, Appellee Br. 62, cannot be reconciled with the plain meaning of the three sentences that constitute the charging paragraph. The indictment hardly could have been clearer that DriveScrubber was not the government's only theory.

At trial, the government offered evidence that Katakis "destroyed [or] concealed . . . electronic records and documents," ER463, when he

"deleted . . . electronic records and documents," ER464, by double-deleting emails and other documents on several office computers and by single-deleting emails on Swanger's Dell. This proof was entirely consistent with the allegation that Katakis "deleted . . . electronic records and documents," ER464, and was simply two particular applications of this specific allegation. *Cf. United States v. Sindona*, 636 F.2d 792, 797 (2d Cir. 1980) (finding no variance and holding that "the Government was not required to specifically denominate the substance of what was concealed" where the indictment charged concealment of the source of funds).

Katakis's reliance on *United States v. Adamson*, 291 F.3d 606 (9th Cir. 2002), is misplaced because the indictment and the trial evidence in that case represented two entirely separate sets of facts. The indictment alleged that Adamson made a specific misrepresentation to Hewlett-Packard that computer servers had not been modified or upgraded, but the trial proof showed a different misrepresentation, namely *how* the servers had been upgraded. *Id.* at 616. The relevant allegation in Katakis's indictment is more broadly worded than the highly specific misrepresentation alleged in *Adamson*, and the trial

evidence here was an illustration of the indictment's terms rather than proof of a fact not alleged. As this Court explained in *Adamson*, "[i]f the indictment had not specified a different particular misrepresentation, one might say the variance was benign." *Id.* *Adamson* thus supports the government's position, not Katakis's. In addition, the variance in *Adamson* was "reinforced" by the district court's jury instruction, *id.* at 611, which did not happen here.[3]

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[3] The other cases Katakis cites also involve marked distinctions between specific allegations and the evidence offered at trial, rather than, as here, trial evidence that illustrates the conduct alleged.

In *United States v. Choy*, 309 F.3d 602 (9th Cir. 2002), the indictment charged that Choy committed bribery by giving $5,000 to a public official, but the theory at trial was that he gave the money to a private individual, indirectly conferring value on the public official. *Id.* at 607. Not only was the "set of facts distinctly different from that set forth in the indictment," but "the set of facts upon which Choy was convicted [giving money to a private person] cannot constitute the crime of bribery." *Id.* at 607 n.5.

In *United States v. Tsinhnahijinnie*, 112 F.3d 988 (9th Cir. 1997), the defendant was prejudiced because "the charge and evidence are two years apart," amounting to two different crimes. *Id.* at 992.

And in *Jeffers v. United States*, 392 F.2d 749 (9th Cir. 1968), the indictment itself was defective because it failed to allege that placing bets at a dog track was not a "religious purpose," thereby relieving the government of part of its burden of proof. *Id.* at 752.

Katakis also fails to prove that any variance adversely affected his substantial rights, which in this case means unfair surprise.[4] *See United States v. Anderson*, 532 F.2d 1218, 1227 (9th Cir. 1976). Katakis cannot establish unfair surprise because the alleged variance "did not alter the crime charged, the requisite elements of proof or the appropriate defenses in a significant manner." *United States v. Caporale*, 806 F.2d 1487, 1500 (11th Cir. 1986). The indictment charged obstruction of justice by, among other things, deletion of electronic records, and the evidence showed the same crime.

United States v. Hazeem, 679 F.2d 770 (9th Cir. 1982), is instructive. There, the indictment alleged the full amount of money taken from a bank, but the proof was limited to the portion taken by one conspirator. *Id.* at 773. The evidence at trial was thus directed to a subset of the indictment's broader factual allegation, and this Court found such variance, if any, to be harmless. *Id.* at 773-74. Similarly here, the government's evidence of double- and single-deletion at least

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[4] A defendant's substantial rights may also be adversely affected if he is exposed to double jeopardy or suffers evidentiary spillover from other defendants involved in a different conspiracy, *see United States v. Wihbey*, 75 F.3d 761, 774 (1st Cir. 1996), but those circumstances are not present here.

proved a subset of the destruction and concealment of electronic records alleged in the indictment, so any variance likewise would be harmless. *Cf. United States v. Pierce*, 893 F.2d 669, 676 (5th Cir. 1990) (holding that any variance between the alleged "cocaine" and the proven "cocaine base" is "plainly harmless").

Moreover, Katakis was put on notice repeatedly that the government would offer proof of deletion without the use of DriveScrubber. The Superseding Indictment began this case by telling Katakis that the means by which he had deleted records were not limited to DriveScrubber. Later, but still long before trial, Agent Medlin analyzed Swanger's Dell computer, clearly identified it in his expert report that was given to the defense, and explained that he found the ten emails in the "Deleted Items" folder on that computer. In the interview report that the government disclosed in May 2013, Swanger described Katakis deleting files from Swanger's Dell computer. *See* ER114. Katakis subsequently requested and received access to Swanger's Dell far in advance of trial. That the government intended to make Swanger's Dell one of the bases of the obstruction charge at trial could not have come as a surprise.

In addition, still weeks before trial, the government's trial brief told the district court and Katakis that "Steve Swanger is expected to testify that he observed Katakis deleting information from Swanger's computers *and* installing and running DriveScrubber." SER16 (emphasis added). Katakis was thereby put on notice, again, that the government's theory was not limited to DriveScrubber and that there would be eyewitness testimony from Swanger about Katakis deleting information from both of Swanger's computers.

Then, in its opening statement, the government previewed what it would prove by saying: "The evidence will show that Andrew Katakis deleted e-mails and computer files *and* installed a computer scrubber program to try to scrub, or wipe away, any traces." SER83 (emphasis added). The government thus put Katakis on notice once again that its theories of record destruction and concealment were not limited to DriveScrubber but also included Katakis's deleting records on his own.

To the extent that Katakis seeks to use Agent Medlin's pre-trial report, the government's trial brief, and the government's opening statement as evidence of a material variance, as opposed to prejudice, *see* Appellee Br. 10-12, 59-60, his argument is legally erroneous. When

making a determination of variance, "the relevant inquiry is whether 'the *evidence* adduced at trial establishe[d] facts different from those alleged in an indictment.'" *Heimann*, 705 F.2d at 667 (alterations in original) (quoting *Dunn v. United States*, 442 U.S. 100, 105 (1979)). Counsel's opening and closing statements are not evidence, *see id*., nor are pre-trial expert reports or trial briefs. In any event, as explained above, these sources confirm that the case was always about both deleting documents and using DriveScrubber to eliminate all traces of the documents.

Katakis's claim of prejudice is further undermined by his opportunity to cross-examine Agent Medlin and Swanger on all of the government's theories and to respond to them in closing argument. *See United States v. Hynes*, 467 F.3d 951, 964 (6th Cir. 2006) (holding that a variance would not be prejudicial when the defendant "had the opportunity to cross-examine" the government's witness "and to respond to the government's evidence . . . during closing arguments").

The gist of Katakis's complaint is that the government more strongly emphasized his use of DriveScrubber before trial than it did his double- and single-deletions by, for example, supporting the

DriveScrubber allegation with an expert. But nothing required the government to give its theories equal emphasis or equal weight in the proof.

Katakis was convicted of the crime charged in the indictment and was not unfairly surprised. The evidence of double- and single-deletion was entirely consistent with the indictment because it was proof that Katakis "deleted . . . electronic records and documents," ER464. There was no variance, much less a fatal one.

III. The Prosecutorial-Misconduct Claim Is Meritless and Premature

Katakis's contention that the government knowingly relied on false assertions of fact in closing argument is baseless. The jury was instructed that closing arguments are not evidence, ER135; *see United States v. Hsiung*, 758 F.3d 1074, 1081 (9th Cir. 2014), and Katakis neither objected during or immediately after the closing nor requested a corrective jury instruction or mistrial at that time. The failure to object "may well have reflected the statement[s'] insignificance," *Knox v. Johnson*, 224 F.3d 470, 480 (5th Cir. 2000), and may also "demonstrate defense counsel's belief that the live argument, despite its appearance

in a cold record, was not overly damaging," *Brooks v. Kemp*, 762 F.2d 1383, 1397 n.19 (11th Cir. 1985).

When Katakis first alleged prosecutorial misconduct in his Rule 29 motion, ER98-101, the district court did not find or even suggest that any misconduct occurred in closing argument, ER1-17. It is hard to imagine either that the district court overlooked egregious misconduct or that it made no comment about it.

In any event, Katakis's allegation of misconduct is both substantively meritless and procedurally flawed. It is meritless because it is based on the premise that Agent Medlin "retract[ed]" his testimony, Appellee Br. 64, so that the government had no valid DriveScrubber theory. But that premise is incorrect. As explained above and in the government's opening brief, Agent Medlin clarified his testimony on rebuttal and adhered to his opinion, explaining that even if emails themselves would not have entered the free space, he still would have expected to find remnants of them there, in the form of transmission logs that store important metadata about them. ER197-99. Vilfer agreed, saying "typically, we would find some sort of a remnant had these e-mails passed through the server." ER202. Because Agent

Medlin did not find such remnants, he maintained his opinion that DriveScrubber had destroyed records. ER198-99. The jury was entitled to find that opinion credible.

Katakis suggests that because his expert provided a report, albeit in the middle of trial, the government had "every reason to doubt the veracity of its DriveScrubber theory." Appellee Br. 64. But the government was not required to accept an opposing expert's opinion, and rightly so, because the DriveScrubber theory continues to provide a valid evidentiary basis for obstruction. *See supra* pp. 4-8. Agent Medlin forthrightly acknowledged the portion of Vilfer's opinion with which he agreed, while also explaining in rebuttal how Vilfer's opinion was incomplete. ER197-99.

The government therefore was entitled to argue in closing that the jury could infer that Katakis's use of DriveScrubber caused the destruction or concealment of any "remnant" or "trace of th[o]se ten e-mails." SER203-04; *see United States v. Gray*, 876 F.2d 1411, 1417 (9th Cir. 1989) (explaining that prosecutors are "granted reasonable latitude to fashion closing arguments" and are "free to argue reasonable

inferences from the evidence"); *accord United States v. Hermanek*, 289 F.3d 1076, 1100 (9th Cir. 2002).

And the prosecutor was careful to argue that the jury should draw an inference that Katakis must have deleted the emails, rather than represent that he did so as a fact. By repeatedly using the language "*the only reasonable explanation* is that Andrew Katakis deleted them," SER196, 197 (emphasis added); *see also* SER200, 203, 204 (similar), the prosecutor made clear that she was not stating a fact but was asking the jury to draw an inference from the evidence. *See United States v. Mageno*, 762 F.3d 933, 944 (9th Cir. 2014) (explaining that using introductory phrases such as "I submit" alerts the jurors that counsel is "'not stating a fact'" but rather "'asking them to use their common sense in drawing an inference'" (quoting *United States v. Kojayan*, 8 F.3d 1315, 1321 (9th Cir. 1993)).

Katakis further asserts that the government committed misconduct "by melding its original DriveScrubber theory with its new manual-deletion theories," Appellee Br. 65, but he offers no explanation or citation to any authority to show why the government supposedly is required to keep its explanations of the evidence separate. There was

nothing untoward about arguing the points in conjunction because Katakis's purchase, installation, and use of DriveScrubber was powerful evidence of his intent when he deleted emails and other computer files, regardless of what the software accomplished. *See infra* pp. 27-28.

Nor did the prosecutor misstate the law by referring to "hitting the delete key." Appellee Br. 65. The prosecutor never said that the jury could convict Katakis without finding that he intended to impede, obstruct, or influence a federal investigation, and the government never took that position, as shown by the undisputed jury instructions on obstruction. To the contrary, when she began her argument on the obstruction charge, the prosecutor recognized that the government needed to show that Katakis "acted with the intent to impede or obstruct that investigation." FER5; *see also* FER2 (beginning of rebuttal argument).

Read in context, the prosecutor's references to "hitting the delete button" always are part of an argument that Katakis acted with the requisite intent. At the page Katakis cites, Appellee Br. 65 (citing SER205), the prosecutor argued:

> Andrew Katakis purchased, downloaded, installed and used Drivescrubber on multiple computers. And before that, he

> hit the delete button. *None of this was a mistake. None of this was an accident.* It was obstruction of justice.

SER205 (emphasis added). This was an argument that Katakis acted with specific intent to obstruct justice and that his purchase and use of DriveScrubber demonstrated that intent.

Similarly, earlier in her closing, the prosecutor immediately coupled her reference to "hit[ting] the delete button" with this explanation:

> The fact that Drivescrubber was installed on these computers is important because it shows what was going through Andrew Katakis' mind. He bought this program with his PayPal account, he even used a coupon code, all with the intent to buy a program that would permanently erase.

SER200; *see also* SER203 ("Andrew Katakis had the means, he had the motive, and he had the intent to delete those e-mails. This was no accident. . . . He purchased DriveScrubber, he downloaded it, he installed it."). The government thus argued that Katakis "hit the delete button" with the intent to obstruct, as shown by his purchase and installation of DriveScrubber, regardless of whether DriveScrubber accomplished anything.

No misconduct occurred here, but even if it had, Katakis's argument does not come close to the standard for an acquittal, which requires a showing of "flagrant" misconduct by which "a defendant suffers substantial prejudice, and no lesser remedial action is available for the misconduct." *See United States v. Reyes*, 577 F.3d 1069, 1078-79 (9th Cir. 2009) (citing *United States v. Chapman*, 524 F.3d 1073, 1085-87 (9th Cir. 2008)). The district court has found no prosecutorial misconduct here, much less flagrant misconduct, which is no surprise when the parties have simply argued competing inferences from the expert testimony about DriveScrubber. And Katakis's failure to object during closing, or to contemporaneously move for a mistrial, further suggests that he did not think that any of the government's arguments were egregious when they were made.

But even assuming some misconduct falling short of "flagrant," Katakis's own cited cases recognize that the normal remedy is a new trial, not acquittal. *See Mageno*, 762 F.3d at 948 n.15; *Reyes*, 577 F.3d at 1079. Even when this Court has found deliberate misconduct, it has been reluctant to dismiss an indictment when a new trial might be available. *See Reyes*, 577 F.3d at 1079. A new trial for Katakis is not

only available, but has already been requested. Katakis has moved for a new trial in the district court, arguing in part the same misconduct he asserts here. *See* ER55. Because the district court will not rule on that motion until this appeal concludes, *see* ER542 (ECF No. 341 (minute order) (staying all proceedings pending remand from this Court)), his prosecutorial-misconduct argument in this Court is premature.

CONCLUSION

This Court should reverse the district court's grant of acquittal on the obstruction count and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5748 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This reply brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point New Century Schoolbook font.

December 23, 2014

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CERTIFICATE OF SERVICE

I, Adam D. Chandler, hereby certify that on December 23, 2014, I electronically filed the foregoing Reply Brief for the United States of America and the accompanying Further Excerpts of Record with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF System.

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

December 23, 2014 /s/ Adam D. Chandler
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