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VIA ECF

The 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 Your Honor will recall, this firm represents defendant Keila Ravelo in the above referenced matter. Please accept this letter brief in lieu of a more formal submission in support of defendant Ravelo's motion to suppress any and all evidence obtained as a result of the seizure of her cellular telephone on or about December 22, 2014. For the reasons set forth in more detail below, this evidence was obtained in violation of Ms. Ravelo's Fourth Amendment rights, as her cell phone was seized without a warrant and the seizure was not justified by any exception to the warrant requirement. Accordingly, all evidence obtained as a result of the seizure must be suppressed.

I. BACKGROUND

The following is a summary of the facts that the defense, in good faith, proffers in support of this motion; obviously, to the extent that they are disputed, an evidentiary hearing will be required. *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)).

During the early morning hours of December 22, 2014, Ms. Ravelo and her husband Melvin Feliz were arrested on a complaint charging them with conspiracy to commit wire fraud. Specifically, Ms. Ravelo, Mr. Feliz, and their two sons were awoken when more than twelve federal law enforcement officers stormed into the home. Upon entering, the officers immediately identified and handcuffed Feliz in the foyer of the home. At around the same time, Ms. Ravelo's sons were coming down the stairs and were instructed by an officer to stay seated in the living room. Although startled by the intrusion, Ms. Ravelo calmly met the officers in the hallway adjoining her bedroom, where she was immediately handcuffed and searched without

incident. She was then brought down a set of stairs to the home's living room, where she remained handcuffed and under the close supervision of at least two officers, who were at all relevant times standing directly by her side. Having arrested and fully restrained Ms. Ravelo and her husband, the remaining officers did a quick sweep of the home, which yielded no results.

Approximately fifteen minutes after she was arrested and brought into the living room, Ms. Ravelo, in the presence of the officers who were detaining her, asked her younger son to call her attorney, Steven Sadow, to inform him that she had been arrested. She told her son that Mr. Sadow was listed as a contact in her cell phone, which was sitting on the nightstand beside her bed. Ms. Ravelo's son retrieved the phone, returned downstairs and, while standing approximately fifty feet away from his handcuffed mother and the officers who were supervising her, began dialing Mr. Sadow's number. As he was dialing, another officer approached him and asked who he was calling. When Ms. Ravelo's son responded that he was calling his mother's attorney, the officer grabbed the phone out of his hands and took it, without explanation.

On February 19, 2016, during the course of discovery, the government produced a hard drive containing the content retrieved from Ms. Ravelo's cell phone seized on the day of the arrest, including emails, text messages, contact lists and photographs. In total, the hard drive contains approximately 90,000 separate items. The government has conceded that the cell phone was seized without a warrant, but has indicated that it was seized incident to Ms. Ravelo's arrest and was therefore lawful. The government has also stated that it obtained a warrant after the phone was seized in order to search the phone's contents, but has expressly refused to produce a copy of the warrant, despite requests from defense counsel.[1]

II. THE GOVERNMENT'S WARRANTLESS SEIZURE OF MS. RAVELO'S CELL PHONE WAS IN VIOLATION OF THE FOURTH AMENDMENT AND THE CELL PHONE'S CONTENTS MUST THEREFORE BE SUPPRESSED

The Fourth Amendment to the Constitution establishes the right of American citizens to be free from "unreasonable searches and seizures." *U.S. Const. Amend. 4*. It has long been established that a warrantless search or seizure is "per se unreasonable" under the Fourth Amendment unless it is justified by an exception to the general rule. *See Riley v. California*, 134 S. Ct. 2473, 2482 (2014); *Horton v. California*, 496 U.S. 128, 133 (1990); *United States v. Katzin*, 769 F.3d 163, 169 (3d Cir. 2014); *United States v. Harrison*, 689 F.3d 301, 306 (3d Cir. 2012). To deter Fourth Amendment violations, the exclusionary rule requires suppression of evidence obtained pursuant to an illegal search or seizure. *Katzin*, 769 F.3d at 169 (citing *Herring v. United States*, 555 U.S. 135, 139 (2009)). As a general rule, the burden of proving that a search or seizure was unreasonable is on the defendant seeking to suppress evidence. *See United States v. Acosta*, 965 F.2d 1248, 1256 n.9 (3d Cir. 1992) (citations omitted). However, once the defendant has established that the search or seizure was conducted without a warrant,

[1] Given the large amount of data contained on the hard drive, defense counsel does not intend to review the 90,000 items retrieved from Ms. Ravelo's cell phone pending the Court's determination regarding the admissibility of this evidence.

the burden shifts to the government to show that is nonetheless justified by one of the exceptions to the warrant requirement. *United States v. Johnson*, 63 F.3d 242, 245 (3d Cir. 1995).

One well-recognized exception to the warrant requirement is a search or seizure incident to a lawful arrest. *See Riley*, 134 S. Ct. at 2483; *United States v. Robinson*, 414 U.S. 218, 235 (1973); *Chimel v. California*, 395 U.S. 752, 763 (1969). The justification for this exception rests on the need both to protect law enforcement and to preserve evidence for later use at trial. *Robinson*, 414 U.S. 218, 234 (1973); *Riley*, 134 S. Ct. at 2484 (noting that "concerns for officer safety and evidence preservation underlie the search incident to arrest exception"). To avoid exceeding these two justifications, the Third Circuit has explained "that a search incident to arrest has both geographic and temporal limitations." *United States v. Myers*, 308 F.3d 251, 266-67 (3d Cir. 2002) (quoting *United States v. Hudson*, 100 F.3d 1409, 1419 (9th Cir. 1996); *see United States v. Nigro*, 218 Fed. App'x. 153, 156-57 (3d Cir. 2007) (same).

Specifically, it is well established that searches incident to arrest must be limited to "'the arrestee's person' and the area 'within his immediate control.'" *United States v. Shakir*, 616 F.3d 315, 317 (3d Cir. 2010), *cert. denied*, 562 U.S. 1116 (2013) (quoting *Chimel*, 395 U.S. at 763). Courts have defined the area within the arrestee's "immediate control" as "'the area from within which [the arrestee] might gain possession of a weapon or destructible evidence.'" *Id.* (quoting *Chimel*, 395 U.S. at 763); *Myers*, 308 F.3d at 267 ("A legitimate search incident to arrest is limited to the arrestee's person and to the area within his immediate control, meaning the area from which he might gain possession of a weapon or destructible evidence." (internal quotation marks omitted)). Thus, a search or seizure may be incident to arrest only when, "under all the circumstances, there remains a reasonable possibility that the arrestee could access a weapon or destructible evidence in the container or area being searched." *Shakir*, 616 F.3d at 320; *see United States v. Matthews*, 532 Fed. App'x. 211, 218 (3d Cir. 2013) (Once "'there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.'" (quoting *United States v. Chadwick*, 433 U.S. 1, 15, (1977)); *Arizona v. Gant*, 556 U.S. 332, 339 (2009) ("If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply."). This standard "requires something more than the mere theoretical possibility that a suspect might access a weapon or evidence." *Shakir*, 616 F.3d at 320. "In determining whether an object is conceivably accessible to the arrestee, we are to assume that he was neither an acrobat nor Houdini." *Myers*, 308 F.3d at 267.

Put another way, a search or seizure of this sort, in order to excuse the Constitutional requirement of a warrant, must also be spatially and temporally incident to the arrest, meaning that it 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 Nigro*, 218 Fed. App'x. at 156-57 (noting that searches incident to arrest must occur in "'the area where the arrest occurred'" (quoting *Myers*, 308 F.3d at 267)); *United States v. Vallejo*, 482 F.2d 616, 619 (3d Cir. 1973) (Aldisert, J., concurring) (noting that a "contemporaneous search incident to a lawful arrest must be limited to the situs of the arrest"); *United States v. Camou*, 773 F.3d 932, 937-38

(9th Cir. 2014) (same). As the Supreme Court has explained, the justifications for a search or seizure incident to arrest are absent when the search or seizure "is remote in time or place from the arrest." *Preston v. United States*, 376 U.S. 364, 367 (1964); *see Chadwick*, 433 U.S. at 15 (holding that warrantless searches "cannot be justified as incident to that arrest . . . if the search is remote in time or place from the arrest"). "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Preston*, 376 U.S. at 367.

Here, the government has conceded that the officers seized Ms. Ravelo's cell phone without a warrant, meaning that the seizure was "*per se* unreasonable" under the Fourth Amendment unless the government is able to establish that it was justified by an exception to the warrant requirement. *See Riley*, 134 S. Ct. at 2482 (2014); *Katzin*, 769 F.3d at 169. Although the government has indicated that the seizure occurred incident to Ms. Ravelo's arrest, the facts clearly demonstrate that it exceeded both the temporal and geographic limitations necessary for a valid seizure incident to arrest and it was therefore violative of the Fourth Amendment.

First, the phone was not seized from Ms. Ravelo's person or from an area within her immediate control. By the time the phone was seized, Ms. Ravelo had been handcuffed for more than fifteen minutes, and she was being restrained by at least two officers who were closely monitoring her. Moreover, her son, who maintained possession of the phone up until it was seized, never came within fifty feet of where she and the officers were standing. These facts amply demonstrate that the phone was not seized from "the area from within which [she] might [have] gain[ed] possession," meaning the phone was not within her "immediate control." *Shakir*, 616 F.3d at 317; *see, e.g.*, *Matthews*, 532 Fed. App'x. at 218 ("Here, there was no reasonable possibility that Matthews could have accessed the backpack at the time Officer Pomeroy executed the search, as he was handcuffed in the back of a locked police car."); *Myers*, 308 F.3d at 273 (finding that a search was not incident to arrest where the arrestee was handcuffed and restrained by two policemen at the time his bag was searched); *see also United States v. Livingston*, 445 Fed. App'x. 550, 555 (3d Cir. 2011) (finding that a "gun was discovered and seized during a legitimate search incident to arrest because it was found in an area close to [the arrestee] before he was handcuffed"); *Shakir*, 616 F.3d at 315 (affirming warrantless search of defendant's gym bag for weapons because although defendant was handcuffed, he was not fully restrained and still could have accessed bag). Because Ms. Ravelo was completely restrained at the time the phone was seized, and because the phone was not seized in an area from within which Ms. Ravelo might have gained possession, the seizure cannot be justified as being incident to arrest.

Nor was the seizure temporally incident to Ms. Ravelo's arrest. Ms. Ravelo was handcuffed, searched and placed under arrest in the hallway adjoining her bedroom. She was then brought downstairs to the living room where she was restrained by at least two officers for approximately fifteen minutes. Thus, the seizure of Ms. Ravelo's phone was not "contemporaneous with [her] arrest," and did not occur in "the immediate vicinity of the arrest." *Stoner*, 376 U.S. at 486; *Myers*, 308 F.3d at 267; *Nigro*, 218 Fed. App'x. at 156-57. For this reason too, the seizure was "simply not incident to the arrest." *Preston*, 376 U.S. at 367.

Importantly, even if the Court finds that Ms. Ravelo's cell phone was lawfully seized incident to her arrest, which, for reasons set forth above, was not the case, a warrantless search of the cell phone's contents would have been strictly prohibited by the Fourth Amendment. *See Riley*, 134 S. Ct. at 999 (holding that a warrant is a precondition for law enforcement to perform a search of cell phone data even when the phone was lawfully seized incident to arrest). In this regard, the government claims to have secured a warrant prior to searching the contents of Ms. Ravelo's cell phone, but it has expressly refused to provide defense counsel with a copy of that warrant or of the affidavit which supported it, thus raising serious doubts as to the constitutionality of the ensuing search as well. *See* Fed. R. Crim. P. 41(f)(1)(C) (mandating that the government "give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property"); *United States v. Williamson*, 439 F.3d 1125, 1133 (9th Cir. 2006) (holding that failure to comply with the requirements of Rule 41(f)(1)(C) may result in suppression of evidence if defendant suffered prejudice or the violation was deliberate); *Baranski v. Fifteen Unknown Agents of the BATF*, 452 F.3d 433, 443 (6th Cir. 2006) (noting that the decision "not to present an incorporated affidavit to the [person whose property was searched] upon request may be a relevant factor in determining the reasonableness of a search"); *United States v. Freitas*, 800 F.2d 1451, 1456 (9th Cir. 1986) (finding that failure to provide notice of a search "casts strong doubt on [a warrant's] constitutional adequacy" (citing *Berger v. New York*, 388 U.S. 41, 60 (1967))); *see also Groh v. Ramirez*, 540 U.S. 551, 560 (2004) ("But unless the particular items described in the affidavit are also set forth in the warrant itself (or at least incorporated by reference, and the affidavit present at the search), there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit."). At the very least, that warrant, and the affidavit upon which it was based, should be provided to the defense so that it may fully explore the facts regarding this troubling search and seizure.

III. CONCLUSION

For the reasons set forth above, Ms. Ravelo's motion to suppress the contents of her cellular telephone should be granted; her phone was seized without an authorizing warrant and was not seized incident to arrest, or pursuant to any other exception to the warrant requirement.

In the alternative, the Court should Order a hearing to fully explore the facts surrounding this application.

Respectfully submitted,

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