

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES DEVAN FULTON, Sr.,
also known as Black, also known as Blacc,
Petitioner,

V.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITIONER'S APPENDIX

FEDERICO REYNAL
Texas Bar No. 24060482
Fertitta Reynal, LLP
815 Walker Street, St. 1553
Houston, Texas. 77002
Telephone: (713) 228-5900
Fax: (713) 820-6981
areynal@frlaw.us

Attorney for Petitioner

TABLE OF CONTENTS

Fifth Circuit Opinion on Petition for Rehearing.....	1
District Court Memorandum Opinion Denying Motion to Suppress.....	14

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-41251

United States Court of Appeals
Fifth Circuit

FILED

June 27, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

CHARLES DEVAN FULTON, SR., also known as Black, also known as Blacc,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

Before WIENER, SOUTHWICK, and COSTA, Circuit Judges.

LESLIE H. SOUTHWICK, Circuit Judge:

The petition for rehearing is DENIED. The court's prior opinion is withdrawn, and this opinion is substituted.

A jury convicted Charles Fulton, Sr. on four counts of sex trafficking and one count of conspiracy. The most significant issue concerns a long-delayed search of his cellphone. Fulton also makes arguments drawn from the Confrontation and Grand Jury clauses of the Constitution, and he challenges the sufficiency of the evidence. We AFFIRM.

No. 17-41251

FACTUAL AND PROCEDURAL BACKGROUND

In October 2014, a Galveston juvenile probation officer learned from the father of a juvenile she supervised that the girl was pictured in an online advertisement offering her services as an “escort” – in effect, a prostitute. The probation officer began to investigate and saw that the house where the girl had been arrested was a location where other young girls consistently were arrested. She began monitoring incoming police reports, spoke with some of the girls, compiled a list of names and ages, and gathered information from other probation officers. Her investigation revealed common links among the girls: Charles Fulton, Sr. and a residence on Avenue L. In February and early March 2015, the Galveston Police Department, in tandem with the FBI, began an investigation. Police discovered that Fulton acted as the girls’ pimp, directing them to prostitution dates; providing them with food, condoms, housing, and drugs; and having sex with some of them as young as 15.

In May 2016, Fulton was indicted in the United States District Court for the Southern District of Texas on six counts of sex trafficking in violation of 18 U.S.C. § 1591(a)–(b) (2015), with a different minor victim identified in each count. Fulton was also charged with a seventh count for conspiracy to commit sex trafficking under 18 U.S.C. § 1594(c). He was found guilty after a jury trial on four of the substantive counts and on the conspiracy count. The district court sentenced him to prison for concurrent life terms.

DISCUSSION

We will analyze four issues. First, Fulton asserts the district court admitted evidence obtained from his cellphone in violation of the Fourth Amendment. Second, he argues the district court violated the Confrontation Clause by prohibiting him from questioning one of the minor victims about a purported aggravated assault charge. Third, he argues that special findings

No. 17-41251

made by the jury in two of his counts of conviction were not supported by sufficient evidence. Finally, Fulton contends the district court violated the Grand Jury Clause by constructively amending the indictment.¹

I. Search of Fulton's phone

In February 2015, Galveston police obtained a search warrant on the Avenue L house where the prostitution was based. The warrant, though, was due to a separate investigation into Fulton's narcotics activities. Fulton's cellphone was seized. Nine days later, police obtained a second warrant to examine its contents but were unable to bypass the phone's security features. Around this same time, the FBI agent assisting with the Fulton sex-trafficking investigation learned that the Galveston police had the phone. The agent acquired it to determine if the FBI could access the phone's data. Three weeks later, that agent obtained a federal warrant to search the phone. Still, it took a year before the data on the phone was accessed. The FBI discovered evidence that helped piece together Fulton's involvement with the minor victims. Fulton moved to suppress the evidence, but the district court denied the motion. At trial, the Government introduced evidence of the phone's contents through the testimony of the FBI agent and of minor victims. The district court also admitted evidence such as text messages, a photograph, and the results of searches of the phone's files, linking Fulton to five minor victims and revealing behaviors consistent with sex trafficking.

¹ At trial, Fulton also raised issues bearing on Jencks Act, *Brady*, and *Giglio* material. See 18 U.S.C. § 3500; *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972). At oral argument in this court he requested that we review the district court's determinations on these issues. In his brief he mentioned his request for *Brady* material and suggested we "review the propriety of the district court's determinations." We will not consider such "passing reference[s]" that are devoid of legal analysis. *Hollis v. Lynch*, 827 F.3d 436, 451 (5th Cir. 2016) (citation omitted).

No. 17-41251

On appeal, Fulton argues that the phone's seizure in the February 2015 raid violated the Fourth Amendment. He alternatively argues that even if the initial seizure had been lawful, the nine-day delay in obtaining a warrant to search it was unconstitutional. At oral argument, Fulton's counsel stated that those two arguments are the limit of the objections to the search and seizure. Thus, no issue is made about the FBI's obtaining the phone, procuring its own search warrant, and finally accessing the data on the phone a year later.

We review a ruling on a motion to suppress "in the light most favorable to the verdict," accepting "the district court's factual findings unless clearly erroneous or influenced by an incorrect view of the law" and reviewing "questions of law *de novo*." *United States v. Carrillo-Morales*, 27 F.3d 1054, 1060–61 (5th Cir. 1994). The disagreements here are ones of law. We review the sufficiency of the warrant authorizing the seizure of Fulton's phone *de novo*. *United States v. Cavazos*, 288 F.3d 706, 709 (5th Cir. 2002). We also review the district court's determination of the reasonableness of a search or seizure *de novo*. *United States v. Jones*, 133 F.3d 358, 360 (5th Cir. 1998).

A. Whether the narcotics warrant authorized the phone's seizure

We start with whether the initial seizure of the phone was proper. Fulton contends "the warrant did not particularly describe the phone as one of the items to be seized." The Constitution states that a warrant should not issue without "particularly describing" what is to be seized. U.S. CONST. amend. IV. A warrant's particularity is sufficient if "a reasonable officer would know what items he is permitted to seize," which does not mean all items authorized to be taken must be specifically identified. *United States v. Aguirre*, 664 F.3d 606, 614 (5th Cir. 2011). "We have upheld searches as valid under the particularity requirement where a searched or seized item was not named

No. 17-41251

in the warrant, either specifically or by type, but was the functional equivalent of other items that were adequately described.” *Id.*

This narcotics warrant did not mention cellphones. The alleged equivalent was a reference to “ledgers,” which is a “book . . . ordinarily employed for recording . . . transactions.” *Ledger*, OXFORD ENGLISH DICTIONARY (2d ed. 1989). The government argues that is enough, because this court has held that a cellphone that is “used as a mode of both spoken and written communication and containing text messages and call logs, served as the equivalent of records and documentation of sales or other drug activity.” *Aguirre*, 664 F.3d at 615. In that precedent, a warrant permitted seizure of a cellphone when it referred to “personal assets including computers, disks, printers and monitors utilized in the drug trafficking organization.” *Id.* at 614–15. That is because what was seized were “the functional equivalents of several items listed” on the warrant. *Id.* at 615. We also held that if meaningful particularity is not possible, “generic language suffices if it particularizes the types of items to be seized.” *Id.* at 614 (quoting *Williams v. Kunze*, 806 F.2d 594, 598 (5th Cir. 1986)).

We do not see the same factors involved in the present case. There was nothing in the Galveston warrant suggesting that anything similar to computers or even electronics was to be seized. Moreover, the officer in this case was a veteran of the Galveston Police Department’s narcotics unit, and he indicated at the suppression hearing that he knew cellphones are used in the drug trade. Though a ledger can serve one of the myriad purposes of a cellphone, we do not extend the concept of “functional equivalency” to items so different, particularly one as specific, distinguishable, and anticipatable as a cellphone.

We now examine an exception to the exclusionary rule that nonetheless allows the introduction of the evidence from the phone.

No. 17-41251

B. Good faith

An exception for good faith may allow the introduction of evidence unlawfully obtained “[w]hen police act under a warrant that is invalid for lack of probable cause.” *Herring v. United States*, 555 U.S. 135, 142 (2009). Here, of course, we have held the initial seizure of the phone to be invalid because, regardless of probable cause, the phone was not covered by the warrant.

To constitute good faith, the “executing officer’s reliance on the [deficient] warrant [must be] objectively reasonable and made in good faith.” *United States v. Massi*, 761 F.3d 512, 525 (5th Cir. 2014) (citation omitted). The Government argues the FBI agent’s reliance on the federal search warrant meets these requirements. Fulton argues we should the good faith exception should not apply “to situations where law enforcement unreasonably delays in obtaining a search warrant.” The district court refused to consider this exception because it held the phone and its contents to be admissible on other grounds.

In *Massi*, law enforcement officers prolonged a proper investigatory stop based on reasonable suspicion well beyond the time permitted. *Id.* at 522–23. The officers detained the suspects for several hours “until evidence could be corroborated, an affidavit prepared, and the search warrant obtained.” *Id.* at 523. We applied the following test to determine whether the invalid seizure of the suspects while evidentiary justification for a warrant was developed would nonetheless allow the introduction of evidence that was later obtained:

(1) the prior law enforcement conduct that uncovered evidence used in the affidavit for the warrant must be “close enough to the line of validity” that an objectively reasonable officer preparing the affidavit or executing the warrant would believe that the information supporting the warrant was not tainted by unconstitutional conduct, and (2) the resulting search warrant must have been sought and executed by a law enforcement officer in good faith.

No. 17-41251

Id. at 528.

This same approach can be applied when, as here, the initial seizure of an object was without justification, but a later-obtained warrant led to the discovery of incriminating evidence.

We have already discussed the events that followed the seizure of the cellphone. We conclude that viewed objectively, an FBI agent who obtained a search warrant in these circumstances would not have had reason to believe the seizure and continued possession of the cellphone by the Galveston police were unlawful. We so conclude because the question of whether the warrant applied to the cellphone does not lead to an easy negative answer, though that is the one we have given. Consequently, the seizure of the cellphone was “close enough to the line of validity” to permit the officer to prepare the second warrant that led to the search of the cellphone. The federal search warrant was “sought and executed by a law enforcement officer in good faith.” *Id.*

The cellphone evidence obtained was properly admitted.

II. Confrontation Clause violation regarding a witness

Fulton argues he was improperly limited on the range of cross-examination of a witness. The Government called Minor Victim 3 to testify. She admitted that the FBI agent investigating the sex trafficking case sought her assistance and that she initially refused to help. She also admitted that she later contacted the FBI agent after she was jailed apparently on state charges. She changed her mind again later, resisted testifying, and appeared at trial only after being brought to court under a material-witness warrant.

Fulton wanted to cross-examine her on what he understood to be an aggravated assault arrest in her “juvenile history” to probe her motives for contacting the FBI agent. Fulton sought to impeach her on the theory that she contacted the FBI agent thinking he could help her “get off that aggravated

No. 17-41251

assault charge.” There is no indication that any assault charge was related to Fulton’s offense. The district court refused to let Fulton pursue this line of questioning. Counsel was permitted to ask if “any member of law enforcement offered [her] any kind of . . . benefit in exchange for testifying.” Fulton argues this restriction violated his Sixth Amendment right to confrontation.

We review alleged Confrontation Clause violations *de novo*. *United States v. Jimenez*, 464 F.3d 555, 558 (5th Cir. 2006). We analyze “whether the jury had sufficient information to appraise the bias and motives of the witness.” *United States v. Templeton*, 624 F.3d 215, 223 (5th Cir. 2010) (citation omitted). Fulton “need only show that ‘a reasonable jury might have received a significantly different impression of the witness’s credibility had defense counsel been permitted to pursue his proposed line of cross-examination.’” *Id.* (citation omitted). In the context of purported deals with the Government, it does not matter whether an agreement was reached: “What counts is whether the witness may be shading his testimony in an effort to please the prosecution.” *Greene v. Wainwright*, 634 F.2d 272, 276 (5th Cir. 1981). At the same time, the Confrontation Clause does not permit a defendant to cross-examine a witness if there are sufficient concerns of “harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

Fulton relies primarily on *Davis v. Alaska*, 415 U.S. 308 (1974). The defendant there was convicted in state court based on “crucial” testimony from a juvenile who was on probation after having previously been adjudicated delinquent in state court for two burglaries. *Id.* at 310–11. The defendant wanted to introduce the witness’s juvenile record for these reasons: the witness may “have made a hasty and faulty identification of petitioner to shift suspicion away from himself as one who [actually committed the crime, and

No. 17-41251

the witness] might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation.” *Id.* at 311. Instead of the juvenile record’s being admitted, the defendant was allowed to ask questions about the witness’s state of mind in cooperating with the police. *Id.* at 311–13. This limitation violated the Confrontation Clause. *Id.* at 318. Without the specificity of the juvenile record, jurors “might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness.” *Id.*

Fulton argues that Minor Victim 3 had reason to alter her testimony in a federal prosecution in order to receive assistance in a state juvenile proceeding. We consider the fact that this witness’s prosecutions were by two different sovereigns on two unrelated crimes to be critical. *Davis* is based on the fact that state prosecutors had the ability and perhaps some reason to charge that witness with the same offense and perhaps also could have affected his state probation on two other burglary offenses; the witness had ample motivation for identifying a different culprit. *Id.* at 317–18. We see no reason to make such assumptions when the witness appeared in a federal court trial and the separate matter was in state court. “[N]othing in the record or pleadings suggest[ed] that the federal prosecutor could have influenced any state juvenile-court proceedings and thereby provided an inducement for the victims to testify in the federal trial.” *United States v. Miller*, 538 F. App’x 501, 501 (5th Cir. 2013) (citing *United States v. Thorn*, 917 F.2d 170, 176 (5th Cir. 1990) (proper to limit cross-examination when there was no showing federal prosecutors could influence an unrelated state prosecution of a witness)).

We conclude that Fulton has not shown that the witness had a reason to be biased based on the unrelated offense. We also conclude that the effect of limiting cross-examination of this witness was minimal, as ample other

No. 17-41251

evidence existed of Fulton's guilt of this offense. The district court did not err in not allowing Fulton to probe this witness about any state charge.

III. Sufficiency of evidence on special findings

The statute of Fulton's convictions on the substantive counts required that he either knew or recklessly disregarded (1) "that means of force, threats of force, fraud, coercion . . . or any combination of such means will be used to cause the [victim] to engage in a commercial sex act" or (2) "that the [victim] has not attained the age of 18 years and will be caused to engage in a commercial sex act." 18 U.S.C. § 1591(a) (2015). Fulton was convicted on four of these substantive counts. For two of them, Counts 2 and 7, the district court instructed the jury to look only for the second of the two possible findings. Conviction on those counts is not contested.

On Counts 4 and 6, the district court instructed the jury that it could make either finding. Accordingly, the jury entered special findings on Counts 4 and 6 that Fulton "used force, threats of force, fraud or coercion" and "at the time of the offense, the victim had attained the age of 14 years but had not attained the age of 18 years." Fulton argues there was insufficient evidence for the jury to find he "used force, threats of force, fraud or coercion" on these two counts.

Fulton moved in the district court for a judgment of acquittal after the Government's case-in-chief. He renewed the motion after his own case-in-chief. Consequently, we review his evidentiary sufficiency contentions *de novo*; the analysis considers "all evidence in the light most favorable to the verdict" and asks "only whether the jury's decision was rational, not whether it was correct." *United States v. Lewis*, 774 F.3d 837, 841 (5th Cir. 2014) (citations omitted).

No. 17-41251

There is evidence Fulton used force and threats with the minor victims associated with Counts 4 and 6. There was testimony he threatened to “beat . . . up” one victim. He also hit the other victim because she was leaving him, making “a big handprint on [her] face.” That victim further testified Fulton choked her for “talking to other guys.” There was also testimony that Fulton emotionally and financially manipulated the victims so as to support a finding of coercion. *See* § 1591(e)(2), (e)(4) (2015).

Even if this evidence were not sufficient, Fulton’s convictions would be unaffected. Either one of the special findings in Counts 4 and 6 supported a conviction under Section 1591(a). A finding of force, threats, fraud, or coercion carried a minimum sentence of 15 years; a finding that the victim “had attained the age of 14 years but had not attained the age of 18 years” carried a minimum sentence of 10 years. § 1591(b). Either finding carried a maximum sentence of life. *Id.* Even if we hold the findings of force, threats, fraud, or coercion were not supported by sufficient evidence, it remains true the jury found the victims to be younger than 18. That leaves Fulton guilty under Counts 4 and 6 with a maximum sentence of life, which he received for both. We leave his convictions on Counts 4 and 6 undisturbed.

IV. Grand Jury Clause violation

The final issue concerns what is argued to be effectively an improper amendment of the indictment concerning Fulton’s knowledge of the age of his victims. Section 1591(a) permits the Government to convict a defendant on alternative theories. For one of the theories, the Government is not required to prove that the defendant “knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.” § 1591(c). Instead, the evidence only has to prove that “the defendant had a reasonable opportunity to observe

No. 17-41251

the” victim. *Id.* Fulton’s indictment does not mention this “reasonable opportunity to observe” concept.

Fulton argues on appeal that the district court imported this concept into the case by giving this jury instruction: “If the Government proves beyond a reasonable doubt that the defendant had a reasonable opportunity to observe the [alleged victims] . . . then the government does not have to prove that the defendant knew that the person had not attained the age of 18 years.” Fulton argues this instruction allowed the jury to convict on a basis broader than that stated by the indictment. He did not make this argument in district court.

Our analysis starts with the special role of indictments under our Constitution: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” U.S. CONST. amend V. A district court errs by “permit[ting] the defendant to be convicted upon a factual basis that effectively modifies an essential element of the offense charged or permits the government to convict [a] defendant on a materially different theory or set of facts than that with which she was charged.” *United States v. Thompson*, 647 F.3d 180, 184 (5th Cir. 2011) (citation omitted).

In one precedent we discussed the exact issue presented by Fulton. There, an indictment charged two defendants under Subsections 1591(a) and (b)(2) “but did not include the ‘reasonable opportunity’ language found in [S]ubsection (c).” *United States v. Lockhart*, 844 F.3d 501, 515 (5th Cir. 2016). As here, the district court instructed the jury using Subsection (c) language. *Id.* We held “the district court materially modified an essential element of the indictment by transforming the offense . . . the indictment charged . . . from one requiring a specific *mens rea* into a strict liability offense.” *Id.* at 515–16 (emphasis added).

No. 17-41251

That error caused us to reverse the judgment of conviction of one defendant but not of the other. *Id.* at 516. Prejudice need not be shown *if a timely objection* is made in the district court to the violation of the right to be tried only by a properly issued indictment; only one of the two *Lockhart* defendants objected. *Id.* at 515–16, 515 n.3. His was the judgment of conviction we vacated. *Id.*

His codefendant did not object to the broadening of the indictment, and we reviewed his conviction for plain error. *Id.* at 515 n.3. We will reverse a conviction for plain error only when: “(1) [the instruction] was erroneous; (2) the error was plain; and (3) the plain error affected the substantial rights of the defendant.” *United States v. Daniels*, 252 F.3d 411, 414 (5th Cir. 2001). Even if those requirements are met, we will exercise discretion to reverse the district court only if “the error ‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *Id.* (citation omitted). We held in *Lockhart* that regardless of the first three factors of plain error review, we would decline to exercise our discretion to reverse because of the “substantial evidence against” the defendant. *Lockhart*, 844 F. 3d at 515 n.3.

The evidence against Fulton was also “substantial,” and we refuse to vacate his convictions based on the jury instruction.

AFFIRMED.

ENTERED

June 24, 2016

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

UNITED STATES OF AMERICA,	§	
	§	
VS.	§	CRIMINAL ACTION NO. 3:15-CR-7
	§	
CHARLES DEVAN FULTON SR; aka	§	
BLACK; aka BLACC, <i>et al</i> ,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND
ORDER DENYING DEFENDANTS' MOTIONS TO SUPPRESS

Pending before the Court is Defendant Charles Devon Fulton, Sr. ("Fulton") Motion To Suppress The Fruits of the Warrantless Seizure of his Cellphone ("Motion")(Dkt. 104). The Motion has been fully briefed.¹ On June 7, 2016, the Court held a suppression hearing. The Court has carefully considered the evidence, Fulton's Motion, and briefing. Based on the record, review of the testimony, the evidence, and oral argument presented by counsel, the Court **DENIES** the Motion (Dkt. 104).

BACKGROUND

Fulton was indicted for violating 18 U.S.C. § 1591 and 1594(c), sex trafficking of children by force, fraud, or coercion and the conspiracy to commit sex trafficking. *See* Dkt. 1, Criminal Complaint. An evidentiary hearing on Fulton's motion was held on June 7, 2016, during which the Government's witness Officer David Roark ("Officer Roark")

¹ The Government filed a Response (Dkt. 118), Fulton filed a Reply (Dkt. 124), and the Government filed a SurReply (Dkt. 131).

testified. The following facts are taken from his testimony, the exhibits entered into evidence, and the Parties' briefing.

Fulton, a resident of Galveston, was the subject of many investigations involving the illegal distribution of narcotics in late 2014 and early 2015, prior to law enforcements' formal investigation into sex trafficking. On February 6, 2015, Judge Kerry Neves of the 10th District Court, Galveston County, signed a search and arrest warrant for Fulton and his residence, which was presented by Officer Roark of the City of Galveston Police Department ("GPD"). The warrant sought evidence of illegal narcotics activity and Fulton's arrest. *See* Dkt. 118, Government's Exhibit 1. The warrant, authorized by a Texas State judge, was specifically for the search of the residence and for the arrest of Fulton and any other person found there in possession of illegal narcotics. *See id.* Two state search warrants were executed at Fulton's residence. One state search warrant was executed on September 12, 2014, and the other was executed on February 9, 2015. Cellular phones were seized during the execution of both warrants.

After Fulton was arrested, and his cell phone seized incident to that arrest, Officer Roark sought a state search warrant specifically for the contents of the cell phone itself. *See* Dkt. 118, Government's Exhibit 2. That warrant was presented to District Court Judge Ellisor of the 122nd District Court, Galveston County, on February 18, 2015. *See id.* When GPD personnel attempted to search the phone pursuant to that warrant, they were unsuccessful because it was password protected. Next, the GPD sought the assistance of FBI agents assigned to Texas City.

The investigation into Fulton's participation in the sex trafficking of minors began on February 25, 2015. Suspicious that the phone contained evidence of sex trafficking of minors, FBI Special Agent Rennison ("SA Rennison") sought a federal search warrant instead of searching the device pursuant to the prior state warrant. *See* Dkt. 118, Government's Exhibit 3. In the course of his investigation into the sex trafficking of minors, SA Richard Rennison learned that Fulton used his phone to communicate with his co-conspirators, the victims, and possibly individuals seeking to engage in commercial sex. Prior to seeking the federal search warrant authorizing the search of Fulton's phone, SA Rennison reviewed the police report wherein co-defendant Potts told law enforcement that Fulton was prostituting minor females. On March 25, 2015, SA Rennison applied for a federal search warrant for Fulton's phone. That search warrant was granted by U.S. Magistrate Judge Mary Milloy. *See* Dkt. 118, Government's Exhibit 3. The FBI obtained the warrant to search the contents of Fulton's cell phone for evidence of sex trafficking. The cell phone at issue here was seized incident to Fulton's arrest during the execution of the February 9, 2015 search.

Because the phone was password protected, it took approximately one year for the government to gain entry into the device. When the phone could be searched, it was analyzed. The results of that analysis have been made available to Fulton and the co-defendants. The Government seeks to use as evidence the text messages retrieved from the cell phone at trial. Fulton now moves to suppress the evidence from his cell phone under the Fourth Amendment.

DEFENDANT'S MOTION TO SUPPRESS

Fulton now moves to suppress all evidence obtained from his cell phone, arguing that it was seized in violation of the Fourth Amendment to the United States Constitution and was not authorized by warrant. Specifically, Fulton argues that (1) the phone was not in the scope of the drug warrant because the warrant did not authorize GPD to seize phones, communications, or even electronic devices; (2) neither the seized-incident-to-arrest exception nor (3) the plain-view exception applies because GPD did not have probable cause to believe the phone was used in the commission of a crime; (4) even if the phone was seized legally, GPD waited an unreasonable period of time to obtain a warrant; and (5) the good faith exception does not apply under the facts of this case.

ANALYSIS

The Fourth Amendment of the Constitution protects individuals from “unreasonable searches and seizures” by the government. *See* U.S. CONST. AMEND. IV. Searches and seizures are reasonable, and therefore lawful, if they are based on probable cause and executed pursuant to a warrant issued by a neutral, detached magistrate. *Id.*; *see also Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971). Even warrantless searches and seizures may be lawful if they meet an exception to the warrant requirement. *See Coolidge v. New Hampshire*, 403 U.S. at 453. The Government must demonstrate only by a preponderance of the evidence that the challenged evidence was lawfully obtained in order to prevail on a motion to suppress. *See United States v. Waldrip*, 1 F. Supp. 3d 551, 555-56 (S.D. Tex. 2014) (Galveston Division, Costa, J.) (citing *United States v. Matlock*, 415 U.S. 164, 178 n.14 (1974) (“[T]he controlling

burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence.”).

As explained below, the Court finds the Fulton’s phone was both seized pursuant to a lawful arrest warrant and later searched pursuant to valid warrants issued by neutral, detached magistrates. Additionally, the Court finds even without the valid warrants, the seizure and subsequent search of Fulton’s phone would clearly fall under exceptions to the warrant requirement and exceptions to the exclusionary rule. Accordingly, the Court finds that the evidence from Fulton’s phone should be admitted and the exclusionary remedy should not be applied.

A. Fulton’s Phone Was Lawfully Seized Incident to Arrest, and A Valid Warrant Authorized the Subsequent Search of its Contents

Even if Fulton’s phone was not seized based upon the executed search warrant, the Court finds it was still lawfully “seized” incident to Fulton’s arrest. Fulton argues that the search and seizure of his cell phone was improper because the warrant did not particularly describe it as one of the items to be seized. Specifically, Fulton argues that the State warrant did not authorize the GPD to seize his cell phone or any other electronic device. *See* Dkt. 104, p. 4. The Government argues that the Fulton’s cell phone was seized incident to arrest. *See* Dkt. 118, p. 4; Dkt. 131, p. 5-6. The narcotics warrant precisely authorized GPD to arrest Fulton. *See* Dkt. 118, Government’s Exhibit 1. Evidence seized without a warrant is presumptively inadmissible under the Fourth Amendment to the United States Constitution and *Wong Sun v. United States*, 371 U.S. 471 (1963). The Supreme Court has held that seizures incident to arrest may include the

person of the arrestee as well as the area within the arrestee's "immediate control." *See Chimel v. California*, 395 U.S. 752, 755-56, 763 89 S. Ct. 2034, 2036, 23 L. Ed. 2d 685 (1969). *See also United States v. Robinson*, 414 U.S. 218, 236 (1973)(arresting officers automatically have the right to search the arrestee and the area within the arrestee's immediate control in every arrest, even if weapons or destruction of evidence are not specific concerns).

Here, the seizure of Fulton's cell phone during his arrest fell squarely within the exception articulated in *Chimel* and *Robinson* as a seizure incident to arrest. Fulton also argues that the seizure of his phone was not incident to his arrest because the phone was not on his person or within the area of his immediate control when it was seized. *See* Dkt. 124, p. 4-5. Based on the testimony given at the suppression hearing and the incident report, the Court finds that Fulton's cell phone was within the area of his immediate control—a few feet away, in the same room of the house in which he was arrested. *See* Dkt. 123, Fulton's Exhibit 1, Incident Report; *see also United States v. Curtis*, 635 F.3d 704, 711 (5th Cir. 2011)(cell phone was lawfully seized incident to arrest when the defendant was outside of his car and the phone was on the inside center console). *See also United States v. Jadowe*, 628 F.3d 1, 12-13 (1st Cir. 2010).

The Court finds that the phone was seized incident to arrest, and after it was seized, two separate warrants were obtained to search the contents of the phone (one for evidence of narcotics and one for the evidence of sex trafficking of minors). "[A] warrant is generally required before [searching the contents of a cell phone], even when a cell phone is seized incident to arrest." *See Riley v. California*, 134 S. Ct. 2473, 2493, 189 L.

Ed. 2d 430 (2014). The Court finds that the factual record establishes that the extraction of data from Fulton's cell phone was conducted pursuant and subsequent to a valid search warrant being issued. Further, the Court finds that law enforcement had to take Fulton's cell phone into custody incident to Fulton's arrest because Fulton told the arresting law enforcement officers that the phone was his, but that the house where he was arrested was not his. *See* Dkt. 131, Government Exhibit 4, FILE002 at 15:00-15:04, 16:22- 16:46.

Accordingly, the Court concludes that the seizure of Fulton's cell phone was reasonable and the search of its content was lawful. Neither the search nor the seizure constituted a violation of Fulton's Fourth Amendment rights and the evidence obtained is not entitled to suppression.

B. The Plain View Exception and the *Leon* Good Faith Exception

The Government has also advanced alternative theories that Fulton's cell phone was seized in plain view and that the "good faith exception" should save the evidence from exclusion at trial, in the event that a Fourth Amendment violation is found by the Court. *See* Dkt. 118, p. 6-10; Dkt. 131, p. 7-9. The Court, however, declines to extend that analysis because it finds that the seizure incident to arrest is a valid exception to the general warrant requirement.

C. Police Obtained a Warrant Within a Reasonable Time

Finally, Fulton contends that even if the police lawfully seized his phone, they waited an unreasonably long time to obtain a warrant to search it. *See* Dkt. 124, p. 6-8. Warrantless seizures must comply with the reasonableness requirement of the Fourth Amendment. *See Segura v. United States*, 468 U.S. 796, 812 (1984). Here, law

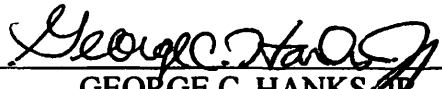
enforcement seized Fulton's cell phone for eight days until obtaining the warrant. The Court finds that there is no evidence of bad faith, nor evidence that the officers purposely delayed obtaining the warrant. Additionally, there is no evidence of unjustified neglect.

CONCLUSION

For the reasons set forth above, Defendant Charles Devon Fulton, Sr. Motion to Suppress the Fruits of the Warrantless Seizure of his Cellphone (Dkt. 104) is **DENIED**.

IT IS SO ORDERED.

SIGNED AT GALVESTON, TEXAS, on June 23 2016.



GEORGE C. HANKS, JR.
UNITED STATES DISTRICT JUDGE