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July 12, 2016

VIA ECF AND FEDEX

Honorable Kevin McNulty
United States District Judge
Martin Luther King, Jr. Federal Building
& United States Courthouse
50 Walnut Street
Newark, NJ 07102

Re: *United States v. Ravelo*,
Criminal No. 15-576

Dear Judge McNulty:

As Ordered by the Court at the status conference before Your Honor on June 27, 2016, defendant Keila Ravelo respectfully submits this letter brief in lieu of a more formal submission in support of her motion, pursuant to Federal Rule of Criminal Procedure 41(g), for the return of her cellular telephone and its contents, as well as any copies thereof, which were obtained by the government as a result of the warrantless seizure of her phone.

I. BACKGROUND

On April 29, 2016, Ms. Ravelo moved to suppress any and all evidence obtained as a result of the seizure of her cell phone on the date of her arrest, December 22, 2014. In her supporting brief, Ms. Ravelo argued that this evidence was obtained in violation of her Fourth Amendment rights because her cell phone was seized without a warrant and the seizure was not justified by any exception to the warrant requirement. The government's opposition, filed May 24, 2016, did not respond to the arguments raised by Ms. Ravelo with regard to the constitutionality of the seizure, but instead argued that because the government had not yet determined whether it intended to use any of the contents of the phone in its case-in-chief – as it could not because those contents had not yet been made available to it, pending a privilege review by the defense – the Court should defer hearing the motion as it was not ripe for adjudication. Ms. Ravelo filed a reply brief on June 14, 2016, arguing that the motion to suppress was in fact ripe for adjudication and reiterating that the Court should order the suppression of the evidence at issue. [1]

[1] To the extent that they are not specifically articulated in this letter brief, Ms. Ravelo incorporates the facts and legal arguments set forth in support of her previously filed motion to suppress as if fully set forth herein.

At oral argument, held in conjunction with a scheduled status conference on June 27, 2016, defense counsel argued that the warrantless seizure of the phone was unconstitutional and that the phone and its contents, which remain in the possession of a taint team and have not yet been reviewed by the trial team, should be returned to Ms. Ravelo.[2] The government, in response, maintained its position that the Court should not consider the suppression issue until after the government has determined whether it intended to use any of the phone's contents at trial. The government also argued, for the first time, that even if the Court were to suppress the evidence, the government would nevertheless be permitted to retain and review the material in order to impeach Ms. Ravelo in the event that she elects to testify at trial. Ms. Ravelo countered that, under Rule 41(g), the illegally seized evidence should be returned to her, before the government reviewed it. The Court requested supplemental briefing on this issue.

II. ALL EVIDENCE OBTAINED AS A RESULT OF THE UNCONSTITUTIONAL SEARCH OF MS. RAVELO'S CELL PHONE MUST BE RETURNED PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 41(G)

Rule 41(g) provides, in pertinent part, that "[a] person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return." Property that may be the subject of a Rule 41(g) motion includes "storage media [and] electronically stored information." Fed. R. Crim. P. 41(a) (Advisory Committee Notes to 2009 Amendments); *see United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1172 (9th Cir. 2010) (noting that "Rule 41(g) empowers district courts" to cure unlawful seizures "by ordering the government to return the illegally seized data"). As Ms. Ravelo argued in her motion to suppress, the warrantless seizure of her cell phone – and accordingly the subsequent search of its contents – violated her rights under the Fourth Amendment; the return of the phone and its contents is appropriately sought under Rule 41(g).

In order to prevail under Rule 41(g), a criminal defendant must demonstrate that (1) he or she is "'entitled to lawful possession of the seized property,'" (2) the property is not "'contraband or subject to forfeiture,'" and (3) the government does not have a continuing "'need for the property as evidence.'" *United States v. Chambers*, 192 F.3d 374, 377 (3d Cir. 1999) (quoting *United States v. Van Cauwenberghe*, 934 F.2d 1048, 1061 (9th Cir. 1991))); *United States v. Approximately $16,500.00 in United States Currency*, 113 F. Supp. 3d 776, 780 (M.D. Pa. 2015) (same). Ultimately, however, "[a] Rule 41(g) motion is governed by equitable principles," *United States v. Nelson*, 190 Fed. App'x. 712, 714 (10th Cir. 2006) (*citing Floyd v. United States*, 860 F.2d 999, 1002-03 (10th Cir. 1988)); "Rule 41(g) contemplates a 'reasonableness' standard." *United States v. Staton*, 2012 U.S. Dist. LEXIS 82583, at *14-15

[2] The government's decision not to immediately review the contents of Ms. Ravelo's cell phone was the result of two emails it received from Ms. Ravelo's attorney on the day of her arrest. *See* Exhibit A. The first email, sent at 8:35 p.m., advised the government that the seized phone contained information protected by attorney-client privilege. The second email, sent at 9:13 p.m., informed the government of the defense's position that the seizure of the phone was unlawful as it was not seized incident to arrest or with consent, and requested that the government immediately return the cell phone.

(E.D. Pa. June 14, 2012) (*quoting United States v. Korbe*, No. 09-0005, 2010 U.S. Dist. LEXIS 59815, at *4 (W.D. Pa. June 16, 2010)). As the Advisory Committee Notes to Rule 41 state:

> No standard is set forth in the rule to govern the determination of whether property should be returned to a person aggrieved either by an unlawful seizure or by deprivation of the property. The fourth amendment protects people from unreasonable seizures as well as unreasonable searches, *United States v. Place*, 462 U.S. 696, 701, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983), and reasonableness under all of the circumstances must be the test when a person seeks to obtain the return of property.

Fed. R. Crim. P. 41 (Advisory Committee Notes to 1989 Amendments); *see Gov't of Virgin Islands v. Edwards*, 903 F.2d 267, 273 (3d Cir. 1990) ("[R]easonableness under all of the circumstances must be the test when a person seeks to obtain the return of property."); *Nelson*, 190 Fed. App'x. 712, 714 (noting that under Rule 41(g) property must be returned when "'the retention of the property by the government is unreasonable'" (quoting *In re Matter of Search of Kitty's East*, 905 F.2d 1367, 1375 (10th Cir. 1990))); *United States v. Robinson*, 2013 U.S. Dist. LEXIS 7887, at *3 (S.D. Ohio Jan. 17, 2013) (noting the "reasonableness" standard set forth in the Advisory Committee Notes).

Applying this framework, the Court must first consider whether Ms. Ravelo is "entitled to lawful possession of the seized property." *Chambers*, 192 F.3d at 377; *Van Cauwenberghe*, 827 F.2d at 433. Lawful possession exists, under Rule 41(g), when a defendant "was the rightful owner of the property at the time it was seized," and did not, subsequent to the seizure, "irrevocably transfer" his or her ownership rights. *Van Cauwenberghe*, 827 F.2d at 433. Consistent with the traditional principles of property ownership, "[p]ossession by a person is 'prima facie evidence of some kind of rightful ownership or title,'" and may serve as sufficient proof under Rule 41(g). *Ferreira*, 354 F. Supp. 2d at 409 (quoting *Northern Pac. R.R. Co. v. Lewis,* 162 U.S. 366, 372 (1896)). Here, there is no dispute that Ms. Ravelo was the rightful owner of the cell phone at the time it was seized.[3] Although the phone was not physically in Ms.

[3] To the extent that these facts are disputed, and the resolution of such dispute is required in order to decide this application, the Court should hold an evidentiary hearing. *See United States v. Jackson*, 363 Fed. App'x. 208, 210 (3d Cir. 2010) (noting that an evidentiary hearing is required if there are "'issues of fact material to the resolution of the defendant's constitutional claim.'") (quoting *United States v. Voigt*, 89 F.3d 1050, 1067 (3d Cir. 1996). Notably, even if the Court were to accept the facts set forth in the affidavit upon which the Magistrate Judge relied in authorizing the search warrant, facts which Ms. Ravelo disputes, they do not at all demonstrate that the seizure of the phone occurred incident to arrest, which must be "substantially contemporaneous with the arrest and . . . confined to the immediate vicinity of the arrest." *Stoner v. California*, 376 U.S. 483, 486 (1964); *see United States v. Nigro*, 218 Fed. App'x. 153, 156-57 (3d Cir. 2007) (noting that searches incident to arrest must occur in "'the area where the arrest occurred'" (quoting *United States v. Myers*, 308 F.3d 251, 266-67 (3d Cir. 2002))). Indeed, even according to the government's version of the offense, as set forth in that affidavit, Ms. Ravelo's phone was not seized at the time of her arrest; rather, after law enforcement placed Ms. Ravelo under arrest and handcuffed her in the hallway outside the master bedroom, the officers escorted Ms. Ravelo to use the bathroom, then into her bedroom for the purpose of changing her clothes and retrieving her passport, and then into yet another room where

Ravelo's hands at that very moment – as stated in her motion to suppress, the phone was seized from Ms. Ravelo's son who standing approximately fifty feet away from his handcuffed mother – it was taken from her home after federal law enforcement officers permitted her son to retrieve the phone from the nightstand beside her bed. Moreover, that Ms. Ravelo was the rightful owner of the property flows from the fact that the phone was registered in her name and the fact that it was used exclusively for her personal use up until the time it was seized. Because Ms. Ravelo has never transferred or relinquished her ownership rights in any capacity, she is, under Rule 41(g), "entitled to lawful possession of the seized property." *Chambers*, 192 F.3d at 377.

The circumstances here also satisfy Rule 41(g)'s second requirement that the party seeking the return of property demonstrate that the seized property is not "contraband or subject to forfeiture." *Chambers*, 192 F.3d at 377; *Van Cauwenberghe*, 827 F.2d at 433; *Ferreira*, 354 F. Supp. 2d at 409. Ms. Ravelo's cell phone certainly does not constitute contraband, which, for purposes of Rule 41(g), "is property the mere possession of which is unlawful." *Mendez v. United States*, 2003 U.S. Dist. LEXIS 12267, at *9-10 (S.D.N.Y. July 16, 2003) (*citing United States v. Eighty Eight Thousand Five Hundred Dollars*, 671 F.2d 293 (8th Cir. 1982)). Nor is the cell phone subject to forfeiture, notwithstanding that there is a forfeiture action currently pending against other of Ms. Ravelo's property. *See United States v. The Real Properties Located at: 164 Chestnut Street, Englewood Cliffs, New Jersey, et al.*, Docket No. 2:14-cv-07936.

With regard to Rule 41(g)'s third requirement, the government in this case cannot possibly have a continuing "'need for the property as evidence.'" *Chambers*, 192 F.3d 374, 377. For one thing, courts consistently reject the government's purported need to retain property as evidence when the property was obtained pursuant to an illegal seizure, in which case it could not be used as evidence as a matter of law. *See, e.g.*, *Ferreira v. United States*, 354 F. Supp. 2d 406, 409 (S.D.N.Y. 2005) (noting that a criminal defendant may meet his burden under Rule 41(g) by demonstrating "'either the seizure was illegal or the government's need for the property as evidence has ended'" (quoting *United States v. Van Cauwenberghe*, 827 F.2d 424, 433 (9th Cir. 1987)); *United States v. Gladding*, 584 Fed. App'x. 464, 464-65 (9th Cir. 2014) (same); *In re Uche*, 2014 U.S. Dist. LEXIS 109430, at *2 (E.D.N.Y. Aug. 7, 2014) (same). Here, as set forth in Ms. Ravelo's motion to suppress, the contents of her cell phone were obtained in violation of the Fourth Amendment as the phone was seized without a warrant and the seizure was not justified by any exception to the warrant requirement. The government cannot therefore, introduce those contents as evidence,[4] and cannot, accordingly, establish that is has a need for

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she changed her clothing. Ms. Ravelo then assisted an officer by providing the security code needed to access the phone so that the officer could provide Ms. Ravelo's son with her attorney's phone number. D.N.J. Affidavit, at 20-26. Thus, even based on the government's own account, the warrantless seizure obviously occurred "remote in time or place from the arrest" and therefore "cannot be justified as incident to that arrest." *United States v. Chadwick*, 433 U.S. 1, 15 (1977).

[4] The government certainly cannot introduce this evidence in its case in chief, and cannot even use it to impeach witnesses other than the defendant herself. *James v. Illinois,* 493 U.S. 307, 309 (1990). And whether Ms. Ravelo will testify is, of course, entirely speculative since she obviously has the constitutional right not to do so. *United States v. Gordon*, 290 F.3d 539, 546 (3d Cir. 2002); *United States v. Pennycooke*, 65 F.3d 9, 10 (3d Cir. 1995).

that evidence, particularly where, as here, it does not know and therefore cannot demonstrate its evidentiary value.

Indeed, in order for the government to show its "interest in maintaining control of property relevant to the prosecution and sentencing of a defendant" sufficient to justify it retention of illegally seized property, the government must "establish the property seized is actually relevant to that process." *Nelson*, 190 Fed. App'x. at 715. In *Nelson*, the Tenth Circuit found that "the continued retention of [certain] items by the government" – including the defendant's "cameras, computers, personal photos and papers, as well as clothing and accessories" and "[v]arious items of [defendant]'s personal property" – was unreasonable and the Court therefore ordered that the property be returned. *Id.* at 713, 715. In particular, the Court found that the government's argument that its retention of the items was justified by "the possibility of use" in a subsequent proceeding was unreasonable, holding that "[t]he government cannot simply rely on the possibility [that it will use the evidence] to justify retaining all property seized, especially that of an apparently innocuous and irrelevant nature." *Id.* at 715.

Like the items seized in *Nelson*, Ms. Ravelo's personal cell phone and its contents, which are "of an apparently innocuous and irrelevant nature," *id.*, can only be retained if the government can justify its retention of the phone and its contents based on an actual need for the evidence – beyond "the possibility of use" in its case-in-chief. Of course, the government cannot do so; certainly, it has no basis to assert that the phone contains any evidence of criminal wrongdoing or is any way connected to the underlying charges, as it has not yet reviewed the contents of Ms. Ravelo's cell phone which remains in the possession of the taint team. Nor was there probable cause to seize the phone; to the contrary, that seizure phone was the result of sheer happenstance: had Ms. Ravelo's son not attempted to call her attorney, and had a law enforcement officer not observed Ms. Ravelo's son attempting to make the call at that very moment, the phone would have never been seized. Indeed, there is no indication that, prior to that point, the government had any interest in obtaining the contents of Ms. Ravelo's personal phone; indeed, it did not obtain a warrant to seize the phone or a wiretap order to record her conversations, and the officers did not inquire into the whereabouts of the phone at the time they entered Ms. Ravelo's home to arrest her. In sum, there is nothing more than "the possibility" that the evidence may be relevant to the government's case, which, for reasons expressed in *Nelson*, in an insufficient basis upon which to resist a Rule 41(g) motion. 190 Fed. App'x. at 715.

Moreover, contrary to the government's position at oral argument, "Rule 41(g) does indeed contemplate that district judges may order the return of the originals, as well as any copies, of seized evidence." *Comprehensive Drug*, 621 F.3d at 1174 (citing Fed. R. Crim. P. 41 (Advisory Committee Notes to 1989 Amendments) (noting that "equitable considerations might justify an order requiring the government to return or destroy all copies of records that it has seized.")). That is, the government's argument that a ruling in Ms. Ravelo's favor would nevertheless allow the government to retain copies of the phone's contents for impeachment purposes, while true in the context of a motion to suppress, *see e.g., James v. Illinois*, 493 U.S. 307, 311-14 (1990), does not apply to Rule 41(g). In particular, this argument "overlooks the

crucial distinction between a motion to suppress and a motion for return of property: The former is limited by the exclusionary rule, the latter is not." *Comprehensive Drug*, 621 F.3d at 1172. More specifically:

> The return of seized property under Rule 41(g) and the exclusionary rule serve fundamentally different purposes. Suppression helps ensure that law enforcement personnel adhere to constitutional norms by denying them, and the government they serve, the benefit of property that is unlawfully seized. Rule 41(g) is concerned with those whose property or privacy interests are impaired by the seizure.
>
> . . .
>
> Most importantly, judicially-imposed restrictions on the scope of the exclusionary rule – itself a judicially-created remedy – are not applicable to orders for return of property which derive their authority from the Federal Rules of Criminal Procedure and their enabling legislation.

Id. at 1173.

The circumstances here indisputably merit the return of all copies of Ms. Ravelo's cell phone records, *see id.* at 1164, as the government's seizure of the phone was a warrantless one, meaning that it was "*per se* unreasonable" under the Fourth Amendment; nor has the government borne (or even attempted to bear) its burden of establishing a basis for this warrantless seizure. *See Riley v. California*, 134 S. Ct. 2473, 2482 (2014); *United States v. Katzin*, 769 F.3d 163, 169 (3d Cir. 2014). In sum, where, as here, "the government comes into possession of evidence by circumventing or willfully disregarding [the requirements of the Fourth Amendment], it must not be allowed to benefit from its own wrongdoing by retaining the wrongfully obtained evidence or any fruits thereof." *Comprehensive Drug*, 621 F.3d at 1174; *see also Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955, 961 (3d Cir. 1984) (upholding preliminary injunction against federal officers and ordering the return of seized documents upon concluding that the search of a law office was unreasonable because investigators "took not one step to minimize the extent of the search or to prevent the invasion of the clients' privacy guaranteed by the attorney-client privilege"); *Watts v. Kroczynski*, 636 F. Supp. 792, 800-02 (W.D. La. 1986) (ordering the return of property seized outside the scope of the warrant). Nor, of course, does the fact that the government obtained a warrant to search the cell phone's contents subsequent to the warrantless seizure cure the unconstitutionality of the government's conduct. *See United States v. Stabile*, 633 F.3d 219, 243 (3d Cir. 2011) (holding evidence to be inadmissible if property obtained as a result of an illegal seizure "'prompted the officers to obtain the [subsequent] search warrant'" (quoting *United States v. Herrold*, 962 F.2d 1131, 1144 (3d Cir. 1992) (alteration in original))); *In re Cunnius*, 770 F. Supp. 2d 1138, 1143 (W.D. Wash. 2011) (noting that "the ability to seek a second warrant after finding evidence as to which there was no probable cause to search only magnifies the danger" of an overbroad and unconstitutional search); *see also Segura v. United States*, 468 U.S. 796, 804 (1984) (concluding that evidence obtained in an initial illegal entry or

seizure may not used to obtain the warrant authorizing the subsequent entry or seizure unless "the discovery and seizure of the evidence is 'so attenuated as to dissipate the taint'" (quoting *Nardone* v. *United States*, 308 U.S. 338, 341 (1939))). Defendant Ravelo's motion for the return of her telephone and the contents thereof must be granted.

Thank you for your kind consideration of this matter.

Respectfully submitted,

/s/ Lawrence S. Lustberg
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cc: Steven H. Sadow, Esq.
Andrew D. Kogan, Assistant U.S. Attorney

Goodman, Jake

From: steve sadow <steve8300@icloud.com>
Sent: Tuesday, February 23, 2016 1:24 PM
To: Goodman, Jake
Subject: Fwd: U.S. v. Ravelo

Begin forwarded message:

> **From:** Steve Sadow <stevesadow@gmail.com>
> **Date:** December 22, 2014 at 9:13:23 PM EST
> **To:** "Kogan, Andrew (USANJ)" <Andrew.Kogan@usdoj.gov>
> **Cc:** "Wilson, Ronnell (USANJ)" <Ronnell.Wilson@usdoj.gov>, Aidan O'Connor <aoconnor@pashmanstein.com>
> **Subject: Re: U.S. v. Ravelo**
>
> Just to be as clear as possible, it will be the defense's position that the cellphones were not seized incident to arrest or with consent, and therefore have been seized unlawfully. Additionally, please be advised that you do not have the defense's consent to search or otherwise obtain the contents of the cellphones.
>
> Accordingly, by this email, the defense hereby requests the immediate return of the cellphones seized from Ms. Ravelo's residence today.
>
> Steve Sadow
> 404-577-1400 office
> 404-242-9440 cell
>
> On Dec 22, 2014, at 9:48 PM, steve sadow <steve8300@icloud.com> wrote:
>
> > My assistant's emails are cp8300@icloud.com and cp8300@me.com and cellphone is 4044569112
> >
> > Please get Aidan's info directly from him.
> >
> > Steve Sadow
> > 404-577-1400 office
> > 404-242-9440 cell

On Dec 22, 2014, at 9:39 PM, Kogan, Andrew (USANJ) <Andrew.Kogan@usdoj.gov> wrote:

Received. Thank you for the information.

On Dec 22, 2014, at 8:35 PM, steve sadow <steve8300@icloud.com<mailto:steve8300@icloud.com>> wrote:

You are hereby notified that the cellphones seized or obtained from Keila today may contain attorney-client text messages and emails, both deleted and undeleted.

DO NOT ATTEMPT TO REVIEW OR OTHERWISE GAIN ACCESS TO ANY TEXT MESSAGES TO/FROM MY CELL PHONE (4042429440) OR MY EMAIL ACCOUNTS (steve8300@me.com<mailto:steve8300@me.com>; steve8300@icloud.com<mailto:steve8300@icloud.com>; stevesadow@gmail.com<mailto:stevesadow@gmail.com>). This also applies to any text messages or emails to/from Aidan's cellphone and email account.

Please confirm receipt of this email and direct your agents accordingly.

Steve Sadow

404-577-1400 office

404-242-9440 cell