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October 21, 2016

Honorable Kevin McNulty
United States District Judge
United States Post Office and Courthouse
Federal Square
Newark, New Jersey 07102

Re: United States v. Ravelo
Crim. No. 15-576 (KM)

Dear Judge McNulty:

Please accept this letter brief in lieu of a more formal submission in opposition to the defendant's motion to suppress evidence recovered from her cellular telephone ("the Phone"). Specifically, this brief is submitted in response to the defendant's October 17, 2016 brief filed in support of her motion. For the reasons that follow, as well as for those set forth in the Government's October 17, 2016 submission, law enforcement lawfully seized the Phone and the United States respectfully submits that the Court should deny the defendant's motion.

Legal Argument

1. Law Enforcement Lawfully Seized the Phone After Special Agent Matejicka Observed Incriminating Evidence on the Phone while Responding to the Defendant's Request to Obtain her Attorney's Contact Information

Special Agent ("SA") Matejicka properly seized the Phone after she observed incriminating evidence on the Phone while responding to the

defendant's request to obtain information from the Phone. The law is clear that law enforcement may seize incriminating evidence it observes in plain view while responding to a defendant's post-arrest request. United States v. Varner, 481 F.3d 569 (8th Cir. 2007); United States v. Jackson, 414 F.Supp.2d 495 (D.N.J. 2006).

For example, the District Court in Varner held that law enforcement properly seized suspected contraband observed in plain view while responding to the defendant's post-arrest request for cigarettes. In that case, law enforcement officers arrested Varner outside his home. Varner, 481 F.3d at 570. Varner asked if he could enter his home to tell his girlfriend that he was under arrest and would be leaving. Id. Law enforcement agreed to the request and accompanied Varner into the home. Id. Once inside the home, Varner asked to go to the basement to retrieve cigarettes to smoke. Id. Law enforcement agreed to his request, but insisted that law enforcement accompany him into the basement. Varner, 481 F.3d at 570. The defendant changed his mind, but then asked if his girlfriend could retrieve the cigarettes from the basement. Id. The officers granted this request with the condition that law enforcement accompany the defendant's girlfriend to the basement. Id. While doing so, law enforcement observed marijuana, a pipe, and a white substance in a clear bag – all of which law enforcement seized. Id. The District Court denied Varner's motion to suppress the marijuana, pipe, and white substance. Varner, 481 F.3d at 571.

The Eighth Circuit affirmed the District Court's holding. As an initial matter, the Eighth Circuit found that law enforcement lawfully accompanied Varner into his home after he requested to reenter the home. Id. at 571-572. The Eighth Circuit next found that Varner verbally consented to law enforcement entering his basement to fulfill his request for cigarettes. Id. at 572. As a result, the Court ruled that law enforcement lawfully seized the items it observed in plain view while in the basement. Id. at 572-573.

Similarly, in Jackson, District Judge Wolfson ruled that law enforcement properly seized evidence observed in plain view while law enforcement was obtaining shoes for the defendant at his request. In that case, law enforcement arrested the defendant, who was not wearing shoes, when he answered his apartment door. Jackson, 414 F.Supp.2d at 499-500. Following his arrest, the defendant asked law enforcement to retrieve his shoes. Id. at 500. While the defendant remained in the kitchen with other law enforcement officers, one law enforcement officer entered the defendant's bedroom to retrieve the shoes. Id. While in the room, the law enforcement officer observed and seized a handgun in plain view. Id.

In its decision, the District Court discussed the clothing exception to the Fourth Amendment. Judge Wolfson noted that the exception permits law enforcement to seize evidence found in clothing that law enforcement obtained for an arrested individual. 414 F.Supp.2d at 504-505. The Court, however, found that the clothing exception was inapplicable because the defendant in Jackson requested that law enforcement obtain his shoes and thus consented to law enforcement entering his bedroom. Id. at 504-505.

The Court then analyzed the issue under the plain view doctrine. In that regard, the Court ruled that law enforcement's seizure of the handgun was justified because law enforcement observed the handgun in plain view and as a result of the defendant's request and consent to have law enforcement retrieve his shoes from his bedroom. Id. at 507-508.[1]

In this case, SA Matejicka properly seized the Phone after seeing the information about Gary Friedman ("Friedman") on the Phone – an observation that occurred as a result of the defendant's request and consent. After the defendant was arrested and permitted to use the bathroom, SA Matejicka told the defendant that she needed to get dressed and retrieve her passport. Tr. 7:14-15. In response, the defendant led law enforcement into her bedroom, which law enforcement had already secured. Tr. 7:16-17; 71:17-18. SA Matejicka testified that at that time the defendant was being compliant, SA Matejicka did not view her as a threat, and law enforcement remained in close proximity to the defendant. Tr. 53:6-13.

Once in her bedroom, the defendant picked up the Phone from the nightstand next to the bed. Tr. 8:1-2. SA Matejicka told the defendant that she was not allowed to make any telephone calls. Tr. 8:8-10; 75:4-5. In response, the defendant requested permission to provide her attorney's telephone number to one of her sons. Tr. 8:11-13. SA Matejicka replied that

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[1] United States v. Gwynn, 219 F.3d 326 (4th Cir. 2000) is but one example where a court allowed the introduction of evidence seized pursuant to the clothing exception. In addition, the Third Circuit has allowed the introduction of evidence found in the clothing law enforcement intended to provide to an arrested defendant under the theory of a search incident to arrest, even when the clothing was located in a different room than where law enforcement arrested the defendant. United States v Leftwich, 461 F.2d 586, 592 (3d Cir. 1972). In this matter, as the defendant requested to obtain her attorney's contact information and consented to SA Matejicka opening the Phone, the United States is not directly relying on these cases but is bringing them to the Court's attention in support of the proposition that seizure is proper and evidence is admissible when the evidence is inadvertently observed during the routine events following an arrest, such as providing clothing, an inventory of a car, providing medication, or obtaining an attorney's contact information for a defendant.

the information would be provided, but only after the defendant got dressed. Tr. 8:12-14. At no time did SA Matejicka tell the defendant to put down the Phone. Tr. 29:3-4, 11-12. Nor did SA Matejicka take the Phone directly from the defendant. Tr. 29:13-14. Instead, law enforcement allowed the defendant to carry the Phone into her closet where she chose to put the Phone down. Tr. 8:15-19; 29:15-25.

SA Matejicka then picked up the Phone to comply with the defendant's request, which was to provide the defendant's attorney's phone number to one of the defendant's sons. Tr. 9:1-7; 32:10-14. There is no evidence that law enforcement seized the Phone in the Constitutional sense at this time. Instead, the evidence is clear that law enforcement took possession of the Phone to aid the defendant in obtaining her attorney's contact information. Indeed, SA Matejicka testified that she picked up the Phone to provide the attorney's phone number to the defendant's sons pursuant to the defendant's request. Tr. 32:18-19.

SA Matejicka asked the defendant for the Phone's code. Tr. 9:6-7. The defendant did not object and willingly gave the code to SA Matejicka. Tr. 9:8-9. SA Matejicka unlocked the Phone with the code and she observed that the e-mail application was open and that there was an e-mail either to or from Friedman. Tr. 9:10-14.

The facts of this case make clear that when she picked up the Phone, SA Matejicka intended to use the Phone solely to respond to the defendant's request and with the defendant's consent. First, SA Matejicka testified that prior to the observation of the Friedman information law enforcement, while aware that the defendant used a cellular phone, had no discussions about and made no attempts to obtain a search warrant for the Phone. Tr. 13:19-14:4. Law enforcement only became interested in seizing and searching the Phone following the observation of the Friedman observation. Second, SA Matejicka did not immediately seize the Phone from the defendant. Tr. 29:13-14. SA Matejicka did not even tell the defendant to put the Phone down when the defendant initially picked up the Phone. Tr. 29:3-4, 11-12. Instead, the defendant retained possession of the Phone and carried it to the closet where she decided to put the Phone down. Tr. 29:15-22; 29:24-25. Third, even after observing the Friedman information, SA Matejicka and the defendant worked cooperatively to satisfy the defendant's request. Indeed, SA Matejicka testified that she told the defendant to "scroll through [the recent call list] until she identified the number for her attorney." Tr. 11:9-10.

In sum, SA Matejicka viewed the Friedman information while responding to the defendant's request. SA Matejicka only viewed this information when

the defendant consented to her use of the Phone by providing the code to SA Matejicka and helping SA Matejicka find the number of the defendant's attorney. Law enforcement did not seize the Phone until after it viewed the Friedman information. Thus, law enforcement's seizure falls squarely within the plain view exception and the Court should deny the defendant's motion.[2]

2. Observing the Friedman Information Provided Probable Cause to Seize the Phone

Viewing the Friedman information provided ample probable cause to seize the Phone. The "incriminating character" of evidence is immediately apparent if "there is probable cause to associate the [seized] property with criminal activity." Texas v. Brown, 460 U.S. 730, 741-42 (1983). Importantly, this standard does not require the officers to have "near certainty" that items in plain view are contraband or evidence of a crime. Id. at 741. Nor does the standard require an "officer to 'know' that items are evidence of a crime, but 'merely requires that the facts available to the officer would warrant a [person] of reasonable caution in the belief that certain items may be contraband . . . or useful as evidence of a crime . . . ." Id. at 742.

In this case, at the time of SA Matejicka' s observation, SA Matejicka was aware that Friedman was possibly one of the defendant's co-conspirators in the charged crime. This belief was based in part on the fact that in 2012 the defendant, in an effort to cover up her crime, submitted documents to her employer that she claimed were from a legitimate vendor and represented work product generated by the vendor. In reality, metadata contained in the documents established that the documents were authored by an individual working at Friedman's law firm. See Tr. 12:15-20. Moreover, the belief that Friedman was a possible coconspirator was based on financial records that showed that Friedman, the head of a prominent New York law firm, received total payments of $100,000 from the two companies that the defendant and her husband caused to be created in furtherance of their criminal activity. Law enforcement, on the date of the defendant's arrest, was not aware of any legitimate reason for these payments from the sham companies to Friedman. The fact that there was an e-mail on the Phone, whether to or from Friedman, was therefore evidence that at a minimum: (a) confirmed the defendant's knowledge of Friedman, the person from whom law enforcement believed she obtained documents to cover up her criminal activity; (b) demonstrated that the relationship between Ms. Ravelo and Friedman was personal in nature, as the

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[2] The cases cited by the defendant concerning plain view seizure of phones (see Defendant's Brief, p. 4-5) are inapplicable as they do not involve law enforcement seizing phones it observed in plain view while complying with a defendant's request.

defendant had previously resigned from her law firm; and (c) showed that the defendant had a relationship with Friedman independent of any relationship her husband Melvin Feliz had with Friedman. Even without knowing the content of the email communication between the defendant and Friedman, it was immediately apparent to law enforcement that the communication itself was incriminating evidence.

The defendant attempts to argue that viewing the information about Friedman did not warrant seizure. In particular, the defendant argues that her social relationship with Friedman negates probable cause as the e-mail communication observed in the Phone may have been a social exchange between friends. Defendant's Brief, p. 7. As stated above, establishing that the defendant and Friedman have a relationship advances the argument that the defendant obtained documents from Friedman or his firm that she used to cover up her criminal activity. Thus, whether the e-mail was social or criminal in nature, the evidence of the e-mail was incriminating evidence.

The United States further disagrees with defendant's argument in light of the actions taken following the seizure of the Phone. Just two days after seizing the Phone, law enforcement sought a search warrant for the Phone. The underlying affidavit was based upon facts known to and reviewed by SA Matejicka. Tr. 34:15-24; 36:9-12.[3] In response to the application, the Honorable Cathy L. Waldor, United States Magistrate Judge, District of New Jersey granted the search warrant application for the Phone on December 24, 2016.

3. SA Matejicka's Testimony is Credible

SA Matejicka's testimony was consistent and credible. The United States submits that SA Matejicka testified truthfully and to the best of her recollection about events that transpired on December 22, 2014. Her testimony is corroborated by former Supervisory Special Agent ("SSA") Linda Masessa's testimony. SA Matejicka's testimony is further corroborated by the information provided by SA Robert Bowe concerning the Phone's code. The biased, intent based testimony of the only other witness to testify, Michael Feliz, fails to present any legitimate challenge to, or call into doubt, SA Matejicka's testimony.

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[3] In her submission, the defendant agrees that "the affidavit in support of the warrant to search Ms. Ravelo's phone was based primarily on SA Matejicka's purported observation..." of the Friedman information. Defendant's Brief, p.6, fn. 4.

The defendant unsuccessfully attempts to impugn SA Matejicka's testimony. First, the defendant argues that the testimony is not credible as the defendant was allowed to walk into her bedroom and pick up the Phone. Defendant's Brief, p.6. However, SA Matejicka testified that following the defendant's arrest, SA Matejicka told the defendant that she needed to get dressed and retrieve her passport. Tr. 7:14-15. SA Matejicka further testified that the defendant was being compliant, SA Matejicka did not view her as a threat, and law enforcement remained in close proximity to the defendant. Tr. 53:6-13. It would thus have been reasonable for law enforcement to believe that the defendant was walking into her bedroom (which law enforcement had secured) to retrieve her passport or obtain clothing, even if she had additional clothing in a closet that she passed by on route to the nightstand.

Second, the defendant argues that SA Matejicka's testimony that the defendant provided the Phone's code to law enforcement is not credible. Defendant's Brief, p.6. To the contrary, this fact makes perfect sense. The defendant – even according to her son – wanted her children to contact her attorney. At that point, the attorney's contact information could only be obtained from the Phone. The defendant therefore had a motive to provide the code to law enforcement. Additionally, the information from SA Bowe corroborates SA Matejicka's testimony that the defendant provided the Phone's code to her. SA Bowe obtained the code from another law enforcement officer on December 30, 2014 for the purpose of searching the Phone. Based upon the testimony, the only way this is possible is that the defendant provided the code to law enforcement.

Moreover, the defendant argues that SA Matejicka's testimony that the e-mail application was open and that she observed the Friedman information is implausible. Defendant's Brief, p.6. These facts though are corroborated by the testimony of former SSA Masessa. They are also corroborated by the information from SA Bowe. Instead, what is implausible is that SA Matejicka opened the Phone with the code, did not observe the Friedman information, but nonetheless seized the Phone, a phone that SA Matejicka testified law enforcement had no prior interest in searching. The defendant's argument is even more implausible as law enforcement did not seize any other item from the home.

Finally, the defendant argues that SA Matejicka's testimony is not believable because there was no contemporaneous written record of the circumstances surrounding the seizure of the Phone and former SSA Masessa, who was present, was unable to recall details concerning the seizure of the Phone. Defendant's Brief, p.6. There was, though, a contemporaneous record. Just two days following the seizure of the Phone, law enforcement

applied for and obtained a search warrant for the Phone. The facts concerning the seizure of the Phone were plainly stated in the affidavit supporting the application for that search warrant. SA Matejicka reviewed these facts and approved of them being included in the affidavit. Thus, the facts surrounding the seizure of the Phone were contemporaneously memorialized. Moreover, the lack of a contemporaneous record does not automatically negate the credibility of a witness.

Further, the fact that former SSA Masessa did not remember each and every action concerning the Phone's seizure does not impugn SA Matejicka's credibility. As former SSA Masessa testified, law enforcement's objective on December 22, 2014 was to execute the arrest of the defendant and her husband in a safe manner. Tr. 83:20-84:2. Former SSA Masessa further testified that her attention was often drawn in different directions because there were many people inside the home and there was a lot taking place inside the home. Tr. 84:19-20. The facts show that SA Matejicka, not former SSA Masessa, was the law enforcement officer interacting with the defendant. Moreover, until being told about the Friedman information on the Phone, former SSA Masessa would have considered law enforcement accessing the Phone at the defendant's request a minor, administrative event. In light of these facts, it is hardly shocking that former SSA Masessa did not recollect or observe every detail regarding the arrest and seizure of the Phone.

Nevertheless, what is important is that that former SSA Masessa did remember facts that corroborate SA Matejicka's testimony. Former SSA Masessa testified that SA Matejicka and the defendant discussed obtaining her attorney's contact information in either the closet or the hallway. Tr. 78:3-9. Former SSA Masessa recalled that a law enforcement officer looked at the Phone to get the contact information either inside or right outside the closet. Tr. 79:12-13. According to former SA Masessa, this took place only after someone asked for the defendant's permission to access the Phone and after the defendant did not object. Tr. 81:8-11. Overall, former SSA Masessa's testimony corroborates SA Matejicka's testimony that: (1) the defendant requested to retrieve her attorney's contact information; (2) the defendant provided the code to SA Matejicka and consented to her unlocking the Phone; (3) law enforcement unlocked the Phone to obtain the attorney's information; and (4) the events occurred when and where SA Matejicka testified they occurred.

Conclusion

Law enforcement properly seized the Phone. Hence, the United States respectfully submits that the Court should deny the defendant's motion.

Thank you for your consideration.[5]

Respectfully submitted,

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United States Attorney

By: Andrew Kogan
Assistant U.S. Attorney

cc: Lawrence S. Lustberg, Esq.
Steven Sadow, Esq.

[5] During the September 19, 2016 hearing the Court instructed the parties to file submissions concerning the plain view and inevitable discovery doctrines. The United States therefore respectfully requests that if the Court grants the defendant's motion, which the United States submits it should not, that the United States be provided one week in which to file a submission concerning the return of property pursuant to Fed. R. Crim. Pro. 41(g).