No. 19-6095

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S RESPONSE

I. Other grounds do not support seizure of cell phone.

The Government's assertion that "other grounds could have -- and do -- support the lawfulness of the seizure of Petitioner's phone…" has been rejected. BIO. 11, 16. The Government resurrects this argument, which was previously urged in the district court, that Petitioner's cell phone was properly seized incident to arrest and/or pursuant to the plain view exception. Pet. App. 18-20. The district court ruled that the seizure was lawful incident to Petitioner's arrest and declined to address the applicability of the plain view exception. Pet. App. 20.

Notwithstanding the deferential review accorded the district court's ruling on Petitioner's suppression motion and the Government's arguments below that Petitioner's phone was properly seized under the plain view and search incident to arrest doctrines, the Fifth Circuit implicitly rejected both theories. *See Riley v. California*, 573 U.S. 373, 403 (2014)(holding search incident to arrest exception inapplicable to cell phones). Instead, the Fifth Circuit focused on the Government's alternative theory that the phone was properly seized pursuant to the narcotics warrant because it was the functional equivalent of "ledgers", an item named in the warrant, and the court of appeals initially found no Fourth Amendment violation.[1] Pet. App. 4-5. Significant to the instant petition, however, the Fifth Circuit ultimately held that the initial seizure of Petitioner's cell phone was invalid. Pet. App. 6.

[1] The Government does not now reurge the "functional equivalent" argument.

II. Police error in seizing Petitioner's phone was not "subtle" so as to warrant good faith exception.

In contending that the Fifth Circuit properly applied the good faith exception to salvage evidence obtained from the illegally seized cell phone, the Government argues that any error in seizing the phone was "subtle", thus shoring-up the Fifth Circuit's "close enough the line of validity" rationale for applying the good faith exception. BIO 10; Pet. App. 7. An examination of the record, however, reveals that there was nothing subtle about the illegal seizure. During the suppression hearing, Galveston Police Department ("GPD") Detective Roark, who obtained the narcotics warrant for Petitioner's arrest and search of his residence, readily admitted that the warrant and accompanying affidavit did not include a cell phone. Roark conceded that his affidavit did not include a cell phone as an item to be seized nor did the affidavit reference Petitioner using a cell phone for drug transactions. C.A. ROA.2232-3. Further, Roark admitted that there were no statements in the warrant application itself regarding a phone or its use to further narcotics trafficking. C.A. ROA.2250; Pet. App. 5.

More significantly, Roark's suppression testimony and incident report establish that he doubted his authority to seize Petitioner's phone under the warrant. Roark admitted that his incident report reflected that he seized Petitioner's phone as part of an separate and distinct investigation. Specifically, upon execution of the narcotics investigation, GPD officers encountered a minor female who they suspected was a runaway. Roark admitted that he seized Petitioner's cell phone as part of an investigation into the minor being a runaway rather than the narcotics investigation:

Q: At the time you seized the phone, you didn't seize it as evidence in the drug investigation, you seized it as evidence in an investigation concerning whether [A.V.] was a runaway; isn't that true?

A: That is also part of it, sir.

Q: Okay, so in fact if we look at your incident report, you don't say anything about seizing the phone as part of your drug investigation. You say that you seize the phone to – let me see here –"Darlene, Charles Montrey Evan (phonetics), and A.V.'s cellphones were recovered pending investigation for evidence of crime in regarding to [A.V.] being a runaway since 9/23/2014, and the circumstances documented in Case Number 2014A299." That's what you wrote, isn't it?

***

A: Yes, sir.

C.A. ROA.2237-9. Roark's suppression testimony is significant because it underscores the fallacy of the Government's assertion.

In the same vein, the Government seems to seize on the argument that the officers who seized Petitioner's phone and who later obtained the federal search warrant were different people. BIO 13, n.1. While technically correct, such characterization overlooks the reality that the prosecution of Petitioner for sex trafficking was the product of a tandem investigation by GPD and the FBI in a small community, and such investigation took place when GPD was also investigating Petitioner for narcotics.[2] Logically, the FBI agent who obtained the federal search warrant did so with knowledge of GPD's activities and the circumstances under which Petitioner's cell phone was obtained.

[2] The court of appeals acknowledged the joint nature of the investigation in its opinion denying rehearing. Pet. App. 2.

Specific to that point, the record reflects that GPD executed a narcotics warrant and seized Petitioner's cell phone on February 9, 2015. A state warrant to search the contents of Petitioner's phone was obtained on February 18, 2015. However, the sex trafficking investigation actually commenced in October, 2014, when a Galveston probation officer was alerted to the possibility that one of the minors that she supervised, J.R. who was later named as a complainant, was a trafficking victim. C.A. ROA.938-41. After the probation officer spoke to J.R. in December, 2014, she shared her concerns with GPD and FBI Agent Rennison who later obtained the federal warrant to search the contents of Petitioner's cell phone. C.A. ROA.944.

An investigation into Petitioner's involvement in the trafficking of minor females began to focus on Petitioner in January, 2015, before Petitioner's phone was seized. At trial, GPD Detective Sollenberger testified that the probation officer contacted her office in January, 2015, and Sollenberger proceeded to interview J.R. C.A. ROA.1068-71. Sollenberger also became aware that girls in a juvenile delinquent center were being trafficked for purposes of sex through a Galveston residence that was associated with Petitioner. C.A. ROA.1071. In February, 2015, Sollenberger opened an investigation into Petitioner for sex trafficking of minors and located police reports involving runaway juvenile females located at that same Galveston residence or in Petitioner's company. C.A. ROA.1077-9. Sollenberger compiled a list of individuals that she suspected were being trafficked and shared her

information with FBI Agent Rennison who assisted in interviewing the suspected victims starting in February, 2015. C.A. ROA.1079.

Rennison testified at trial that he became involved in the instant case on March 1, 2015, after being contacted by the Galveston District Attorney. C.A. ROA. 1842. He then contacted GPD Detective Sollenberger, and they interviewed a minor female who identified several girls and implicated Petitioner. C.A. ROA.1843. Rennison confirmed that he interviewed J.R. in early March, 2015, and that J.R. identified other possible complainants, Petitioner, and co-defendants. C.A. ROA.1851. Just a little over a month after the state search warrant issued, Rennison obtained the federal warrant to search Petitioner's cell phone on March 25, 2015.

Recitation of the above facts demonstrating the joint nature of the GPD and FBI investigation into Petitioner's activities serves to rebut the Government's assertion that the FBI agent who obtained the federal search warrant had no reason to "'know[] that the search warrant was illegal despite the magistrate's authorization.'" BIO. 11 (*citing United States v. Leon*, 468 U.S. 897, 922 n. 23 (1984)). Moreover, these facts illustrate the fallacy of the Fifth Circuit's "close enough the line of validity" rationale for applying the good-faith exception. BPD and the FBI were working hand-in-hand on investigating Petitioner in a close-knit community. Obviously, there was concern as to the validity of the initial seizure of the phone, concern that both GPD and the FBI would have shared. For that reason, the federal warrant was secured with the hope of removing the taint of the unconstitutional seizure. Under this set of facts, the Government should not prevail.

III. Petitioner was harmed.

The Government asserts that any error in the admission of phone derived evidence was harmless. BIO.18-19. However, such argument is belied by the voluminous phone evidence presented at trial, which included call logs, text messages and photographs, and the Government's admitted reliance on such evidence in investigating and prosecuting Petitioner.

Based on information extracted from Petitioner's cell phone, the Government learned of Petitioner's gang affiliation, identified additional victims, formulated timelines for Petitioner's interactions with complainants, and gained direct and corroborating evidence of Petitioner's criminal activities. C.A. ROA.1854, 1871-3, 1877-82, 1937. In addition to the phone evidence that the Government specifically referenced at trial, the jury was free to consider the remaining voluminous and prejudicial phone evidence contained in the Government's exhibits while deliberating Petitioner's guilt/innocence.

Indeed, the Government emphasized the "crucial" nature of the cell phone evidence in closing argument:

> *And the phone is crucial, ladies and gentlemen*, because what is in that phone are the defendant's own words. It demonstrates as to each girl that testified about what they did for the defendant, that he knew exactly what they were doing, posting, licks, all of it. Come back to look at the outgoing messages. Those are all the defendant.

C.A. ROA.2110-1 (emphasis added). Also in closing, the Government encouraged jurors to take their time and review all of the evidence extracted from Appellant's

phone - not just the evidence that the Government referred to specifically - remarking that such evidence was "incredibly telling." C.A. ROA.2111.

A. Specific Testimony and Evidence

The extent to which the Government relied on Petitioner's phone data is illustrated by the following summary of the phone evidence presented at trial.

i. *Richard Rennison - FBI, and Derek Stigerts - Sacramento Police*

Through FBI Agent Rennison, the Government elicited phone related testimony that was harmful to Petitioner for several reasons. Rennison's testimony concerning the phone evidence directly linked Petitioner to two of the minor complainants named in the indictment, interjected a non-testifying complainant into the proceedings; established that Petitioner sent text messages using language common to the prostitution trade; and, linked Petitioner to gang activity. Specifically, Rennison testified that there were two pictures that were recovered from Petitioner's phone depicting two different complainants. C.A. ROA.1876-7. Additionally, over the objection of defense counsel, the Government elicited testimony from Rennison that linked Petitioner to K.G., the Count 3 complainant who did not testify. Rennison testified that he located a phone number on Petitioner's phone that he was able to trace to K.G. C.A. ROA.1884-5.

Referring to specific language in Petitioner's text messages, Rennison linked Petitioner to gang activity and the prostitution trade. He testified that Petitioner never put the letters "C" and "K" together so that "lucky" was spelled "luccy" and "lick" was spelled "licc." C.A. ROA.1872. According to Rennison, Petitioner's spelling

idiosyncrasy of not using "C" and "K" together signified Petitioner's affiliation with the Crips gang. C.A. ROA.1872. Rennison also stated that the Petitioner's use of certain words in his texts indicated his involvement in the prostitution trade and matched the language of the girls that Rennison interviewed. C.A. ROA.1872-4. Rennison explained that Petitioner's use of "licc" was a reference to a prostitution date and "post" referred to posting advertisements on backpage.com. C.A. ROA.1872. Over defense counsel's objection, Rennison linked Petitioner's involvement in the prostitution trade to K.G., the non-testifying complainant alleged in Count 3, when he testified regarding text messages between them with references to "licc[s]" and "licks." C.A. ROA.1883-9.

Derek Stigerts, the Government's expert on the pimping/prostitution culture, similarly linked Petitioner to the prostitution trade through his analysis of language that Petitioner used in text messages extracted from his phone. C.A. ROA.1751-4. For instance, Stigerts testified that he saw "daddy" in several texts. According to Stigerts, it was common for victims to refer to their traffickers as "daddy" or another name for a father figure, basically denoting the top person in the organization. C.A. ROA.1753-5. Additionally, Stigerts interpreted a text message exchange between complainant A.V. and Petitioner where Petitioner told A.V. to get a "tune-up" from co-defendant Warner which was indicative of Petitioner punishing A.V. C.A. ROA.1762. Such testimony contributed to the jury's finding that Appellant "used force, threats of force, fraud or coercion to carry out the offense" relating to complainant A.V. C.A. ROA.433.

ii. *Co-defendant Charmell Potts and Krystal Gross*

During the testimony of co-defendant Charmell Potts, the Government inquired about text messages between her and Petitioner that were extracted from Appellant's phone and presented to the jury. C.A. ROA.1160-6. Specifically, the Government used those text messages to establish that Petitioner was aware that some of the complainants were minors; that Petitioner directed Potts to place prostitution ads for the complainants; and, that Petitioner knew that a co-defendant transported complainants to prostitution dates. C.A. ROA.1161, 1165, Ex. 6.2 at lines 2, 10, 49.

The Government elicited similarly damaging testimony from Krystal Gross who testified regarding text messages between herself and Petitioner. The Government referred Gross to a text message where she informed Petitioner that one of the minor complainants was "bouta hit a stain," meaning a prostitution date. C.A. ROA.1302-3, Ex. 6.12, line 3.

iii. *Complainants*

The Government elicited information from each of the five testifying complainants regarding their text message exchanges with Petitioner that were extracted from Appellant's cell phone. Through these witnesses, the Government presented phone-related testimony that was harmful to the Petitioner for several reasons, including that the testimony connected Petitioner with the Crips gang; established that Petitioner directed his victims in their prostitution activities; demonstrated Petitioner's use of force, threats of force, fraud or coercion regarding

one of the complainants; established that Petitioner profited from the complainants' prostitution activities; and, established a timeline for Petitioner's criminal activities.

For instance, M.P., the complainant in Count 6, testified regarding her text messages with Petitioner which were presented to the jury. M.P. testified that she spelled Petitioner's nickname as "Blacc" with two CCs, rather than "Black", because Petitioner was a member of the Crips. C.A. ROA.1428-9, Ex. 6.5, line 10. S.P., the Count 7 complainant, identified text messages between herself and Petitioner that established a timeline for their interaction. C.A. ROA.1815.

A.V, the complainant in Count 4, testified regarding her text messages with Petitioner which were presented to the jury. Specifically, the Government asked A.V. about a text message where Petitioner asked her to send photos of herself to a particular number in order that a potential client could see what he was buying for his prostitution date. C.A. ROA.1482, Ex. 6.8, line 2. In other texts, A.V. instructed Petitioner to post her and two other girls, T and J.R., on backpage.com. C.A. ROA.1487, Ex. 6.8, line 9. In additional texts, A.V. asked Petitioner whether he was going to take her to a prostitution date and discussed the amount of money that Petitioner would receive. C.A. ROA.1491-3, Ex. 6.8, lines 30 & 34.

Undoubtedly, A.V.'s phone-related testimony contributed to the jury's affirmative finding as to Petitioner's use of force, threats of force, fraud or coercion. A.V. testified regarding Petitioner's text messages to her where he told her to get a "tune up from [M]eathead" and stated that he was going to "beat [her] ass". C.A. ROA.1490-4, Ex. 6.8, lines 25 & 40.

J.R., the Count 2 complainant, testified regarding her text exchanges with Petitioner which were presented to the jury. The Government elicited testimony regarding a text where Petitioner complained that J.R. never performed oral sex on him even though she performed it on "everybody else." C.A. ROA.1602, Ex. 6.3 line 6. In another text conversation, Petitioner directed J.R. to make some money selling herself, writing " I was playing[.] U stay grinding [real nigga shit]. [J]ust hit the licc for us." C.A. ROA.1603, Ex. 6.3, line 10. In a later text conversation, J.R. asked Petitioner whether she could go back to the house. C.A. ROA.1603, Ex. 6.3 line 20. Petitioner then directed J.R. to make some money first, and she asked him to post her. C.A. ROA.1605, Ex. 6.3, lines 20-2.

Finally, H.F., the complainant in Count 5, testified about her text messages with Petitioner. The Government elicited testimony from H.F. regarding text messages between H.F. and Petitioner in September, 2014, where H.F. wrote that her boyfriend discovered that she was working for Petitioner. C.A. ROA.1704-6, Ex. 6.6, line 15. Based on H.F.'s text messages with Petitioner, the Government was also able to establish a timeline for the period during which H.F. was prostituting for Petitioner. C.A. ROA.1707.

The Government's closing argument reference to the phone-related evidence as "crucial" to its investigation and prosecution of Petitioner was no exaggeration. C.A. ROA.2110-11. In approximately 26 pages of closing argument, the Government referred to the phone texts and/or messages evidence at least 16 times to establish the following propositions:

- that co-defendant Potts was mad about the "little girls" and Petitioner sleeping with them. C.A. ROA.2104-5;

- that "this particular crime" had a unique vocabulary. C.A. ROA.2105;

- that Petitioner was a member of the Crips. C.A. ROA.2106;

- that Petitioner was a "Romeo pimp." C.A. ROA.2112, 2133-4;

- that Petitioner was a "puppet master pulling the strings." C.A. ROA.2112, 2133-4;

- that the complainants were "children in an adult world." C.A. ROA.2114;

- that Petitioner used force, threats of force, fraud or coercion with A.V. based on his text reference to a "tune-up." C.A. ROA.2117;

- that Petitioner arranged a prostitution date for M.P. C.A. ROA.2119-20; and,

- that Petitioner was in constant contact with the complainants and monitored them through text messages. C.A. ROA.2143.

In sum, the record does not support the Government's assertion that Petitioner was not harmed by the cell phone derived evidence. Such assessment is clearly refuted by the jury's guilty verdicts on five counts and the five life sentences that Petitioner is now serving.

CONCLUSION

For the reasons stated above, the Court should grant the petition and reverse the decision below.

Date: January 10, 2020

Respectfully submitted,

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