# A DISTRICT COURT SUPPRESSES EVIDENCE FOUND ON THE DEFENDANT'S IPHONE AFTER DETERMINING THAT NO EXCEPTIONS TO THE WARRANT REQUIREMENT APPLIED

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In United States v. Hulscher, 2017 WL 657436 (D.S.D. Feb. 17, 2017), a District Court was asked to consider whether law enforcement officers' search of Defendant Robert Hulscher's iPhone violated his Fourth Amendment rights. Specifically, Hulscher moved to suppress "all evidence from the advanced logical extraction" of his cell phone. The District Court set Hulscher's motion to suppress for an evidentiary hearing, but neither the Government nor Hulscher offered any testimony. Instead, the Parties offered only exhibits in support of their respective positions. After considering the Parties' arguments and the exhibits provided, the District Court granted Hulscher's motion to suppress for the following reasons.

The District Court began its analysis by noting that Hulscher's motion to suppress revolved around the review of his cell phone data by two law enforcement agencies: (1) the Huron Police Department and (2) the Bureau of Alcohol, Tobacco, and Firearms (ATF). Both agencies investigated Hulscher on unrelated charges. The Huron Police Department was investigating Hulscher on forgery, counterfeiting, and identity theft charges. The ATF was investigating Hulscher for various firearm offenses.

During the investigation by the Huron Police Department, Sergeant Mark Johnson applied for a search warrant to search Hulscher's iPhone. A state court judge issued a search warrant allowing any law enforcement officer in Beadle County to search Hulscher's iPhone for: "(1) The content of any texts, including but not limited to incoming texts, sent texts, draft texts and deleted texts that were sent or received by the cellular communication devices. (2) Incoming or outgoing cell phone call records by the cellular communication devices. (3) The content of the address book for the cellular communication devices. (4) Video and/or photographs on the phones or stored in the internal memory of the cellular communication devices. (5) Any other data on the communication device as it relates to this case."

After obtaining Hulscher's iPhone, Detective Casey Spinsby of the Huron Police Department extracted the data from the iPhone and created a digital copy. Detective Spinsby performed a search of the data, and in his official report, Detective Spinsby noted several pieces of evidence related to

the Huron investigation. Detective Spinsby also noted 531 messages related to the sale, use, or purchase of illegal drugs. As part of his analysis of the cell phone, Detective Spinsby segregated the data on the phone that was relevant to the Huron state court prosecution and saved that data separately. Hulscher later pleaded guilty in state court to one charge of Grand Theft–More than $1,000 and Less than or equal to $2,500. Detective Spinsby was not looking for and did not find any information related to the illegal possession of firearms.

In preparation for Hulscher's federal trial (Hulscher had been charged with two counts: (1) stealing firearms and aiding and abetting stealing firearms under 18 U.S.C. § 924(1) and § 924(2), and (2) felon in possession of firearms under 18 U.S.C. § 922(g)(1)), ATF Agent Brent Fair reviewed a National Crime Information Center report on Hulscher. The report indicated that Hulscher had been arrested by the Huron Police Department. Agent Fair contacted the Huron Police Department and learned that it had data taken from Hulscher's iPhone. Agent Fair requested a copy of the data and initially received a DVD disc containing Detective Spinsby's segregated data that related only to the state charges. Agent Fair, then, contacted the Huron Police Department again and discovered that the Huron Police Department also had a complete, unsegregated digital copy of Hulscher's iPhone data. Because the complete digital copy of Hulscher's iPhone data could not be sent electronically, Agent Fair drove to Huron with another ATF agent, obtained a complete digital copy of Hulscher's iPhone data, and reviewed the data on his return to Sioux Falls. Agent Fair did not get a search warrant before he reviewed the data.

The Government then notified Hulscher's counsel that it intended to use the complete, unsegregated iPhone data at his federal trial. Hulscher responded by filing a motion to suppress the complete, unsegregated iPhone data, but he did not object to the admission of the segregated data. The Government argued that the District Court should deny Hulscher's motion to suppress for four reasons: (1) Agent Fair's review of the iPhone data did not constitute a search within the meaning of the Fourth Amendment; (2) Agent Fair did not have knowledge of the Beadle County warrant; (3) the plain view doctrine applied to the warrant requirement; and (4) the exclusionary rule should not apply. The District Court rejected each of the Government's objections.

The District Court began its analysis by repeating that the Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. The Government argued, however, that Agent Fair never conducted a search of Hulscher's iPhone. Instead, the Government contended that Agent Fair merely conducted a subsequent viewing of evidence that had already been seized. As such, the District Court stated that the issue before it was whether a subsequent viewing of a copy of electronic data from a cell phone constitutes a search when the data was collected under a valid search warrant and was unresponsive to that warrant.

The District Court stated that this specific fact scenario was relatively new to Fourth Amendment analysis. Despite the lack of precedent on how courts should treat digital copies of electronic information, the District Court opined that it had two obvious choices: it could treat searches of copies just like searches of originals or it could treat copies merely as data stored on government-owned property.

In rejecting the Government's position, the District Court highlighted that the United States Supreme Court had explained in Riley that cell phone data is not the same as physical evidence. Riley v. California, 134 S. Ct. 2473, 2482 (2014). In Riley, the issue before the Supreme Court was whether cell phones could be searched incident to an arrest like other physical objects found on arrestees. Id. The Supreme Court held that, because cell phones contain immense amounts of personal information about people's lives, they are unique, and law enforcement "officers must generally secure a warrant before conducting such a search." Id. at 2485.

The District Court used the Supreme Court's reasoning to reach a similar conclusion. The chief evil that the Fourth Amendment was intended to address was the hated general warrant of the British crown. Payton v. New York, 445 U.S. 573, 583-84 (1980). Accordingly, if the scope of the Beadle County warrant was not limited to the Huron Police Department's counterfeiting investigation, the search warrant would have been an invalid general warrant. As such, the District Court found the conclusion to be inescapable: Agent Fair should have applied for and obtained a second warrant that would have authorized him to search Mr. Hulscher's cell phone data for evidence of firearms offenses.

The District Court rejected the Government's argument that this conclusion was impractical because it overlooked the ultimate touchstone of the Fourth Amendment: reasonableness. According to the Government, law enforcement agencies can permanently save all unresponsive data collected from a cell phone after a search for future prosecutions on unrelated charges. If the Government's argument is taken to its natural conclusion, then this opens the door to pretextual searches of a person's cell phone for evidence of other crimes. Under the Government's view, law enforcement officers could get a warrant to search an individual's cell phone for minor infractions and, then, use the data to prosecute felony crimes. No limit would be placed on the Government's use or retention of unresponsive cell phone data collected under a valid warrant. Therefore, the District Court rejected the Government's position that would allow for mass retention of unresponsive cell phone data as being inconsistent with the protections of the Fourth Amendment.

Next, the District Court held that whether Agent Fair knew about the Beadle County warrant was irrelevant. Initially, the District Court noted that the Government introduced no evidence that Agent Fair knew about the warrant. But even if Agent Fair were aware of the Beadle County warrant, the warrant was limited to a search for evidence relating to the counterfeiting charges, and a reasonable officer who read the search warrant would have known that. Thus, at best, the Government's position is that Agent Fair knew about the Beadle County search warrant and disregarded its parameters. Under either fact scenario—Agent Fair knew about the warrant or did not know about the warrant—the District Court held that a reasonably well-trained officer would have known that the search was illegal despite the issuing judge's authorization.

Furthermore, the District Court held that the plain view exception to the warrant requirement was inapplicable. In Horton v. California, 496 U.S. 128, 135 (1990), the United States Supreme Court explained that the plain view doctrine applies when law enforcement has a prior justification for a search and inadvertently comes across a piece of incriminating evidence. As the District Court had already explained in its Opinion, Agent Fair's search of the complete, unsegregated iPhone data

lacked a sufficient justification. Accordingly, the District Court found that the plain view doctrine did not apply.

Finally, the District Court determined that the exclusionary rule applied to the data on Hulscher's iPhone. The District Court explained that a violation of the Fourth Amendment does not automatically trigger the application of the exclusionary rule. Herring v. United States, 555 U.S. 135, 141 (2009)(citing United States v. Leon, 468 U.S. 897, 905-06 (1984)). In considering whether to exclude evidence as a remedy for a violation of a criminal defendant's constitutional rights, a district court must determine "the efficacy of the rule in deterring Fourth Amendment violations in the future." Id. at 141. The district court must weigh the benefits of applying the rule against its costs. Id.

Here, the District Court found that, when weighing these competing values, the balance tipped toward excluding the iPhone data. As noted by the Supreme Court in Herring, "[t]he principle cost of applying the [exclusionary] rule is, of course, letting guilty and possibly dangerous defendants go free . . . ." Id. In this case, the cost of applying the exclusionary rule was minimized because the evidence was peripheral in nature and was not directly related to the firearms offense.

The Government's actions also suggested that the evidence was not necessary for a conviction. Prior to Agent Fair's search of the iPhone data, the Government was ready to proceed with trial. If the issue had not come up shortly before the trial began, the Government would have tried its case, and the iPhone data would not have been used.

In contrast, the benefits of applying the exclusionary rule in this case were clear. If the exclusionary rule was not applied, law enforcement agencies would have carte blanche authority to obtain a warrant for all data on a cell phone, keep the unresponsive data forever, and then later use the data for criminal prosecutions on unrelated charges—erasing the protections specifically contemplated in Riley. Based on this weighing, the District Court overruled the Government's objection and suppressed the unsegregated iPhone data because the Government's review of Hulscher's unsegregated iPhone data constituted a search under the Fourth Amendment for which the Government should have first obtained a warrant. Because the Leon good faith exception and the plain view doctrine did not apply, the Government's search of Hulscher's iPhone data violated Hulscher's Fourth Amendment rights. Because the benefits of applying the exclusionary rule outweighed the costs of applying the rule, the District Court excluded the unsegregated iPhone data.

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***Note:*** *Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.*