Overseizure of Digital Information

and

US v. Ganias
824 F.3d 199, (2nd Cir. 2016)

or

Something old, something new, something borrowed and something that the government took and will never, ever give back to you

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By **Kevin Clark, Esq**. Thursday, October 20, 2016

In 2008, Stavros Ganias, an accountant and former Internal Revenue Service ("IRS") agent, was convicted of two-counts of tax evasion before the United States District Court for the District of Connecticut. Nothing earth shattering there.

What is interesting is where the proof used to convict Ganias came from – copies of his computer hard drives seized with a warrant by the Army Criminal Intelligence Division ("Army") years before in 2003, during an unrelated investigation into contractor fraud. These hard drives, or more specifically, copies of these hard drives, were held in evidence for years, until a second warrant, this time targeting Ganias himself, was obtained by the IRS in 2006.

The case against Ganias began in 2003, when an anonymous informant contacted the Army to report that James McCarthy, owner of Industrial Property Management ("IPM"), a government contractor, was billing the government for work performed by one of McCarthy's other companies, American Boiler ("AB") and also billing the government for work performed for IPM's operations manager at his home residence. An investigation was commenced that led to the issuance of a warrant and seizure of three computers belonging to Stavros Ganias, who happened to be McCarthy's accountant. Ganias was not a suspect in McCarthy's fraud, though it was believed that evidence pertaining to the AB and IPM fraud would be found on his hard drives.

Working within the constraints of the warrant, Army computer forensic analysts carefully segregated information on Ganias' computers that was responsive to the warrant from information that was not, but held onto everything, even providing a copy of the Ganias hard drives to the IRS for use in their concurrent investigation into McCarthy's suspected tax fraud. As the Army CID case agent explained at the suppression hearing, he considered the Ganias hard drives to be "the government's property, not Mr. Ganias'[s] property," Ganias, at 206, footnote 13.

By July of 2005, the IRS had developed reason to believe that Ganias was also involved in income tax evasion, both as a principal and accomplice of McCarthy, and expanded the investigation to include him. Thereafter, in April of 2006, during a proffer session with Ganias and his attorney, the IRS asked for consent to access Ganias' personal and business Quickbooks files that they knew were located on the seized hard drives. When Ganias failed to "respond…either by consenting, objecting, or filing a motion under Federal Rule of Criminal Procedure 41(g) for return of seized property," the IRS obtained a warrant. Ganias, at 207.

Ultimately, the IRS charged Ganias with income tax evasion, relying upon evidence seized by the Army in 2003 during their initial investigation into the activities of McCarthy, but not searched by the IRS until 2006. He was tried, convicted and sentenced to 24 months in prison. In a pre-trial hearing, Ganias attempted to suppress the results of the IRS search, arguing that the Army and IRS had no right to keep data that was beyond the scope of the initial 2003 warrant, and instead should have destroyed or returned it. The trial court denied Ganias' motion.

Following his conviction, Ganias appealed the denial of his motion to suppress to the 2nd Circuit. Though a divided Circuit panel initially overturned his conviction finding a colorable 4th amendment violation had occurred, this decision was later vacated after a rehearing *en banc* was granted. In upholding the search and conviction, the full 2nd Circuit Court skirted the novel 4th Amendment issue presented and, instead, found that the government relied in "good faith" on the 2006 warrant.[1] In doing so, the Court took time to address a number of substantive issues in *dicta*, including the fact that no objection was raised to the government's continued holding of the non-responsive data:

> "…Ganias did not request return or destruction of the mirrors (even after he was indisputably alerted to the Government's continued retention of them) by, for instance, filing a motion for such return pursuant to Federal Rule of Criminal Procedure 41(g)." Ganias at 211.

A lengthy and cogent dissent was filed by Judge Chin, who would have invalidated the 2006 warrant and found that retention of the non-responsive Ganias data amounted to an unlawful general search:

> Once responsive files are segregated or extracted, the retention of non responsive documents is no longer reasonable, and the Government is obliged, in my view, to return or dispose of the non responsive files within a reasonable period of time…At that point, the Government's overseizure of files and continued retention of non-responsive

[1] As of this writing, Ganias' application for certification to the U.S. Supreme Court is pending.

> documents becomes the equivalent of an unlawful general warrant. Ganias at 232. (Citations Omitted.)

As for the majority's mention that Ganias' counsel had never requested the return of his client's property pursuant to F.R.Cr.P. 41(g), Judge Chin had this to say:

> This rule, however, cannot shift the Government s burden under the Fourth Amendment onto the defendant. Pointing fingers at Ganias does not help the Government meet its *own* obligation to be reasonable. Ganias at 236

The prospect of a Ganias-type of situation repeating itself in New Jersey is a real one and has already occurred in at least one case of which I am aware. The obvious danger is that non-responsive data located on a seized hard drive kept in evidence by the government long after the case that resulted in its taking is concluded, may be used to convict that person of an unrelated crime years later.

Should a defendant prevail on a Ganias type suppression motion, arguing that the seizure and continued holding of non-responsive computer data amounted to a general search, all seized non-contraband items and data would have to be returned and/or expunged, in accordance with R. 3:5-7(e). However, New Jersey also has a civil mechanism for return of property, namely, an action in Replevin pursuant to N.J.S.A. 2B:50-1. In a criminal setting, Replevin may be used to obtain return of property held by the government following completion of all criminal proceedings for which it was seized, with the notable exceptions of the instrumentalities of crime, contraband, or the fruits of illegal transactions. See, N.J.S.A. 2B:50-1; State v. Howery, 171 N.J.Super. 182 (App. Div. 1979); State v. Hughes, 138 N.J.Super. 298 (Law. Div. 1975); State v. Sherry, 86 N.J.Super. 296 (App. Div. 1965); Eleuteri v. Richman, 47 N.J.Super. 1,8 (1957).

Until New Jersey addresses the Ganias issue, counsel representing a witness or defendant whose computer or cell phone data was seized in connection with a criminal investigation would do well to request the return or destruction of seized, non-responsive data, and all copies thereof, at the conclusion of the case, including making it a condition of a plea agreement where applicable. Failing the State's assent to such a proposition, which can be hard to come by for a variety of reasons, an action in Replevin would be the next logical step to pursue, assuming that a client has the means and desire to do so. If nothing else, the client should be made aware that his/her data will remain in the hands of the State and that there is a civil mechanism to seek its return.