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

OPENING BRIEF FOR THE UNITED STATES OF AMERICA

WILLIAM J. BAER
Assistant Attorney General

BRENT SNYDER
Deputy Assistant Attorney General

ANNA T. PLETCHER
TAI S. MILDER
MAY LEE HEYE
KELSEY C. LINNETT
Attorneys

U.S. Department of Justice
Antitrust Division

KRISTEN C. LIMARZI
JAMES J. FREDRICKS
ADAM D. CHANDLER
Attorneys

U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Room 3224
Washington, DC 20530-0001
202-353-6638

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STATEMENT OF JURISDICTION

This appeal arises from a criminal prosecution in the U.S. District Court for the Eastern District of California. The district court had jurisdiction under 18 U.S.C. § 3231. On May 9, 2014, the district court entered an order granting defendant's motion for a judgment of acquittal on the Third Count of the Superseding Indictment, setting aside the jury's guilty verdict on that count, and instructing the Clerk of Court to enter a judgment of acquittal on that count. ER1-17. The government filed a notice of appeal of that order on June 6, 2014, within the 30-day period specified in 18 U.S.C. § 3731 and Rule 4(b)(1)(B) of the Federal Rules of Appellate Procedure.[1] ER34. This Court has jurisdiction under 18 U.S.C. § 3731 and 28 U.S.C. § 1291.

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[1] Citing the notice of appeal, the district court stayed all proceedings, including defendant's pending motion for a new trial, ER35-77, until this Court remands. ER542 (ECF No. 341 (minute order)). The government moved to lift the stay, arguing that it would be more efficient to proceed and raising the concern that, under Rule 4(b)(3)(B) of the Federal Rules of Appellate Procedure, the notice of appeal might not be effective until the new trial motion is decided. ER31-33. Defense counsel responded, "our view is that the Ninth Circuit does have jurisdiction." ER21. The district court agreed and left the stay in place. ER25, 29. The government agrees that its notice of appeal is effective, although it does not believe that the notice, which is directed to a single count, deprives the district court of jurisdiction to address other counts.

BAIL STATUS OF DEFENDANT

Defendant Katakis was released from custody on December 14, 2011, on a $900,000 secured appearance bond. ER486.

STATEMENT OF ISSUE FOR REVIEW

Whether a rational jury could find that defendant knowingly destroyed or concealed electronic records to obstruct a federal investigation, in violation of 18 U.S.C. § 1519, based on evidence showing that:

a. Within three days of learning of a grand jury subpoena for his bank records, defendant purchased and used "DriveScrubber" software to expunge all traces of incriminating emails from his computer and other office computers;

b. Defendant erased emails and files from his computer and other office computers around the same time; or

c. Defendant accessed a subordinate's computer and moved selected emails into the "Deleted Items" folder in Microsoft Outlook, where the FBI later found them.

STATEMENT OF THE CASE

This appeal is about a real estate investor who sought to erase electronic evidence of his crimes when he learned that he was the subject of a federal investigation. Andrew Katakis conspired with other real estate investors to rig bids at public foreclosure auctions. Days after learning of a federal grand jury subpoena for his bank records, he deleted emails and other files and used DriveScrubber software to eliminate all traces of the incriminating evidence to keep it out of investigators' hands. The jurors found Katakis guilty of knowingly destroying or concealing electronic records with the intent to impede, obstruct, or influence a federal investigation. This appeal considers whether the evidence was sufficient to support their verdict.

A. Katakis Conspired To Rig Bids at Real Estate Foreclosure Auctions

From September 2008 to October 2009, Katakis helmed a bid-rigging conspiracy, suppressing competition at hundreds of home foreclosure auctions in San Joaquin County, California. He agreed with other real estate investors not to compete against one another in the auctions. *E.g.*, ER339-40, 381-82, 427, 430-36. Katakis approached

potential conspirators "hoping we could all get along and not beat each other up every day." ER407.

Before an auction, the group of investors designated one member to bid on the property while the rest refrained, thereby artificially depressing the prices paid for the properties. ER335-36, 397, 421. Sometimes, the refraining investors received a flat payment for their compliance. ER410-11, 418-19, 427. Other times, the conspiring group held a second, private auction for themselves, called a "round robin." ER422. The difference between the round robin price and the public auction price was distributed among the group members as a payout. ER423-24. The group also paid the auctioneer $1000 per day to help them conceal their pact. ER310, 346-47, 414-15.

Katakis was involved in the conspiracy from its inception and remained one of its leaders. Katakis "micromanaged" the operation, staying "deeply involved in all aspects of it" and earning a reputation for being "[c]ontrolling." ER343; *see also* ER179 (Katakis describing himself as a "control freak"). He wanted to know details of everyone participating in the round robins, ER372, expected to be kept informed of "what was happening at the auctions," ER343, and even repeatedly

cruised by the courthouse on auction days in his unmistakable brown Hummer, ER350. Katakis did not attend the round robins himself but sent subordinates on his behalf, ER353, 375-76, 393, 404 ("Katakis was the one who the money was coming and going from . . . ."), and co-conspiring investors Rick Northcutt and Wiley Chandler managed his incoming and outgoing payouts, ER353-54, 377-78, 385-86, 389, 392-94, 400-01. Katakis instructed a subordinate to label the payout invoices as repairs or rehabilitation, ER305, 329, 332, at one point directing him to discreetly code the payout invoices because his accountant was raising questions about them, ER175-77, 324-26.

Katakis's incoming and outgoing payouts during the conspiracy period from 2008 to 2009 totaled "just over a million dollars," ER192, 303, and his profit from reselling 60 homes purchased at round robins exceeded $1.9 million, ER190-91, 308.

B. After Learning of the Investigation into His Bid-Rigging Conspiracy, Katakis Sought To Erase Electronic Records of the Conspiracy

On Wednesday, September 1, 2010, Katakis received a letter from his bank. ER184, 251, 254. The letter said the bank had been served with a "U.S. Department of Justice Grand Jury Subpoena" requiring it

to disclose Katakis's bank records by September 15, 2010. ER183-86, 252. A copy of the subpoena was enclosed. ER187-89, 252.

Two days later, on a Friday evening at 9:01 p.m., Katakis purchased and downloaded a program called DriveScrubber 3 on his work computer. ER182, 278-80; *see also* ER270 (describing how DriveScrubber is downloaded). Forty minutes later, it was installed. ER164-74, 210, 274-75.

The next day, a Saturday, Katakis summoned his subordinate Steve Swanger to the office. ER316. Swanger did not usually work in the office on Saturdays. *Id.* Katakis told Swanger about a "scrub" program that he was going to install on Swanger's computer. ER317. They went to Swanger's office, and Katakis sat at Swanger's ASUS computer, saying "There is nothing wrong with us cleaning our computers." ER317-18. He proceeded to search the computer for "Northcutt" and "Wiley," the names of two co-conspirators with whom he worked closely. ER318-19; *see supra* p. 5. The searches "pulled up a bunch of documents and e-mails." ER318. Katakis then installed DriveScrubber, ER164, 211, 267, 318-19, and Swanger watched him click and move things around on the computer, ER319-20.

Katakis looked down and was surprised to see a second computer, a Dell, in Swanger's office. ER320. He turned it on, saw that Swanger had over 4,000 emails on the Dell computer, cursed aloud, and asked whether Swanger ever erased his emails. *Id.* Swanger responded, "No." *Id.* Katakis installed DriveScrubber on the Dell, too. ER164, 211-12, 257, 320. Swanger saw him clicking on emails, checking boxes. ER320. Katakis reviewed the documents he had selected, then hit delete. *Id.* He had selected so many documents that the deletion "went at a snail's pace." *Id.* Swanger left for home while the files were still being deleted, and Katakis headed for his own office as Swanger departed. ER321.

Less than an hour after installing DriveScrubber on Swanger's pair of computers, Katakis installed DriveScrubber on a fourth office computer, the office email server. ER164, 259-61. He did so without consulting the company's IT director, who was in charge of managing the server and was angry when he found the program installed.[2] ER237-48.

[2] Eleven days later, Katakis installed DriveScrubber a fifth time, on his accountant's computer. ER164, 261-64. It was the same day Katakis's bank was ordered to respond to the subpoena.

When Swanger returned to work the following Monday, he found "a lot less stuff" on his computers. ER321. As Swanger summarized at trial, he found "E-mails deleted. Some files deleted." *Id.* Indeed, "almost all the e-mails" on his Dell computer "were gone." *Id.*

Unbeknownst to Katakis, Swanger had a self-protective practice of printing and retaining hard copies of emails from Katakis that evidenced illegal activity. ER314-15. He was worried that electronic versions of the documents might become unavailable because Katakis had previously discussed "getting rid of our hard drives." ER315.

When Swanger became a cooperating witness, he turned over his print-outs and computers to investigators, and the government identified ten incriminating emails, principally between Katakis and Swanger, sent between September 2008 and July 2009. ER283, 296; *e.g.*, ER175-77. Pursuant to a warrant, the government also obtained access to Katakis's computer and the company email server. ER299-300. The government's expert witness, FBI Special Agent Scott Medlin, and the defense's expert witness, Don Vilfer, searched for the ten emails on each of the four computers. On Swanger's Dell computer, the experts located the emails in the "Deleted Items" folder in Microsoft Outlook, a

common email program used at Katakis's company. ER163, 202, 205-10, 233-34, 287. But neither expert could find any trace of the emails on Katakis's computer, Swanger's ASUS computer, or the office email server. ER163, 205-10, 286-87.

The experts disagreed as to why. When a user deletes an email in Outlook (known as single deletion), it goes into the "Deleted Items" folder. ER292. When a user empties the "Deleted Items" folder (known as double deletion), the email typically goes into the computer's unused storage capacity, or "free space." ER293-94. Agent Medlin explained that DriveScrubber clears files from the free space, and he deduced that DriveScrubber must have been used to expunge all traces of the emails from the computers. ER270-72, 287-89. He considered it "very improbable that a natural action would cause" the pattern of erasures he observed. ER289.

Vilfer countered that a peculiarity of the email system at Katakis's workplace would have stowed double-deleted emails not in the free space but in a location that DriveScrubber could not reach. ER215-30. During rebuttal testimony, Agent Medlin generally agreed that this was true for the emails themselves but that logs of the emails' transmission

should still have appeared in the free space. ER197-98. Those logs would have recorded each incoming or outgoing email's metadata, such as its header, its sender, and its recipient, as well as its entire content. ER198. The only explanation for the logs' absence, Agent Medlin maintained, was the use of a "scrub" program like DriveScrubber. ER198-99. Asked to explain the missing logs, Vilfer admitted, "I have no explanation, because, typically, we would find some sort of a remnant had these e-mails passed through the server[a]nd so it's a suspicious circumstance to me." ER202.

C. The Grand Jury Alleged and the Trial Jury Found That Katakis Knowingly Destroyed or Concealed Electronic Records, but the District Court Granted an Acquittal

On December 7, 2011, a federal grand jury sitting in the Eastern District of California returned an indictment charging four real estate investors, including Katakis and Wiley Chandler, as well as the auctioneer, with conspiring to rig bids, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and conspiring to commit mail fraud, in violation of 18 U.S.C. § 1349. ER494-504. The indictment alleged that they ran a scheme to suppress competition and defraud banks at home foreclosure auctions in San Joaquin County, California. *Id.*

On May 8, 2013, the grand jury returned a superseding indictment further charging Katakis with obstruction of justice, in violation of 18 U.S.C. § 1519. ER463-64. It alleged that, "[i]n or about September 2010," Katakis "deleted and caused others to delete electronic records and documents" and "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." *Id.*

Chandler and another indicted investor agreed to cooperate and pleaded guilty pursuant to plea agreements.[3] ER438-55, 467-85. Katakis, the fourth indicted investor, and the auctioneer all went to trial. After 23 days of trial, the court instructed the jurors that to convict Katakis of obstruction under Section 1519, they must find that the government proved three elements beyond a reasonable doubt:

> (1) that defendant Katakis knowingly altered, destroyed, or concealed electronic records or documents;
>
> (2) that defendant Katakis acted with the intent to impede, obstruct, or influence an investigation that he either knew of or contemplated; and
>
> (3) that the investigation was about a matter by or within the jurisdiction of the United States Department of Justice or Federal Bureau of Investigation.

[3] Nine other investors, including Northcutt, pleaded guilty prior to indictment. *See* ER487-93.

ER128, 155. Katakis did not object to this instruction.

After five days of deliberation, the jury returned a general verdict finding Katakis guilty of both bid rigging and obstruction of justice.[4] ER119, 124.

After the verdict, Katakis moved for acquittal on the obstruction count arguing that the evidence was insufficient to permit conviction. ER78-102. He did not contest that the evidence proved that he had purchased, installed, and run DriveScrubber on four office computers, only that "DriveScrubber ha[d] no effect." ER87. The government opposed the motion as a "misreading of the record" and pointed to "ample evidence" underlying the jury's verdict. ER104.

On May 9, 2014, the district court granted Katakis's motion, set aside the jury's verdict of guilty on the obstruction count, and instructed the Clerk to enter a judgment of acquittal on that count. ER16. The court identified three potential evidentiary bases for obstruction and found each insufficient to sustain a conviction.

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[4] The jurors did not reach a decision on the mail fraud count, and the court declared a mistrial. ER119, 121, 124. The jurors likewise found the remaining investor guilty of bid rigging and hung on the mail fraud count against him, but they acquitted the auctioneer on both conspiracy counts. ER117-18, 124-25.

First, it considered Katakis's use of DriveScrubber. ER5-7. In the court's view, a reasonable jury could not help but conclude, based on the experts' testimony, that the ten emails that Swanger provided to investigators were out of DriveScrubber's reach. ER7. DriveScrubber clears the free space of a computer, and the experts agreed that, on a Microsoft Exchange server like the one in Katakis's office, double-deleted emails themselves would not enter the free space. *Id.* The court concluded from that testimony that DriveScrubber did not actually destroy any records. *Id.*

Second, setting DriveScrubber aside, the court considered whether the evidence proved that Katakis double-deleted the emails (on all computers but Swanger's Dell) at or near the time he received the letter from his bank, which was the timeframe alleged in the indictment. ER7-11. In the court's view of the evidence, it was possible that Katakis double-deleted the emails before receiving the bank letter, as part of the normal course of business. ER10-11. Consequently, it found the government's proof of intent lacking. ER11.

Lastly, the court considered whether moving emails to the "Deleted Items" folder on Swanger's Dell (*i.e.*, a single deletion), without more,

was sufficient to prove destruction or concealment. ER12-15. It concluded that evidence of single-deleted emails was not sufficient to prove that records were destroyed because such emails are recoverable from the "Deleted Items" folder. ER13. Nor would that evidence prove that records were concealed because single-deleted emails remain just as accessible as emails in the inbox, the court reasoned. ER13-14.

The government appealed the district court's order on June 6, 2014. ER34. The district court then stayed its proceedings "pending receipt of an order of remand from the Court of Appeals." ER542 (ECF No. 341 (minute order)).

SUMMARY OF ARGUMENT

The evidence of Katakis's obstruction is comprehensive and convincing. A rational jury could have relied on three independent evidentiary bases to find that Katakis destroyed or concealed electronic records. The district court, however, overlooked key evidence and improperly substituted its view of the evidence for the jury's. Viewing the evidence in the light most favorable to the government and with proper deference to the jury's verdict, this Court should conclude that

there was sufficient evidence for a rational jury to find Katakis guilty on any or all of the three bases.

First, the government expert testified that Katakis successfully destroyed electronic records of emails, in the form of transmission logs, by running DriveScrubber days after learning of the grand jury subpoena. The district court apparently overlooked this portion of the testimony. To the extent the district court thought the defense expert "discredited" the government expert's testimony, the court improperly made credibility determinations. A rational jury could credit the government expert's testimony and find that Katakis destroyed email logs to keep every trace of the emails from federal investigators. The jury heard nothing from the defense expert that undermined that testimony. While the defense expert opined that DriveScrubber could not have erased the emails themselves, his testimony reinforced the government expert's testimony that, but for Katakis's use of DriveScrubber, they would have found the email logs on Katakis's and other office computers.

Second, the evidence established that Katakis double-deleted emails from his computer, the office email server, and Swanger's ASUS,

and also eliminated documents from both of Swanger's computers, soon after learning of the federal investigation. Swanger watched Katakis delete emails and other files three days after Katakis received notice of the federal investigation, and Swanger found "a lot less stuff" on both of his computers when he returned to work the following Monday. The district court still thought there could be an innocent explanation for the erasures, but the standard of review for a sufficiency motion did not require the government to disprove all innocent explanations of Katakis's conduct.

Lastly, undisputed evidence proved that Katakis single-deleted the incriminating emails on Swanger's Dell, sending them to the "Deleted Items" folder in Microsoft Outlook. The distinction between single- and double-deletion is not meaningful here, nor is the fact that the single-deleted emails were later recovered. A rational jury could find that Katakis's single-deletions were actions knowingly taken to destroy or conceal electronic records to impede the investigation. Thus, the evidence of the single-deletions, by itself, was sufficient to sustain the jury's finding that Katakis destroyed or concealed electronic records.

ARGUMENT

I. Standard of Review

This Court reviews "de novo the grant . . . of a motion for acquittal" under Federal Rule of Criminal Procedure 29. *United States v. Inzunza*, 638 F.3d 1006, 1025 (9th Cir. 2011).

In evaluating a challenge to the sufficiency of the evidence under Rule 29, a reviewing court—whether the district court or the court of appeals—must first view the evidence in the light most favorable to the prosecution. *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010). In doing so, it "may not usurp the role of the finder of fact" but "'must presume . . . that the trier of fact resolved any [evidentiary] conflicts in favor of the prosecution, and must defer to that resolution.'" *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 326 (1979)).

Then, the reviewing court "must determine whether this evidence, so viewed, is adequate to allow '*any* rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt.'" *Id.* (alteration in original) (quoting *Jackson*, 443 U.S. at 319). The court "may not 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt,' . . . only whether '*any*'

rational trier of fact could have made that finding." *Id.* (quoting *Jackson*, 443 U.S. at 318-19).

In making these determinations, it is not the government's task to "rebut all reasonable interpretations of the evidence that would establish the defendant's innocence, or 'rule out every hypothesis except that of guilty beyond a reasonable doubt.'" *Id.* (quoting *Jackson*, 443 U.S. at 326). Nor should the court scrutinize each piece of evidence in isolation because "evidence can be like abundant threads woven into a tapestry," coming into proper view only when "the tapestry is completed and a clear image appears beyond any reasonable doubt." *United States v. Rosales*, 516 F.3d 749, 752 (9th Cir. 2008).

The jury's general verdict should not be set aside "because one of the possible bases of conviction was . . . merely unsupported by sufficient evidence." *Griffin v. United States*, 502 U.S. 46, 56 (1991); *accord United States v. Bussell*, 414 F.3d 1048, 1058 (9th Cir. 2005). "'It is one thing to negate a verdict that, while supported by evidence, may have been based on an erroneous view of the law; it is another to do so merely on the chance — remote, it seems to us — that the jury convicted on a ground that was not supported by adequate evidence when there

existed alternative grounds for which the evidence was sufficient.'" *Griffin*, 502 U.S. at 59-60 (quoting *United States v. Townsend*, 924 F.2d 1385, 1414 (7th Cir. 1991)). Thus, if any one of the three evidentiary bases is sufficient to support the jury's verdict, this Court must reverse the grant of the motion for acquittal.

II. The Evidence Supports the Jury's Verdict That Katakis Knowingly Destroyed or Concealed Electronic Records

Katakis was charged with violating 18 U.S.C. § 1519 by knowingly destroying or concealing electronic records or documents related to bid-rigging and mail-fraud conspiracies with the intent to impede, obstruct, or influence an investigation within the jurisdiction of the U.S. Department of Justice or FBI.[5] ER463-64. There is no dispute that the jury was correctly instructed on the elements of Section 1519. Nor did

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[5] In relevant part, 18 U.S.C. § 1519 provides that:

> Whoever knowingly alters, destroys, . . . [or] conceals . . . any record [or] document . . . with the intent to impede, obstruct, or influence the investigation . . . of any matter within the jurisdiction of any department or agency of the United States . . . or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

Section 1519 does not require that destroyed or concealed records be incriminating or unlawful, only that they be destroyed or concealed with the specified intent.

the district court question that the evidence showed that, in September 2010, Katakis deliberately attempted to destroy electronic records to obstruct the investigation. The district court granted him an acquittal, however, believing that the evidence failed to show Katakis actually destroyed or concealed any records after learning of the investigation. The district court was mistaken. The evidence amply established that Katakis did, in fact, destroy or conceal electronic records, as the jury's guilty verdict reflects. There are three independent evidentiary bases for destruction or concealment, each of which alone is sufficient to sustain that verdict and require reversal of the acquittal.

A. Katakis Used DriveScrubber To Erase Electronic Logs of His Emails

The evidence established that Katakis purchased DriveScrubber two days after being alerted to the criminal investigation, that he installed and ran the program on four office computers in the next 24 hours, and that the program permanently deletes files in the free space of a computer. *See* ER5 (the district court accepting the evidence of these facts as sufficient). Nevertheless, the district court concluded that no rational jury could find that records were actually destroyed unless the evidence also showed that emails were themselves in the free space to

be scrubbed. But the evidence shows that, even if the emails were located elsewhere, electronic records of those emails, in the form of transmission logs, were located in the free space and were destroyed when Katakis ran DriveScrubber. That evidence is sufficient to sustain the jury's verdict.

The import of Katakis's use of DriveScrubber came down to dueling expert witnesses. Agent Medlin, the prosecution's expert, testified that when an email is expunged from the "Deleted Items" folder in Microsoft Outlook—*i.e.*, when it is double-deleted—the email is sent to the free space of the computer. ER293. Vilfer, the defense expert, testified that in a Microsoft Exchange system like the one at Katakis's workplace, double-deleted emails go to the Exchange Database and never enter the free space. ER215-30. As a result, Vilfer explained, DriveScrubber could not have destroyed the emails because it would not have affected the Exchange Database. ER226-27.

During his rebuttal testimony, Agent Medlin largely agreed with Vilfer, saying his prior testimony had "oversimplified a little bit." ER197. But Agent Medlin also pointed out how Vilfer's explanation was incomplete. Agent Medlin explained that when emails are sent or

received through a Microsoft Exchange server, they are recorded in a transaction log. ER198. Such logs list "every e-mail, its header, its from, to, much of the metadata . . . , and the entire content of that e-mail that was passed through the server, coming or going." *Id.* They "are not inside the Exchange Database" and "after a certain length of time . . . will start to fall off and be deleted into the free space." *Id.* For that reason, Agent Medlin expected to see remnants of the emails in the form of these logs in the free space. Because he did not, Agent Medlin remained unequivocal in his opinion that DriveScrubber had been run and had destroyed records. ER198-99.

Vilfer also expected to find the remnant logs, but they were not there. ER202. The missing logs struck Vilfer as "suspicious," and he had no alternative explanation for their absence based on the evidence. *Id.* Vilfer's only guess as to why they were missing was that the emails could have been fabricated from the bottom up, and were never sent or received. *Id.* But as Agent Medlin testified, fabrication of the necessary metadata is extremely difficult. ER285. Moreover, a witness received and authenticated two of the emails, ER357-69, and all of the emails

appeared in the "Deleted Items" folder on Swanger's Dell computer, ER163, 202, 205-10, 287.

The district court reviewed this expert testimony and concluded that Vilfer had "discredited" Agent Medlin, so "[a] rational jury could not have found that Katakis destroyed or concealed any of the emails in question using DriveScrubber." ER6, 7. That conclusion is drawn from a credibility determination that impermissibly invades the province of the jury. *See Nevils*, 598 F.3d at 1164. *See generally* ER194 (the court telling defense counsel that Vilfer "was worth every penny of that $300,000 you had to pay him").

Even if that conclusion were permissible, it would not justify the acquittal. There was ultimately no disagreement between the experts about the point the court relied on, which is that, in a Microsoft Exchange system, double-deleted emails do not, themselves, enter the free space. That point is immaterial because the experts also agreed that records of the emails would have entered the free space. The emails' transmission logs, including relevant metadata and content, should have appeared in the free space, but neither expert found them

there. Agent Medlin gave the only concrete explanation for the logs' disappearance, that DriveScrubber had wiped them away.

The district court appears to have overlooked Agent Medlin's rebuttal testimony regarding the logs. Nothing in Vilfer's testimony changed Agent Medlin's assessment that DriveScrubber had in fact eliminated electronic records. Nor did Vilfer's testimony present any evidentiary basis for the jury to doubt Agent Medlin's assessment, much less present a rational jury with no choice but to reject it. A rational jury could credit Agent Medlin's rebuttal testimony, and based on that testimony, it could conclude that, by using DriveScrubber, Katakis eliminated transaction logs of emails in the free space of office computers and thereby "destroyed . . . electronic records," as charged in the indictment and as forbidden by Section 1519.

B. Katakis Erased Emails, Files, and Documents in the Relevant Timeframe

Separate from Katakis's use of DriveScrubber to clear the free space of the office computers, the evidence also established that Katakis destroyed or concealed records himself by deleting emails and other documents from the same computers after learning of the investigation.

The district court found insufficient evidence "that when Katakis double-deleted the emails he knew of or contemplated the investigation at that time." ER9. That is, the court was not certain that any emails were double-deleted *after* the September 1, 2010, bank letter arrived, amounting to insufficient proof of intent. "In fact," the court wrote, "there was not even circumstantial evidence from which the jury could have inferred an approximate date when Katakis double-deleted the emails." ER10.

To the contrary, at trial, the jury heard several pieces of direct evidence of when Katakis deleted emails and other electronic files from his subordinate's computers. Steve Swanger testified that, "in September of 2010," he "was standing right there while" Katakis deleted "documents includ[ing] e-mails" "that relate to partner buyouts and round-robins" from Swanger's two computers. ER313-14; *accord* ER316 (Swanger testifying that emails "were deleted . . . the first Saturday of September," three days subsequent to the bank letter). Swanger also recounted that, when he returned to work on Monday after the weekend purging session, there was "a lot less stuff" on both of his computers, including both emails and files. ER321. From that

testimony, not to mention the total disappearance of ten incriminating emails from Swanger's ASUS computer, *see supra* p. 9, a reasonable jury could find that Katakis erased electronic records from Swanger's pair of computers in direct response to the bank's news.

The circumstantial evidence of timing as to all of the computers is just as powerful. Katakis purchased, downloaded, installed, and ran DriveScrubber on four office computers starting on a Friday night two days after receiving the bank's letter. *See supra* pp. 6-7. He called Swanger into the office that Saturday, which was atypical, and explained his plan to scrub computers around the office, including his own. ER316-17; *see also* ER318 (Katakis saying as he sat at Swanger's computer, "There is nothing wrong with us cleaning *our computers*." (emphasis added)). On Swanger's ASUS computer that day, Katakis searched for the names of his co-conspirators and "pulled up a bunch of documents and e-mails." ER318-19. Swanger watched him click and move things around on the ASUS, delete emails on the Dell, and then head to his own office. ER319-21. Reviewing those circumstances alongside Swanger's testimony, as a whole and in the light most favorable to the government, a reasonable jury could infer that Katakis

double-deleted the emails from any of the office computers—his own, the office email server, or Swanger's ASUS[6]—as part of his frenzy to erase incriminating evidence after receiving the bank's letter.

The theoretical possibility that Katakis double-deleted the emails from those computers "in the ordinary course of business" prior to learning of the investigation, and thus without an intent to obstruct it, does not justify the acquittal. ER10. For one thing, that hypothesis does not square with the direct evidence from Swanger, recounted above, describing Katakis's actions on Swanger's two computers on Saturday, September 4, 2010. It is also belied by Swanger's "practice about deleting work e-mails"—that he "didn't typically erase any of [his] e-mails"—of which Katakis was unaware. ER314; *see* ER320 (Swanger testifying that he informed Katakis that Saturday that he does not erase his emails). That evidence alone is sufficient for a rational jury to find Katakis guilty of obstruction.

But even if Katakis's own computer is the sole focus, the jury's weighing of the evidence and finding of guilt cannot be disturbed by the

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[6] The ten emails identified by the FBI were single-deleted on Swanger's Dell, where they were found in the "Deleted Items" folder, *see infra* Section II.C, but they were not found on his ASUS, *see supra* p. 9.

theoretical possibility of an innocent explanation. Here, the district court found such a possibility dispositive, observing that regularly deleting emails is a common and legal business practice. ER10. The court relied on this Court's reasoning in *United States v. Delgado*, 357 F.3d 1061 (9th Cir. 2004), quoting its statement that "[w]hen there is an innocent explanation for a defendant's conduct as well as one that suggests that the defendant was engaged in wrongdoing, the Government must produce evidence that would allow a rational jury to conclude beyond a reasonable doubt that the latter explanation is the correct one." ER10 (quoting *Delgado*, 357 F.3d at 1068).

This Court, however, has recognized that the Supreme Court abrogated *Delgado*'s reasoning, *Nevils*, 598 F.3d at 1167 (discussing *McDaniel v. Brown*, 558 U.S. 120, 133-34 (2010)), because it contravenes the command that reviewing courts view evidence in a manner favoring the prosecution.[7] When the proper standard is applied, there is no basis to disturb the jury's reasonable inference from

[7] *Delgado*, on which the district court relied, ER10, relied in turn on *United States v. Vasquez-Chan*, 978 F.2d 546, 549 (9th Cir. 1992), which this Court expressly overruled in *Nevils* in light of *McDaniel*. *See* 598 F.3d at 1166-67.

the evidence that Katakis erased emails and other documents from office computers after learning of the subpoena on September 1, 2010.

C. Katakis Single-Deleted Emails on Swanger's Dell Computer

Finally, the evidence also showed that Katakis destroyed or concealed electronic records by single-deleting emails on Swanger's Dell computer. Swanger watched Katakis delete emails on his Dell computer that Saturday in September 2010, ER320, and both expert witnesses agreed that ten incriminating emails were recovered from that computer's "Deleted Items" folder, ER202, 205-10, 287, the destination for single-deleted emails, ER292. This evidence provides a third and separate evidentiary basis for the jury's guilty verdict.

The district court deemed this evidence insufficient because, in its view of the record, single-deleting the emails did not destroy or conceal them. The court pointed to the fact that the FBI was able to recover the emails from Swanger's Dell, "and thus there was no evidence from which the jury could infer that they were destroyed." ER13. The court also rejected a concealment theory based on Agent Medlin's testimony that a user can retrieve emails from the "Deleted Items" folder. *Id.* (quoting ER292-93). In the court's view, "an email in a deleted items

bin is [no] more concealed from the government than an email that remains in the inbox." ER14.

But single-deleting the emails at least concealed them because it removed them from their ordinary place of storage, dumped them in the digital equivalent of a trash receptacle, and made them more difficult to find. Cases from a variety of contexts illustrate how moving evidence, especially into a waste bin, can constitute concealment or destruction. In *United States v. Lessner*, the Third Circuit found "more than sufficient evidence" of a Section 1519 violation where the defendant threw an appointment book into a trash can, an action the court found "clearly to be a form of 'destruction.'" 498 F.3d 185, 196-98 & n.5 (3d Cir. 2007) (affirming on plain error review the district court's acceptance of a guilty plea). The court separately found sufficient evidence of concealment in the defendant's request that someone "remove a folder from her desk." *Id.* at 198. Likewise, in *United States v. Keith*, evidence that the defendant moved digital files from his laptop to a flash drive before deleting them from the laptop was sufficient to sustain a destruction-of-evidence conviction under Section 1519. 440 F. App'x 503, 508 (7th Cir. 2011) (unpublished order). And just recently,

a jury returned a guilty verdict against a man charged under Section 1519 for destroying or concealing evidence related to the Boston Marathon bombing by throwing a backpack containing fireworks and a thumb drive into a dumpster. *United States v. Tazhayakov*, No. 1:13-cr-10238-DPW, ECF No. 334, at 2 (D. Mass. July 21, 2014). Stowing emails in the "Deleted Items" folder is just as obstructive as placing an object in an open garbage container, removing a folder from a desk, or moving electronic files onto a flash drive.

After all, concealment need not be irreversible. Dictionaries defining "conceal" do not require permanence; just moving something out of view suffices. *E.g.*, *Webster's Third New International Dictionary* 469 (1993) (defining "conceal" as "to place out of sight" or to "shield from vision or notice"); *accord Black's Law Dictionary* 327 (9th ed. 2009) (alternatively defining "concealment" as "esp., an act by which one prevents *or hinders* the discovery of something" (emphasis added)). *See generally United States v. Wagner*, 382 F.3d 598, 607 (6th Cir. 2004) (looking to dictionary definitions of "conceal," such as "[t]o hide; withdraw or remove from observation," to interpret 18 U.S.C. §152(1), a criminal bankruptcy fraud statute). In fact, in *Lessner*, the defendant

tossed the appointment book into a trash can in the presence of law enforcement agents, who promptly fished it back out. 498 F.3d at 196 n.5.

Of course, many obstruction prosecutions occur precisely because concealed evidence comes to light. *See, e.g.*, *Tazhayakov*, No. 1:13-cr-10238-DPW (D. Mass.) (FBI agents recovered the backpack from a landfill after the defendant admitted throwing it away). To require perfect, everlasting concealment would eliminate the bases for such prosecutions, thereby impairing the enforcement of Section 1519 and contravening one of its main purposes. *See* S. Rep. No. 107-146, at 11 (2002) (Section 1519 "establishes tools to improve the ability of investigators . . . to collect . . . evidence which proves fraud."). It would be illogical for an obstruction case to evaporate the minute investigators find what they are looking for.

The district court acknowledged this point to some extent because it accepted that double-deleting an email is sufficient to destroy or conceal the email, despite evidence that double-deleted emails are retrievable, as well. ER9, 215, 220, 294. In Vilfer's words, a double-deleted email is "just not displayed in the deleted folder anymore." ER216. If moving

an email from the deleted folder to a different storage location, whether the free space or the Microsoft Exchange Database, is destruction or concealment, then moving an email from the inbox to the deleted folder should also be destruction or concealment. *See* S. Rep. No. 107-146, at 7, 14 ("[O]verly technical legal distinctions should neither hinder nor prevent prosecution and punishment" under Section 1519, which "is meant to apply broadly."). At the very least, the jury could reasonably conclude that Katakis knowingly destroyed or concealed the emails.

* * *

It is a "rare occasion[]" when "'a properly instructed jury may . . . convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt[.]'" *Nevils*, 598 F.3d at 1164 (alterations in original) (quoting *Jackson*, 443 U.S. at 317). This is not such an occasion. The jury had several legitimate ways to reach its conclusion that Katakis obstructed justice beyond a reasonable doubt, and that conclusion should be reinstated.

CONCLUSION

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

Respectfully submitted.

/s/ Adam D. Chandler

WILLIAM J. BAER
Assistant Attorney General

BRENT SNYDER
Deputy Assistant Attorney General

KRISTEN C. LIMARZI
JAMES J. FREDRICKS
ADAM D. CHANDLER
Attorneys

U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Room 3224
Washington, DC 20530-0001
202-353-6638

ANNA T. PLETCHER
TAI S. MILDER
MAY LEE HEYE
KELSEY C. LINNETT
Attorneys

U.S. Department of Justice
Antitrust Division

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STATEMENT OF RELATED CASES

This appeal is not related to any other appeal pending in this Court.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6530 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

September 5, 2014

/s/ Adam D. Chandler
Attorney for the
United States of America

CERTIFICATE OF SERVICE

I, Adam D. Chandler, hereby certify that on September 5, 2014, I electronically filed the foregoing Opening Brief for the United States of America and the accompanying 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.

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September 5, 2014 /s/ Adam D. Chandler
Attorney