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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:

Please accept this letter in brief reply to the government's letter brief, dated October 17, 2016, and in further support of defendant Keila Ravelo's motion to suppress the evidence derived from her cellular telephone, and for the return of that phone.

At this point, the government has all but conceded that the seizure of Ms. Ravelo's cell phone was not justified by the plain view exception to the warrant requirement. According to the government's brief, SA Matejicka seized Ms. Ravelo's phone – the initial infringement on her Fourth Amendment rights – while Ms. Ravelo was changing her clothing in the walk-in closet. *See* Govt. Br. at 2-3. SA Matejicka then entered the security code, allowing her to unlock and access the phone – the second such violation – at which point she claims to have observed the email either to or from Gary Friedman, that, according to the government, established probable cause to seize the phone. *Id.* at 3; 4-5. Leaving aside the fact that her observation of an email to or from Friedman was, for reasons argued in Ms. Ravelo's prior submission, insufficient to establish probable cause to seize the phone, the inapplicability of the plain view doctrine is demonstrated by the government's own version of events,[1] in which the government concedes that SA Matejicka (1) seized the phone and (2) accessed its contents, all before probable cause was established.

The law regarding these facts is clear: in *Arizona* v. *Hicks*, 480 U.S. 321 (1987), the United States Supreme Court held that the seizure of stolen stereo equipment found by police while executing a valid search for other evidence was invalid under the Fourth Amendment.

[1] The government's argument that the Court should completely disregard the testimony of Michael Feliz, Govt. Br. at 7, is unpersuasive, but it is also completely irrelevant. As explained in Ms. Ravelo's prior submission, although she maintains that her son's version of events is more credible than that offered by SA Matejicka, even under SA Matejicka's version of events, the warrantless seizure of the cell phone cannot be justified by the plain view exception.

Although the police were lawfully inside the defendant's apartment, they obtained probable cause to believe that the stereo equipment was contraband only after moving the equipment to permit officers to read its serial numbers, which, the Court held, constituted an independent search because it constituted an "additional invasion of respondent's privacy interest." *Id.* at 325-26. The Court held that the subsequent seizure of the equipment could not be justified by the plain view doctrine because the incriminating character of the stereo equipment was not immediately apparent; probable cause to believe that the equipment was stolen arose only as a result of a further warrantless search – the moving of the equipment. *Id.* at 327. Likewise, in *Minnesota v. Dickerson*, 508 U.S. 366, 378-79 (1993), the Court held that although an officer "was lawfully in a position to feel the lump in respondent's pocket, because *Terry* entitled him to place his hands upon respondent's jacket, . . . the incriminating character of the object was not immediately apparent to him" because "the officer determined that the item was contraband only after conducting a further search, one not authorized by *Terry* or by any other exception to the warrant requirement."

In this case, just as, in *Hicks*, the officer's "moving of the equipment . . . constitute[d] a 'search' separate and apart from . . . the lawful objective of his entry into the apartment," so, too, did SA Matejicka's seizure of Ms. Ravelo's phone, and then entry of the security code in the phone. *Hicks*, 480 U.S. at 324-35. Indeed, SA Matejicka's actions certainly produced an "additional invasion of [Ms. Ravelo's] privacy interest[s]," *id.*, an invasion that was particularly intrusive when viewed in light of the Supreme Court's more recent recognition of the immense privacy interests that are at stake when a cell phone is searched. *Riley v. California*, 134 S. Ct. 2473, 2491 (2014) ("[A] cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is." (emphasis in original)). Accordingly, the government's argument that "the incriminating nature of the evidence on the Phone was immediately apparent" fails because its assertion of probable cause is based entirely on an email that SA Matejicka observed during a warrantless search of the phone, which was not only itself unconstitutional but which followed after the initial unconstitutional seizure of the phone. *Dickerson*, 508 U.S. at 375 (holding that "the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object – *i.e.*, if 'its incriminating character [is not] immediately apparent,' – the plain-view doctrine cannot justify its seizure." (quoting *Horton* v. *California*, 496 U.S. 128, 136 (1990))).

For the same reasons – and again based upon its own version of events – the government is unable to satisfy the plain view doctrine's requirement that officers have "'a lawful right of access'" to the evidence seized, at least with respect to the opening and viewing of the phone. *United States v. Stabile*, 633 F.3d 219, 241 (3d Cir. 2011) (quoting *United States v. Menon*, 24 F.3d 550, 559 (3d Cir. 1994)). The plain view doctrine "provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment," meaning it is "an extension of whatever the prior justification for an officer's access to an object may be," rather than an independent exception to the warrant requirement. *Texas v. Brown*, 460 U.S. 730, 738 (1983). In other words, under the plain view doctrine, police must be "lawfully

engaged in an activity in a particular place" in order to seize an item they perceive to be suspicious. *Id.* at 739. "Thus, under the 'plain-view' doctrine, the fact that a person displays incriminating evidence in his living room window (or allows it to pass through customs inspection) is *not* enough by itself to authorize a search and seizure of that evidence." *Illinois v. Andreas*, 463 U.S. 765, 779 (1983) (emphasis in original). "More is necessary, and that 'more' must be some *independent* reason for breaching the individual's right to repose and to security in his possessions." *Id.* (emphasis in original). Here, the government argues that SA Matejicka's observation of the Friedman email established probable cause to seize Ms. Ravelo's cell phone under the plain view doctrine, but it is unable to offer any "prior justification under the Fourth Amendment" for SA Matejicka's initial warrantless *seizure* of the phone, after which she conducted the second warrantless *search* of the phone – which search, according to the government's own version of events, led to her observation that established probable cause. *Stabile*, 633 F.3d at 241 (quoting *Menon*, 24 F.3d 559). But probable cause found subsequent to the search cannot establish the plain view that justifies it. *See Whiteley v. Ward*, 401 U.S. 560, 567 n.11 (1971) ("Of course, the discoveries of an illegal search cannot be used to validate the probable cause judgment upon which the legality of the search depends."); *United States v. Martinez-Pena*, 2009 U.S. Dist. LEXIS 87578, at *12 (N.D. Iowa Sep. 23, 2009) (holding that the observation of drugs during a warrantless search could not be used satisfy the probable cause requirement under the plain view doctrine); *United States v. Johnson*, 2008 U.S. Dist. LEXIS 71494, at *24-25 n.9 (M.D. Pa. Sep. 17, 2008) (stating that a warrantless search or seizure "cannot be used to *create* probable cause" (emphasis in original)); *United States v. Burton*, 193 F.R.D. 232, 242 (E.D. Pa. 2000) (holding that evidence discovered during a warrantless search "cannot serve as the basis for probable cause"). Indeed, under these circumstances, the plain view exception simply cannot justify the warrantless seizure of Ms. Ravelo's cell phone.

Nor has the government offered any *evidence* to support its seizure of Ms. Ravelo's phone under the inevitable discovery doctrine, Govt. Br. at 7, despite its clear burden in that regard. It states in its brief that had it not seized the phone at the time, it "would have either stationed law enforcement personal [sic] inside the defendant's home to guard the Phone or requested that defense counsel maintain the Phone while the United States obtained the appropriate search and seizure warrant." Govt. Br. at 7. But this recitation of potential actions that the government might have taken cannot establish that "the officers here had appropriate procedures that would have been followed absent the unconstitutional search," let alone set forth facts that "it was the Government's burden to establish that *during the hearing*." *United States v. Carrion-Soto*, 493 Fed. App'x. 340, 343 (3d Cir. 2012) (emphasis added). The government has not, then, met its burden of offering evidence that "focuses on historical facts capable of ready verification, not speculation." *United States v. Vasquez De Reyes*, 149 F.3d 192, 195 (3d Cir. 1998). Indeed, admitting the evidence from Ms. Ravelo's cell phone in this case ignores the Third Circuit's clear warning that "[i]nevitable discovery is not an exception to be invoked casually, and if it is to be prevented from swallowing the Fourth Amendment and the exclusionary rule, courts must take care to hold the government to its burden of proof." *Id.* at 196 (internal quotation marks omitted).

But beyond these generalities, the law is clear: "to hold that simply because the police could have obtained a warrant, it was therefore inevitable that they would have done so would mean that there is inevitable discovery and no warrant requirement whenever there is probable cause." *United States v. Johnson*, 22 F.3d 674, 683 (6th Cir. 1994). As one court has put it, in words that are equally applicable here, "the government's approach – that the inevitable discovery doctrine can validate the use of evidence seized whenever officers could have secured a warrant, but failed to do so – would eviscerate the warrant requirement, which lies at the heart of the Fourth Amendment." *United States v. Mallory*, 2013 U.S. Dist. LEXIS 33532, at *42-43 (E.D. Pa. Mar. 11, 2013); *see also United States v. Echegoyen*, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986) ("To excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the fourth amendment."). The inevitable discovery exception to the warrant requirement does not apply.[2]

For these reasons, as well as those set forth in Ms. Ravelo's prior submissions, and to be presented at oral argument, the Court should grant Ms. Ravelo's motion to suppress, as well as her motion for the return of her cell phone and its contents, and all copies thereof.

Respectfully submitted,

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[2] The government asserts that the fact that it did obtain a warrant to search the phone later "showed its intent," Govt. Br. at 7, and therefore somehow proves that it would have done so earlier. However, it is equally the case, based upon SA Matejicka's testimony, that the government could have sought a warrant in the first place based upon the facts that Ms. Ravelo was likely to have a phone and that, given her relationship with Mr. Friedman, about which SA Matejicka testified the government knew prior to the search, there would be communications between the two. That it did not reveals its real "intent," though perhaps this was because the government was concerned that probable cause would be lacking, as indeed it was, since, as Ms. Ravelo has argued, the fact of an email from Mr. Friedman – with whom she had a social relationship – did not establish probable cause. *See* Defendant's Br. at 7-8.