4. An opinion from the U.S. District Court for the District of Connecticut denying a motion to suppress evidence from a cell phone where the warrant pursuant to which the cell phone had been seized broadly covered the entire contents of the cell phone and the government did not conclude the search of the cell phone until 47 days after the seizure.

In *United States v. Harry*, *U.S. v. Harry*, No. 3:21cr98 (JBA), 2022 WL 343963 (D. Conn, Feb 4, 2022), U.S. District Judge Janet Bond Arterton denied one of the Defendant's motion to suppress evidence derived from a search of his cell phone executed by a warrant (as well as evidence gathered from a pole camera positioned by law enforcement outside of his place of business).

The Drug Enforcement Agency (DEA) intercepted communications between Defendant and the target of an investigation in 2020 and found that Defendant and the target communicated on numerous occasions in furtherance of the alleged drug trafficking conspiracy using a cell phone. *Id*. at *1. The government obtained a search warrant the day before Defendant's arrest to seize and search the cell phone Defendant used to speak with the DEA's target. *Id*. at *2. The warrant attached a description of the cell phone, the times it might be seized, and the specific records and information on the cell phone to be searched. Upon Defendant's arrest on June 9, 2021, the police confirmed that his cell phone was the one that was used to communicate with the target. The cell phone was put in airplane mode, and the DEA began its forensic search two days later. On or about July 19, an agent conducted a manual search of the data.

Defendant argued that the evidence obtained from his cell phone should be suppressed because the warrant lacked particularity in violation of the Fourth Amendment. According to the Defendant, the lack of particularity allowed law enforcement to search broad categories of information without temporal limitation, and law enforcement delayed the search for 47 days after the seizure before concluding its search. The government responded that the warrant was sufficiently particular because it "specified the offenses for which there was probable cause, the warrant defined the place to be searched as Defendant's cell phone …, and it defined the types of information in connection with the suspected offenses sought from the cell phone." As for the lack of temporal restrictions, the government argued that this did not render a warrant invalid per se and the government was justified due to the scope of conduct under investigation. Finally, the government stated that the delay was not unreasonable as it was executed within the time constraints of Federal Rule of Criminal Procedure 41.

After explaining the general rule for particularity of warrants under the Fourth Amendment, Judge Arterton applied the rule in the context of electronic devices. She stated that courts "must be attuned to the technological features unique to digital media as a whole and to those relevant in a particular case." *Id*. at *3 (quoting *United States v. Ganias*, 824 F.3d 199, 213 (2d Cir. 2016)). She further stated that a warrant may therefore be broad in that "it authorizes the government to search an identified location or object for a wide range of potentially relevant material, without violating the particularity requirement." *Id*. (quoting *United States v. Ulbricht*, 858 F.3d 71, 102-03 (2d Cir. 2017)).

Judge Arterton concluded that the warrant, while broad, did not lack particularity in terms of the data to be searched, pointing to the attachments to the warrant as support. She stated that the first attachment clearly specified the property to be seized as well as the appropriate time and place such seizure may occur. The second attachment limited the warrant to searching data that might

reveal evidence that Defendant violated the drug trafficking offenses for which he was a suspect and listed the categories of data that might have revealed this evidence. This included photographs and videos, encrypted communications, contact lists, and notes, records, ledgers, and any documents indicative of drug trafficking.

Defendant argued that the warrant was still defective because it used the phrase "any and all data" throughout as to his specific criminal offenses and thus "impermissibly authorized agents to access locations within his cell phone beyond the scope [of] their stated probable cause." As an example, Defendant contested the search of photographs, digital notes, and ledgers on his cell phone because no information from the investigation suggested that Defendant had any such documents indicative of drug activity on his phone. Citing *United States v. Zemlyansky*, Defendant argued that the juxtaposition of a few specific locations in the same warrant authorizing a widespread general search for "any and all data" risked confusing the searching agent.

Judge Arterton was unpersuaded, distinguishing the instant search warrant from the one in *Zemlyansky*. *Id*. at *4; *see U.S. v. Zemlyansky*, 945 F. Supp. 2d 438, 460 (S.D.N.Y. 2013). First, the warrant in *Zemlyansky* did not direct the search officers to seize evidence related to or concerning any particular crime or type of crime and allowed officers to seize any cell phone found at a certain place of business that the officers believed could have been associated with unspecified criminal suspects. *Id*. (citing *Zemlyansky*, 945 F. Supp. 2d at 456-459). The *Zemlyansky* warrant also authorized officers to conduct boundless, discretionary searches of any electronic device found at that location. *Id*. (citing *Zemlyansky*, 945 F. Supp. 2d at 458-459). Judge Arterton stated that the warrant at issue had a narrower scope, limiting the search to specific criminal offenses stored on a single device.

Judge Arterton continued that the phrase "any and all data" did not confer unlimited discretion for officers to search for irrelevant data. She stated that law enforcement had probable cause that Defendant used his cell phone to engage in a drug conspiracy and therefore a reasonable basis to expect the cell phone to have incriminating evidence in many different forms. Judge Arterton further stated that "it will often be impossible to identify in advance the words or phrases that will separate relevant files or documents before the search takes place, because officers cannot readily anticipate how a suspect will store information related to the charged crimes." *Id*. (citing *Ulbricht*, 858 F.3d at 102). The warrant limited officers to searching only the records and information in the cell phone "that constitute evidence and instrumentalities of violations of [distribution of controlled substances, use of a communication faculty, and money laundering]." In areas where a specific criminal statute was not referenced, the warrant still referred to particular criminal conduct, showing that the whole search was based on suspicion of criminal activity and the searches were only pertaining to that activity.

Judge Arterton found that the lack of a time period restricting the relevant data to be searched did not invalidate the warrant because " [w]hile the lack of temporal limitations in a warrant is considered in evaluating a warrant's particularity, it is not the sole factor." *Id*. (citing *United States v. Wey*, 256 F. Supp. 3d 355, 388 (S.D.N.Y. 2017)). She added that the "complexity and duration of the alleged criminal activities may diminish the significance of temporal restrictions." Therefore, while a specific timeframe would have been beneficial, its absence did not invalidate the warrant.

Judge Arterton next rejected Defendant's argument that the search was unreasonably delayed. Defendant cited to authority from the Second Circuit suggesting that a monthlong delay to apply for a warrant exceeded what was ordinarily reasonable. *Id*. at *5. While Defendant argued that the issue in that case was the delay in searching a cell phone that had been seized, Judge Arterton disagreed, pointing out that the issue was seizing property pending the issuance of a search warrant. *Id*. (citing *U.S. v. Smith*, 967 F.3d 198, 205 (2d Cir. 2020)). She stated that Defendant's reading of authority was incorrect and did not contemplate delays in searching a cell phone seized pursuant to a valid warrant.

Judge Arterton instead cited the requirements under Federal Rule of Criminal Procedure 41 that law enforcement must execute a warrant within 14 days. Regarding ESI, that time period referred to the seizure or on-site copying of the media or information and not to any later off-site copying or review. *Id*. (citing Fed. R. Crim. P. 41(e)(2)(B)). Further citing the 2009 Advisory Committee Notes, Judge Arterton explained that the rules acknowledged the need for officers to "seize or copy the entire storage medium and review it later to determine what electronically storied information falls within the scope of the warrant." *Id*. (citing Fed. R. Crim. P. 42(e)(2)(B) advisory committee's notes to the 2009 amendment). She pointed out that the Advisory Committee also noted that practical reality meant that a substantial amount of time could be involved in the forensic imaging and review of information. Judge Arterton stated that the Government's Rule 41 violation should not be remedied by suppressing evidence unless "(1) there was prejudice in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule."

Judge Arterton stated that the affidavit supporting the search warrant included information about the amount of time the search would take and noted that the initial search of the cell phone took place the same day it was seized. *Id*. at *5. The government conducted a more thorough search when it deemed it technically practicable. On this basis, Judge Arterton found the delay reasonable, but even if it was not reasonable, the Defendant had not demonstrated prejudice or that it was the result of intentional and deliberate disregard of a provision in the rule. Therefore, suppression was not appropriate.