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July 12, 2016

By ECF and Electronic Mail
Hon. Kevin McNulty
United States Post Office & Courthouse
Federal Square
Newark, New Jersey 07101

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

Dear Judge McNulty:

Please accept this letter brief in response to your Honor's order for briefing on the issues of when the government must return suppressed evidence to a defendant and under what circumstances the government may use the suppressed evidence in a criminal case.

In summary, assuming *arguendo* that the Court granted Keila Ravelo's motion to suppress the contents of her cellular telephone ("the Phone") and a motion to return the Phone, the government would still be able to retain a copy of the Phone to be used lawfully, among other reasons, for impeachment purposes, at a sentencing hearing, filing an appeal, and/or in opposition to any *habeas* petition.

BACKGROUND

On or about December 22, 2014, law enforcement officers arrested Ms. Ravelo and her husband Melvin Feliz pursuant to a Complaint charging them with conspiracy to commit wire fraud. During the course of the arrest, law enforcement took possession of the Phone. On or about December 24, 2014, the Honorable Cathy L. Waldor, United States Magistrate Judge for the District of New Jersey, executed a warrant authorizing law enforcement to search the Phone.

Following the issuance of the search warrant, an AUSA not part of the trial team ("the filter AUSA") caused a copy of the contents of the Phone to be made. The filter AUSA then provided a copy of the Phone's contents to defense counsel. At or about that time, the filter AUSA and defense counsel agreed to a protocol whereby defense counsel would review the copy and identify and notify the filter AUSA concerning any material that defense counsel alleged contained privileged material.

On or about April 29, 2016, Ms. Ravelo filed a motion to suppress the evidence obtained from the seizure and search of the Phone. In response, on or about May 20, 2016, the government filed an opposition motion arguing that Ms. Ravelo's motion was not ripe for adjudication as the government's trial team had not reviewed the contents of the Phone because it was waiting for defense counsel and the filter AUSA to conduct a joint privilege review of the Phone.

At the status conference held on or about June 27, 2016, defense counsel appeared to reverse its earlier position, stating that it did not intend to conduct the joint privilege review of the Phone with the government's filter AUSA. Defense counsel explained that it believed the Court will order suppression of the Phone, thereby obviating defense counsel's need to review the Phone for privileged material. In response, the government argued that both defense counsel and the government's trial team will inevitably have to review the contents of the Phone regardless of whether or not the Court grants Ms. Ravelo's motion to suppress. Shortly thereafter, your Honor ordered the parties to brief the following issues, namely, if the Court were to suppress the evidence obtained from the Phone: (i) what is the government's obligation to return the suppressed evidence (that is, the Phone and its contents), and (ii) what are the government's permissible uses, if any, of the same suppressed evidence in its criminal case?

For the reasons set forth below, were the Court to suppress evidence obtained from the Phone, the government could not use any suppressed evidence from the Phone in its case-in-chief. However, the government could: (1) introduce such evidence to impeach the defendant's testimony and/or certain testimony of other witnesses; (2) use any relevant suppressed evidence from the Phone for sentencing purposes; (3) use relevant suppressed evidence from the Phone in opposition to any *habeas* petition that the defendant might file post-conviction; (4) retain copies of the contents of the Phone, as contemplated by the 1989 Amendments to Fed. R. Crim. P. 41, even if the court granted a motion to return the Phone. Additionally, the government would need to review the contents of the Phone to determine whether an appeal of the court's order to suppress would be appropriate.

PERMISSIBLE USES OF SUPPRESSED EVIDENCE

For over fifty years, the Supreme Court has permitted the government to admit suppressed evidence for certain purposes, regardless

of the exclusionary rule. In this case, if the court were to grant Ms. Ravelo's motion to suppress the contents of the Phone, the government might still try to admit the evidence to, among other reasons, impeach the defendant, prove relevant conduct at sentencing, or oppose a *habeas* petition by the defendant.

In *Weeks v. United States*, 232 U.S. 383 (1914), the Supreme Court initially prohibited the use of evidence seized in violation of the Fourth Amendment to secure a conviction. The Court later explained that the rule of exclusion was based on an effort to deter unlawful police activity and to recognize the judicial integrity in the admission of evidence. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Elkins v. United States*, 364 U.S. 206 (1960). However, the Court also made clear that the exclusionary rule was a judicially created remedy, rather than a constitutional right, and that it did not "proscribe the use of illegally seized evidence in all proceedings or against all persons." *United States v. Calandra*, 414 U.S. 338, 348 (1974).

As such, the courts have allowed evidence obtained in violation of the Fourth Amendment to be used by the government for a variety of purposes. To name just a few examples relevant here, the government may impeach a defendant's false testimony with otherwise excludable evidence that is fruit of the poisonous tree. *Kansas v. Ventris*, 556 U.S. 586, 594 (2009) ("evidence whose very introduction does not constitute the constitutional violation, but whose obtaining was constitutionally invalid[,] is admissible for impeachment" of a testifying defendant); *Harris v. New York*, 401 U.S. 222, 225 (1971) ("Every criminal defendant is privileged to testify in his own defense, or refuse to do so. But that privilege cannot be construed to include the right to commit perjury"); *Walder v. United States*, 347 U.S. 62, 65 (1954) ("[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility"); *United States v. Torres*, 926 F.2d 321, 323 (3d Cir. 1991) (evidence obtained in violation of the Fourth Amendment is admissible for impeachment of defendant's testimony). Illegally obtained evidence can be used to impeach a defendant's testimony on either direct examination or on cross-examination as long as the government's questioning is reasonably suggested by the defendant's direct testimony. *United States v. Havens*, 446 U.S. 620, 627-28 (1980) (illegally seized t-shirt admissible to impeach statements by defendant on cross-examination denying knowledge of scheme using cut-up t-shirt to smuggle cocaine because questions reasonably suggested by direct examination). The government may also use suppressed evidence to impeach witnesses other than the defendant to the extent those witnesses are testifying about out-of-court statements of the defendant herself. *United States v. Rosales-Aguilar*, 818 F.3d 965, 969-70 (9th Cir. 2016).

Evidence obtained in violation of the Fourth Amendment may also be used at sentencing. *United States v. Carlos Torres*, 926 F.2d 321 (3d Cir. 1991) (holding that cocaine that had been suppressed because it was illegally seized could be considered in determining the amount of cocaine involved in the offense for sentencing purposes); *United States v. Tejada,* 956 F.2d 1256, 1262 (2d Cir. 1992) (proper for court to considered suppressed evidence at sentencing despite being illegally obtained because it was not gathered for the express purpose of improperly influencing the sentencing judge). In the post-sentencing context, the government may introduce tainted evidence in *habeas* proceedings. *Stone v. Powell*, 428 U.S. 465, 493 (1976).

In this case, if the court were to grant Ms. Ravelo's motion to suppress evidence obtained from the Phone, Ms. Ravelo would likely file a subsequent motion under Fed. R. Crim. P. 41(g) for the return of the Phone. Were the Court to grant the defendant's Rule 41 motion, the government would likely retain copies of the contents of the Phone. These copies would be necessary so that the government would be able to: (1) impeach any false testimony of the defendant at trial; (2) use any evidence of relevant conduct for sentencing purposes; (3) use the evidence in opposition to a *habeas* petition; and(4) review the evidence so that the U.S. Attorney may certify that the suppressed evidence constitutes "substantial proof of a fact material in the proceeding" to warrant an appeal under 18 U.S.C. § 3731 of the court's grant of Ms. Ravelo's motion to suppress the Phone.

RETURN OF UNLAWFULLY SEIZED PROPERTY

A motion to return property seized by law enforcement is governed by Fed. R. Crim. P. 41(g). Specifically, the rule provides:

> A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

If a motion for return of property is made while a criminal prosecution is pending, the burden is on the movant to show that he or she is entitled to the property. *United States v. Chambers*, 192 F.3d 374, 377 (3d Cir. 1999). A Rule 41(g) motion is often properly denied "if the defendant is not entitled to lawful possession of the seized property, the property is contraband or subject to forfeiture, or the government's need for the property as evidence continues." *Id.* (quoting *United States v. Van Cauwenberghe,* 934 F.2d ,1048, 1061 (9th Cir.

1991).

For the same rationale stated in the above case law, Rule 41(g) contemplates that the return of illegally seized property to the defendant does not automatically prohibit the government from retaining copies or making use of the seized property in the future. In 1989, the current provision of Rule 41(g) (then Rule 41(e)) added the language: "If [the court] grants the motion, the court must return the property to the movant, but may impose *reasonable conditions to protect access to the property and its use in later proceedings*." (emphasis added).

The Advisory Committee Note to the 1989 amendment of Rule 41(g) further provides:

> As amended, Rule 41[(g)] avoids an all or nothing approach whereby the [G]overnment must either return records and make no copies or keep originals notwithstanding the hardship to their owner. The amended rule recognizes that reasonable accommodations might protect both the law enforcement interests of the United States and the property rights of property owners and holders. In many instances documents and records that are relevant to ongoing or contemplated investigations and prosecutions may be returned to their owner as long as the [G]overnment preserves a copy for future use.... The amended rule contemplates judicial action that will respect both possessory and law enforcement interests.

"Accordingly, Rule 41[(g)] provides a balance whereby the property interests of the aggrieved party are protected and the legitimate law enforcement interests are not impaired." *Johnson v. United States,* 971 F. Supp. 862, 869 (D.N.J. 1997) (collecting cases). Thus, even in cases where the Government improperly seizes evidence and where the aggrieved party's Rule 41(g) motion is granted, courts have allowed the Government to retain copies of the evidence. *Ramsden v. United States*, 2 F.3d 322 (9thCir. 1993) (allowing the Government to retain copies of the documents at issue in the case despite the Government's violation of the petitioners' constitutional rights). This is so because property that is inadmissible for one purpose may be admissible for another purpose under the Fourth Amendment.

Therefore, even if the Court were to grant Ms. Ravelo's motion to suppress evidence from the Phone and a subsequent Rule 41(g) motion for the return of the Phone, the government would still be permitted to retain a copy of the contents of the Phone "as a reasonable condition" for "its use in later proceedings" and to protect legitimate "law enforcement interests"

as detailed above.

CONCLUSION

In summary, if the Court granted Ms. Ravelo's motions to suppress and to return the Phone, the parties would still have to review the contents of the Phone because the government would still be able to use the Phone's contents for certain lawful purposes.

Respectfully submitted,

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