United States District Court
Southern District of Texas
ENTERED
August 23, 2021
Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL ACTION NO. 4:20-CR-381
	§	
JAVON OPOKU	§	

ORDER

Before the Court are Defendant Javon Opoku's Motion to Suppress Evidence (the "Motion") (Doc. #22), the Government's Response (Doc. #23), Defendant's Reply and Supplemental Motion to Suppress (Doc. #28), the Government's Supplemental Response (Doc. #29), the Government's Second Supplemental Response (Doc. #31), and Defendant's Reply (Doc. #32). The Court also heard oral argument on the Motion on May 6, 2021. Having considered the parties' arguments and applicable legal authority, the Court grants the Motion.

I. Background

On February 24, 2020, officers from the Houston Police Department ("HPD") stopped Defendant for an expired car registration, which eventually led to his arrest for theft of a firearm and carrying a handgun in a motor vehicle. Doc. #28 at 3. The officers seized an Apple iPhone 11 found on Defendant's person during the arrest (the "2020 Cellphone"). *Id.* At the time, Defendant was on bond for burglary of a motor vehicle, evading on foot, and capital murder. *Id.* Defendant had been arrested for the capital murder offense on November 3, 2019—three days after the murder occurred—and the cellphone that was on Defendant's person during that arrest was seized (the "2019 Cellphone"). Doc. #28 at 3.

On February 28, 2020, HPD Officer Michael Falcone applied for a warrant to search the 2020 Cellphone for evidence related to Defendant's capital murder offense. Doc. #30, Ex. 1.

Officer Falcone's affidavit (the "Affidavit") explained the circumstances surrounding Defendant's alleged involvement in the October 29, 2019 burglary of a motor vehicle and evasion on foot, as well as the alleged capital murder two days later. *Id.* at 3–4; *id.*, Ex. 4 at 2. The Affidavit explained that after a witness identified Defendant and two other individuals, Michael Gonzalez and Felipe Ortuno, as the men involved in the shooting, the three men were charged with capital murder. *Id.*, Ex. 1 at 3–4. It noted that the men were all documented gang members and explained that another HPD officer, Officer Cooper, recognized Gonzalez from previous investigations and Ortuno from music videos Gonzalez had uploaded to Youtube. *Id.* Officer Cooper "also observed [Defendant] on the [Youtube] music videos." *Id.* The Affidavit further stated,

> Based on my knowledge and experience, I[, Officer Falcone,] know that gang members committing violent crimes . . . use their cell phones to communicate with others about the planning and execution of crimes. . . . Documented gang members who commit violent crimes are known to use their cell phones in coordination of their crime. Specifically, Affiant believes there will be text messaging relating to the planning and commission of the Capital Murder. Affiant also believes there will be GPS data showing the Defendant's location at the time of the Capital Murder.
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> ***
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> Affiant states that he has found through training and experience and also through regular human experience that the majority of persons, especially those using cellular telephones, utilize electronic and wire communications almost daily. Therefore, it is the Affiant's opinion that the stored communication probably exists in relation to the target communication device and the contents of these communications are probably relevant and material to an on-going investigation. It is also the professional opinion of the Affiant that the contents of any identified stored communications, whether they are opened or unopened or listened to or un-listened to, are probably relevant and material to the investigation.

Id. at 4. The Affidavit then "request[ed] a warrant be issued to search for the following items:

1. Any photographs or videos;
2. Any text or multimedia messages (SMS and MMS);
3. Any call history or call logs;
4. Any contact information, including but not limited to phone numbers stored on the phone;
5. Documents and evidence showing the identity of ownership and identity of the users of those described items;
6. Any internet history;

> 7. Any Global Positioning System ("GPS") data that is capable of showing the location of the subject phone at a given time;
> 8. Any emails, instant messaging, or other forms of communication capable of being performed by each phone;
> 9. Any voicemail messages contained on the phone;
> 10. Any recordings contained on the phone; and
> 11. Any social media posts or messaging, and any images associated thereto, including but not limit to that on, LETGO, Facebook, Twitter, KIK and Instagram."

Id. Notably, the Affidavit did not state: 1) what Officer Falcone's training and experience was, 2) when HPD retrieved the 2020 Cellphone, 3) that the 2019 Cellphone existed, 4) that HPD officers seized the 2019 Cellphone during Defendant's arrest three days after the alleged capital murder, or 5) that Officer Cooper was simultaneously in the process of applying for a warrant to search the 2019 Cellphone. *See id.*; *id.*, Ex. 4 at 1; Doc. #28 at 3.

Based on the Affidavit, Judge Josh Hill of the 232nd District Court of Harris County, Texas signed a search warrant ("February Warrant"), commanding the search of the 2020 Cellphone

> with the authority to search for and to seize all property or items . . . that may be found therein including, but not limited to all stored communication located in an electronic mailbox, voicemail, Personal Identification Numbers, subscriber information, text messages, names, numbers and addresses stored in a phone book application, all cell phone memory including flash drives, photographs, any data, video, audio and cellular number files listed in the memory or stored on this cellular phone and all removable media including SIM (Subscriber Identity Module) cards and media cards or flash drives that maybe found therein.

Doc. # 23, Ex. 1 at 1. The search and seizure of said "property or items" was limited to "evidence of an offense or evidence tending to show that a particular person committed the offense of Capital Murder." *Id.* "[O]nce seized," the February Warrant "allow[ed] the Affiant to conduct a search of those items for the presence and evidence of" the eleven categories of information listed in the Affidavit. *Id.*

Under the authority of the February Warrant, Officer Falcone began searching the 2020 Cellphone. Doc. #23 at 2. When Officer Falcone opened the "Photos" icon, he discovered three

videos created one minute apart on February 24, 2020 that allegedly depict Defendant, who was 19 years old, engaging in sexual intercourse with a 16-year-old minor female. Doc. #28 at 3. Upon finding the videos, Officer Falcone contacted the district attorney assigned to the case against Defendant and was eventually connected to a second district attorney from the child exploitation division. Doc. #30, Ex. 5 at 1; *id.*, Ex. 7 at 2. The second district attorney voiced "some concerns" about the February Warrant and told Officer Falcone "[i]f we are going to take additional charges on the Defendant I was hoping we could do another search warrant to make sure it's rock solid so we don't run into any issues down the line when we are going to trial." *Id.*, Ex. 7 at 2.

Two days later, Officer Falcone applied for a second warrant, referred to by the Government as a "curative warrant," to search the same categories of the 2020 Cellphone for evidence related to the capital murder offense. *Id.*, Ex. 2. The second affidavit did not mention the February Warrant, the three videos Officer Falcone had already found, the child exploitation investigation, or the 2019 Cellphone. *See* Doc. #28, Ex. 2. The only changes made were the inclusion of additional statements regarding when the 2020 Cellphone was seized and why pictures and videos on the 2020 Cellphone likely contained evidence relevant to the capital murder offense. *Id.* Judge Hill authorized the second search warrant ("March Warrant"), which "did not yield anything different from the first search warrant." Doc. #23 at 3, n1.

Based on Officer Falcone's discovery of the three videos, the FBI began an investigation into Defendant's conduct regarding sexual exploitation of children and obtained a third search warrant for the 2020 Cellphone ("Federal Warrant"). *Id.* at 3–4; Doc. #30, Ex. 3 ¶¶ 23–27. No additional evidence was found. Doc. #23 at 4. On August 19, 2020, Defendant was indicted with one count of sexual exploitation of children in violation of 18 U.S.C. § 2251. *Id.* Defendant now moves for the suppression of all evidence obtained as a result of the February Warrant, arguing that (1) the Affidavit omitted material facts, (2) the February Warrant lacked any indica of probable cause,

and (3) the February Warrant was facially overbroad and not particular. Doc. #28 at 6, 7, 15.

II. Legal Standards

a. Heightened Privacy Interests in Cellphone Searches

The "Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' . . . [that] allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley v. California*, 573 U.S. 373, 403 (2014). Beyond the founding generation's imagination, today "it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives." *Id.* at 395. The "term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." *Id.* at 393. In addition to the numerous types of information available on cellphones, "[o]ne of the most notable distinguishing features of modern cell phones is their immense storage capacity," enabling phones to hold "millions of pages of text, thousands of pictures, or hundreds of videos." *Id.* at 393–94. As such, a "cell phone search would typically expose to the government far *more* than the most exhaustive search of a house." *Id.* at 396–97 (emphasis in original); *see also United States v. Oglesby*, No. 4:18-CR-0626, 2019 WL 1877228, at *5 (S.D. Tex. Apr. 26, 2019) (finding that "the protections given to a cell phone must be at least equal to, if not greater than, the protections set out for houses"). Accordingly, a cellphone seized during an arrest can only be searched pursuant to a lawful search warrant. *Riley*, 573 U.S. at 403.

b. Fourth Amendment

The Fourth Amendment mandates that search warrants issue only "upon probable cause,

supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. AMEND. IV. The exclusionary rule "precludes the use of evidence obtained from an unconstitutional search or seizure[] in order 'to safeguard Fourth Amendment rights.'" *United States v. Beverly*, 943 F.3d 225, 232 (5th Cir. 2019) (quoting *United States v. Leon*, 468 U.S. 897, 906 (1984)). When evidence found pursuant to a search warrant is challenged under the Fourth Amendment, courts ask two questions: first, does "the good-faith exception to the exclusionary rule" apply? *United States v. Cherna*, 184 F.3d 403, 407 (5th Cir. 1999). The good-faith exception applies when "government investigators acted with an objectively reasonable good-faith belief that their conduct was lawful." *Beverly*, 943 F.3d 232. However, it does not apply in four situations:

> (1) When the issuing [judge] was misled by information in an affidavit that the affiant knew or reasonably should have known was false; (2) When the issuing [judge] wholly abandoned his judicial role; (3) When the warrant affidavit is so lacking in indicia of probable cause as to render official belief in its existence unreasonable; and (4) When the warrant is so facially deficient in failing to particularize the place to be searched or the things to be seized that executing officers cannot reasonably presume it to be valid.

Id. at 232–33. If the good-faith exception does not save the evidence found pursuant to the challenged search warrant, courts ask the second question: did the issuing judge have "a substantial basis for concluding that probable cause existed?" *Cherna*, 184 F.3d at 407 (cleaned up).

III. Analysis

a. Good-Faith Exception

Defendant argues, among other reasons, that the good-faith exception to the exclusionary rule should not apply because the Affidavit omitted material facts that 1) HPD officers had already seized the 2019 Cellphone from Defendant's person three days after the capital murder and 2) the 2020 Cellphone was seized from Defendant on February 24, 2020, nearly four months after the

seizure of the 2019 Cellphone and the capital murder. *Id.* at 6. "[T]he good-faith exception will not apply if the warrant application is misleading. The party challenging the good-faith exception bears the burden of establishing that material misstatements or omissions are contained in the supporting affidavit and that if those statements were excised (or the omitted information included), the affidavit would be insufficient to support the warrant." *Beverly*, 943 F.3d at 237. The omission must be made "knowingly and intentionally" or "in reckless disregard for the truth," which "may be inferred from an affidavit omitting facts that are clearly critical to a finding of probable cause." *United States v. Cronan*, 937 F.2d 163, 165 (5th Cir. 1991).

At the suppression hearing, the Government conceded that Officer Falcone knowingly omitted from the Affidavit that HPD had previously seized the 2019 Cellphone and that the 2020 Cellphone was not seized until February 24, 2020. *See* Doc. #30, Ex. 4 at 1 (email from Officer Falcone stating "Yes, we have two phones. Detective Copper has the phone at the time of the arrest for the Capital Murder and I have the phone he used since he got out on bond").[1] The Affidavit states that Officer Falcone "believe[d] there w[ould] be text messaging relating to the planning and commission of the Capital Murder" as well as "GPS data showing the Defendant's location at the time of the Capital Murder" in the 2020 Cellphone. Doc. #30, Ex. 1 at 4. The assumptions underlying these statements are that Defendant used the 2020 Cellphone leading up to October 31,

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[1] Officer Falcone's email further stated that he believed the 2020 Cellphone would "have great information." Doc. #30, Ex. 4 at 1. The belief that Defendant had been using the 2020 Cellphone "since he got out on bond" calls into question Officer Falcone's statement in the Affidavit that he believed the same phone would have "GPS data showing the Defendant's location at the time of the Capital Murder." *Id.*, Ex. 1 at 4. While it is still possible that Officer Falcone believed Defendant had the 2020 Cellphone on his person during the capital murder offense, the heightened privacy interests at issue in cellphone searches combined with Officer Falcone's subsequent failure to disclose in his second affidavit for the "curative" March Warrant that (1) the February Warrant existed and authorized the same search, (2) said search resulted in finding the three videos, and (3) a child exploitation investigation was underway, confirms for the Court that the evidence at issue should be excluded to deter similar conduct in the future. *See id.*, Ex. 2 at 3–7.

2019 and that Defendant had the 2020 Cellphone in his possession during the capital murder offense. These beliefs are undermined by the seizure of the 2019 Cellphone, which was found on Defendant's person three days after the capital murder and nearly four months before the 2020 Cellphone was seized.

The Affidavit provides no reason to believe that Defendant used multiple cellphones at the same time or that Defendant was using the 2020 Cellphone on October 31, 2019 despite being found with the 2019 Cellphone three days later. *See* Doc. #30, Ex. 1. Furthermore, the Affidavit does not state anything related to the capital murder happened between November 3, 2019 (the date the 2019 Cellphone was seized) and February 24, 2020 (the date the 2020 Cellphone was seized), such that the 2020 Cellphone would have new, relevant information not contained in the 2019 Cellphone. The Court finds that Officer Falcone's omissions regarding the 2019 Cellphone and the timing of the two cellphone seizures were "clearly critical to a finding of probable cause" to search the 2020 Cellphone and therefore sufficient to infer that he acted, at a minimum, with reckless disregard for the truth. *See Cronan*, 937 F.2d at 165.

As such, the Court must determine whether "the inclusion of the omitted information would render the affidavit insufficient to support a finding of probable cause." *Id.* Probable cause requires "something more than mere suspicion." *United States v. Froman*, 355 F.3d 882, 889 (5th Cir. 2004). Probable cause exists where "given all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Cavazos*, 288 F.3d 706, 710 (5th Cir. 2002). "Facts in the affidavit must establish a nexus between the [place] searched and the evidence sought." *United States v. Payne*, 341 F.3d 393, 400 (5th Cir. 2003).

The Government argues that because Defendant was not arrested at the scene of the capital

murder, "there is no way of knowing which or how many phones [] Defendant was utilizing at the time of the murder" and thus the inclusion of the omitted information does not impact any finding of probable cause. Doc. #29 at 4. Applying the Government's logic, any time a cellphone is not seized at the scene of the crime, all cellphones subsequently found on a defendant can be seized and searched, regardless of the number of cellphones already seized or the amount of time that has passed, because the government does not know whether the defendant was using this cellphone, one of the previously seized cellphones, or any other cellphone during the offense. Mindful of the Supreme Court's warning that a "cell phone search would typically expose to the government far *more* than the most exhaustive search of a house," the Court finds that such logic lends itself more to an "unrestrained search for evidence of criminal activity" than a search based on showing "a fair probability" that the evidence sought will be found on the particular phone to be searched. *See Riley*, 573 U.S. at 396–97, 403; *Cavazos*, 288 F.3d at 710.

The omissions are especially concerning where, as here, the Affidavit does not contain a single factual allegation relating any cellphone, let alone the 2020 Cellphone, to the capital murder offense. *See* Doc. #30, Ex. 1. Cellphones are not mentioned in any part of the factual recitation and only appear for the first time when Officer Falcone states that "based upon [his undisclosed] training and experience, [he] knows that gang members committing violent crimes which are plaguing the City of Houston use their cell phones to communicate with others about the planning and execution of crimes." *Id.* at 4. Not only would these communications more likely be found on the 2019 Cellphone Defendant had in his possession three days after the crime, but the generalization is no more true for gang members than it is for any cellphone user who makes plans with another person. The Government offers no authority for the proposition that anytime a crime implicates codefendants, cellphones can be searched for communications regarding the planning

and execution of said crime. As explained in more detail below, such a rule would strike a serious blow to the probable cause requirement. As such, the Court finds that the inclusion of the omitted facts regarding the previously seized 2019 Cellphone and the timing between the murder and two cellphone seizures "would render the [A]ffidavit insufficient to support a finding" that the evidence sought would likely be found in the 2020 Cellphone. *See Cronan*, 937 F.2d at 165.

Accordingly, the Court finds that the good-faith exception does not apply.

b. Particularity

Defendant also argues that the February Warrant was facially overbroad and not particularly tailored. Doc. #22 at 9. The Government responds that the February Warrant sufficiently specified which areas within the 2020 Cellphone could be searched. Doc. #23 at 12. "By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the [particularity] requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). "To avoid fatal generality, the place and items to be seized must be described with sufficient particularity so as to leave nothing to the discretion of the officer executing the warrant." *United States v. Triplett*, 684 F.3d 500, 505 (5th Cir. 2012). Warrants that authorize an "all records" search require "much closer scrutiny" under the Fourth Amendment and are only upheld in "extreme cases" where the alleged crime is pervasive, closely intertwined with the place to be searched, and the items to be seized are sufficiently limited and linked to the alleged crime. *United States v. Humphrey*, 104 F.3d 65, 69 (5th Cir. 1997) (warrant to search defendants' home upheld due to allegations of pervasive financial fraud, considerable overlap between the defendants' business and personal lives, and the warrant being limited to financial transaction records).

Here, the February Warrant authorized the search and seizure of "all property or items . . .

that may be found" on the 2020 Cellphone that constitute "evidence of an offense," "including, but not limited to . . . all cell phone memory including . . . any data, . . . all removable media," "any photographs or videos," "any internet history," any "forms of communication capable of being perform by each [sic] phone," "any recordings contained on the phone," and "any social media post." Doc. #30, Ex. 1 at 1. If such a warrant is not an "all records" warrant that authorizes a "wide-ranging exploratory search" and grants discretion to the executing officers, the Court is not sure what would constitute as such. *See Garrison*, 480 U.S. at 84; *Triplett*, 684 F.3d at 505. And unlike the *Humphrey* warrant that limited to items to be seized to financial transaction records, the February Warrant is not limited to a particular category of information or even a specific period of time. *See Humphrey*, 104 F.3d at 69; Doc. #30, Ex. 1 at 1.

At the suppression hearing, the Government offered the calendar, weather, and Netflix applications as examples of information on a cellphone that would not be covered by the eleven categories of "items" delineated in the third paragraph of the February Warrant. Before getting to the eleven categories, the February Warrant authorizes the seizure of "all data," "all cell phone memory," and "all removable media," which is then sent to a forensic examiner who prepares said information and sends it back to an officer to perform a second search for the eleven categories of items. Doc. #30, Ex. 1 at 1. As such, all calendar, weather, and Netflix-related data could be seized pursuant to the February Warrant. But even if the Court only considers the eleven categories, they are not "carefully tailored" to limit "the search to the specific areas and things for which there is probable cause to search." *See Garrison*, 480 U.S. at 84. Of the eleven categories, the "facts as alleged in" the Affidavit only directly refer to two: text messages and GPS data. *Id.*; Doc. #30, Ex. 1 at 4. The Court does not find the generalization that violent gang members "use their cell phones to communicate with others about the planning and execution of crimes"

sufficient to create a nexus with the cellphone's "call history," "emails," "contact information," and "voicemails," but even if it did, the same could not be said for "any photographs or videos," "any internet history," "any recordings," or "any social media posts." *See id.*

As to the "photographs or videos" on the 2020 Cellphone, the Government argues that Judge Hill could have reasonably inferred that there would be photos of Defendant with Ortuno or Martinez, recordings of the capital murder, "trophy" shots with evidence of the crime, or pictures or videos of the targeted location and victims. Doc. #23 at 9–10; Doc. #29 at 5. The Government offers no evidence that Judge Hill made such inferences and the Court declines to assume they would reasonably be made without a single statement in the Affidavit related to any such conduct. *See id.*; Doc. #30, Ex. 1. If the information presented in the Affidavit were sufficient to infer potential "trophy" shots or recordings of a crime, any person suspected of committing any crime, with others or alone, would lose any privacy rights he or she had in the potentially "thousands of pictures, or hundreds of videos" stored on his or her cellphone. *See Riley*, 573 U.S. at 394. The Court declines to make such an inference and concludes that the February Warrant did not "limit the authorization to search to the specific areas and things for which there [wa]s probable cause to search." *See Garrison*, 480 U.S. at 84.

As such, the Court finds that the February Warrant was overbroad, not particular, and in violation of the Fourth Amendment. *See id.*

c. Substantial Basis

Because the good-faith exception does not save the search, the Fourth Amendment imposes on the Court the duty of determining whether the judge who issued the warrant "had a substantial basis for concluding that probable cause existed." *Illinois v. Gates*, 462 U.S. 213, 238–39 (1983) (cleaned up); *United States v. Allen*, 625 F.3d 830, 835 (5th Cir. 2010). "Although [courts] accord

great deference to a[n issuing judge's] determination of probable cause, [courts] will not defer to a warrant based on an affidavit that does not provide the [issuing judge] with a substantial basis for determining the existence of probable cause." *Kohler v. Englade*, 470 F.3d 1104, 1109 (5th Cir. 2006) (citation omitted). "Probable cause exists when there are reasonably trustworthy facts which, given the totality of the circumstances, are sufficient to lead a prudent person to believe that the items sought constitute . . . evidence of a crime" and "will be found in a particular place" to be searched. *Id.*; *Cavazos*, 288 F.3d at 710. While an affidavit may establish "probable cause to believe that a person has committed a crime[, that] does not automatically give the police probable cause to search his house [or cellphone] for evidence of that crime." *United States v. Freeman*, 685 F.2d 942, 949 (5th Cir. 1982); *Riley*, 573 U.S. at 396–97 (noting that "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house") (emphasis in original). Rather, facts in the affidavit must establish a nexus between the place to be searched, the items to be seized, and the criminal activity being investigated. *Kohler*, 470 F.3d at 1109; *Payne*, 341 F.3d at 400.

Here, the only statements connecting a cellphone to the capital murder are 1) the fact that Defendant, Ortuno, and Ortega are documented gang members charged with capital murder, and 2) Officer's Falcone's generalizations, based on his undisclosed "training and experience," regarding the use of cellphones by "the majority of persons" and "gang members who commit violent crimes." Doc. #30, Ex. 1 at 4. Officer Falcone's generalizations about the use of cellphones to coordinate, plan, and execute events apply no more so to "gang members who commit violent crimes" than they do to every cellphone user in modern life. *See id.* Despite detailed descriptions of the motor vehicle robbery, evasion on foot, and capital murder, including that "the entire [capital murder] incident was in fact caught on video surveillance," the Affidavit

does not contain a single allegation regarding coordination of any of the offenses or the use of a cellphone before, during, or after even one of the alleged crimes. *Id.* at 3.

In *United States v. Brown*, the Fifth Circuit explained that a warrant to search a home must be based on more than (1) the fact that a codefendant lives in the home and (2) the truism that drugs must be stored and packaged somewhere. *See* 567 Fed. App'x. 272, 281–82, n7 (5th Cir. 2014). Mindful that a "cell phone search would typically expose to the government far *more* than the most exhaustive search of a house," a warrant to search a cellphone must similarly be based on more than (1) the fact that a codefendant possesses a cellphone and (2) the truism that people often communicate plans via cellphones. *See id.*; *Riley*, 573 U.S. at 396–97. To hold otherwise would undermine the Supreme Court's holding in *Riley* and eliminate privacy rights in cellphones that keep "a digital record of nearly every aspect of their [owners'] lives." *Riley*, 573 U.S. at 395. Because the Affidavit does not allege any offense-specific facts that could establish a nexus between the capital murder and the 2020 Cellphone, the Court finds that there was not a "substantial basis for believing there was probable cause for the search." *See id.* at 430; *Allen*, 625 F.3d at 835.

Accordingly, the unconstitutional search of the 2020 Cellphone is not subject to any exceptions and the evidence resulting from that search must be suppressed as inadmissible.

d. Subsequent Search Warrants

As the parties acknowledged at the suppression hearing, the admissibility of evidence found pursuant the March and Federal Warrants depend on the admissibility of evidence found during the February Warrant search. "The exclusionary rule reaches not only the evidence uncovered as a direct result of the violation, but also evidence indirectly derived from it—so-called fruit of the poisonous tree." *United States v. Mendez*, 885 F.3d 899, 909 (5th Cir. 2018) (quotation

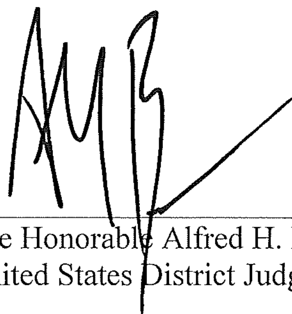
omitted). Here, the March Warrant was secured to ensure that the evidence already found during the February Warrant search would be admissible. Doc. #30, Ex. 7 at 2. In the Federal Warrant affidavit, the only factual statements specific to Defendant address Officer Falcone's search of the 2020 Cellphone pursuant to the February Warrant and his finding of the three videos. *Id.*, Ex. 3 ¶¶ 23–27. No other evidence is mentioned. *See id.* Because the search of the 2020 Cellphone pursuant to the February Warrant was impermissible, the Court finds that the use of that information tainted evidence obtained during the March Warrant and Federal Warrant searches. *Mendez*, 885 F.3d at 909.

Accordingly, the evidence obtained pursuant to all three warrants is inadmissible. *See id.*

IV. Conclusion

In conclusion, the Court finds that the omission of the 2019 Cellphone and the timing between the capital murder offense and cellphone seizures were material omissions that misled the issuing judge and would have rendered the Affidavit insufficient to support a finding of probable cause had they been included. As such, the good-faith exception does not apply. The Court further finds that the February Warrant was not "carefully tailored" and there was not a "substantial basis" for finding that probable cause existed. As such, the evidence found during the February Warrant search must be suppressed. Additionally, because the March and Federal Warrants were executed based on the evidence found pursuant to the February Warrant, evidence obtained from either warrant's search is similarly inadmissible. Accordingly, the Motion to Suppress is GRANTED.

It is so ORDERED.



AUG 2 3 2021

Date

The Honorable Alfred H. Bennett
United States District Judge