

**NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 17-3296

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UNITED STATES OF AMERICA

v.

ADAM SCOTT,  
Appellant

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On Appeal from the United States District Court  
for the Eastern District of Pennsylvania  
(D.C. Criminal Action No. 2-10-cr-00677-001)  
District Judge: Honorable Petrese B. Tucker

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Submitted Pursuant to Third Circuit LAR 34.1(a)  
August 26, 2019

Before: MCKEE, COWEN and RENDELL, Circuit Judges

(Opinion filed: September 18, 2019)

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[[APPENDIX B]]

## O P I N I O N\*

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### PER CURIAM

Adam Scott appeals from the denial of his motion for a new trial under Fed. R. Crim. P. 33, which was addressed to certain wiretap evidence. We will affirm.

#### I.

In 2012, Scott was convicted of federal drug and firearm offenses. The evidence against him at trial included the testimony of his co-conspirator and co-defendant Vincent Marchant, the testimony of another of Scott's co-conspirators Darryl Naylor, and substantial physical evidence. The evidence also included wiretap communications intercepted pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which were subject to the sealing requirement of 18 U.S.C. § 2518(8)(a).

After Scott's conviction, but before his sentencing, he moved for a new trial under Rule 33 on the ground that the Government had failed to produce orders sealing the wiretaps. After the Government produced those orders, Scott argued to the District Court that the orders required a new trial because they revealed the basis for a motion to suppress. The District Court invited Scott to make a motion to suppress if he wished, but Scott did not do so and the District Court found that the delayed production of the sealing

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\* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

orders did not prejudice him. The District Court then denied Scott's Rule 33 motion and sentenced him to 300 months in prison.

Scott appealed and argued, *inter alia*, that the sealing orders revealed that the wiretaps were not timely sealed,<sup>1</sup> that the alleged defect required suppression of the wiretap evidence and a new trial, and that the District Court should have held a hearing on that issue. We affirmed. See United States v. Scott, 607 F. App'x 191 (3d Cir. 2015). In doing so, we held that Scott waived his wiretap-related arguments by failing to file a motion to suppress as the District Court invited him to do. See id. at 199-201.

About three months later, Scott filed a second Rule 33 motion for a new trial, which is the motion at issue here. The timing of Scott's motion required it to be based on "newly discovered evidence." Fed. R. Crim. P. 33(b). Scott, however, again relied on the same wiretap sealing orders and again argued that the wiretap evidence should be suppressed because the wiretaps were not timely sealed. In particular, Scott challenged the sealing of three sources of wiretap evidence. The first was a wiretap on the phone of Scott's co-conspirator and co-defendant Marchant. The second were wiretaps on two of Scott's own phones registered under the names "Leonardo DiCaprio" and "Jason James." The third was a wiretap on the phone of Philip Dimatteo, who was neither a defendant

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<sup>1</sup> Communications intercepted pursuant to a Title III wiretap order must be made available to a judge and sealed "[i]mmediately upon the expiration of the period of the order, or extensions thereof[.]" 18 U.S.C. § 2518(8)(a). We have interpreted "immediately" to mean "as soon as administratively practical." United States v. Carson, 969 F.2d 1480, 1487 (3d Cir. 1992).

nor a witness at trial. Scott also argued that the Government's failure to produce the sealing orders earlier violated Brady v. Maryland, 373 U.S. 83 (1963).

In response to Scott's motion, the Government requested an evidentiary hearing. Thus, the District Court held a hearing at which the Government presented testimony on the circumstances surrounding the sealing of these wiretaps and at which Scott questioned the witnesses and made argument pro se.

The District Court later denied Scott's motion. The District Court, applying the framework set forth in United States v. Ojeda Rios, 495 U.S. 257, 266-67 (1990), and Carson, 969 F.2d at 1487, concluded that the Marchant wiretap evidence was timely sealed. The court further concluded that, even if it were not, a new trial was not warranted because suppression of that evidence would not likely have resulted in acquittal given the other evidence against Scott, including Marchant's testimony.

In light of its ruling on the Marchant wiretap evidence, the District Court found it unnecessary to address sealing of the Scott wiretap evidence because it concluded that all communications intercepted by that wiretap also were intercepted and available through the Marchant wiretap. The District Court further found it unnecessary to address the Dimatteo wiretap because Dimatteo was not a witness or defendant, the Government did not introduce any evidence relating to the Dimatteo wiretap, and Scott provided no reason to believe that the Dimatteo wiretap had any bearing on the case against him. Finally, the District Court concluded that the wiretap sealing orders were not material evidence under

Brady because, for the reasons it previously explained, they were not reasonably likely to result in suppression. Scott appeals.<sup>2</sup>

## II.

The Government argues for the first time on appeal that Scott waived the wiretap sealing issue and that his evidence was not “newly discovered” for purposes of Rule 33 because Scott relied on the same sealing orders in his previous Rule 33 motion and we affirmed the denial of that motion on the ground that Scott had waived his wiretap-related challenges. The Government is right and, if it had taken that position in the District Court, that should have been the end of the matter.

As explained above, however, the Government instead affirmatively requested an evidentiary hearing. (ECF No. 201 at 13). The Government does not acknowledge that request in its brief, though it concedes that it did not raise these arguments below. The Government nevertheless argues that we should affirm on these alternative grounds because they are supported by the record. We could do so if the Government merely forfeited these issues as opposed to affirmatively waiving them. See TD Bank N.A. v. Hill, 928 F.3d 259, 276 n.9 (3d Cir. 2019). There may be some question in that regard because it appears that the Government’s request for a hearing may have been based on its misunderstanding of our prior decision.

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<sup>2</sup> We have jurisdiction under 28 U.S.C. § 1291. We review for abuse of discretion the District Court’s denial of a Rule 33 motion for a new trial, though in doing so we review legal issues de novo. See United States v. Quiles, 618 F.3d 383, 390 (3d Cir. 2010).

We need not resolve that issue, however, because we can resolve this appeal on other grounds, including in large part a different waiver or forfeiture of Scott’s own.<sup>3</sup> As explained above, the District Court held that the Marchant wiretap evidence was timely sealed and, in light of that ruling, it did not address the sealing of the Scott wiretap evidence. It also did not address the sealing of the Dimatteo wiretap evidence because Scott raised nothing suggesting that such evidence had any bearing on the case against him. Thus, the District Court addressed the sealing of the Marchant evidence only.

Scott, however, does not challenge the District Court’s ruling on the Marchant evidence at all. Instead, he writes in his opening brief that he “will focus on the two Scott wiretaps and the Dimatteo wires” and proceeds to raise arguments addressed to the sealing of that evidence only. (Appellant’s Br. at 1.) And even after the Government pointed out as much, Scott did the same in reply. Thus, Scott has provided us with no basis to review whether the sealing of the Marchant evidence was timely. We decline to do so.<sup>4</sup>

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<sup>3</sup> We have liberally construed Scott’s pro se filings in reaching this conclusion. We note, however, that Scott is a sophisticated litigant who had the benefit of a thorough counseled brief raising these wiretap issues in his prior appeal. We also note that Scott was on notice from our decision in his prior appeal of the need to properly raise issues in order to preserve them.

<sup>4</sup> We note, however, that the plain language of the relevant statute suggests that the Marchant evidence was timely sealed. Wiretap evidence must be sealed “[i]mmediately upon the expiration of the period of the order, or extensions thereof[.]” 18 U.S.C. § 2518(8)(a) (emphasis added). In this case, surveillance of Marchant ended with his arrest on June 2, 2010, and the wiretap evidence was sealed on June 10, 2010. The Marchant wiretap order, however, did not expire until June 25, 2010. Thus, the evidence was sealed even before the time required by the plain language of the statute. Despite that plain language, and as the District Court noted, we have suggested that the relevant statutory scheme might require the sealing of wiretap evidence as soon as practical after

Scott's arguments regarding the Scott and Dimatteo wiretaps do not meaningfully challenge the District Court's rulings or otherwise provide any basis to disturb its decision. First, while Scott argues that the Scott wiretap evidence was not timely sealed, he does not challenge or even acknowledge the District Court's ruling that all the communications intercepted as a result of the Scott wiretaps also were intercepted and available under the Marchant wiretap. The Government, to its credit, concedes that there were two exceptions. After surveillance under the Marchant wiretap ended, detectives intercepted through the Scott "Jason James" wiretap one conversation with and one voicemail left by one "Lopez," whom Scott's co-defendant Naylor identified at trial as one of Scott's suppliers. In the brief conversation, Scott asked, "is it here?" and Lopez answered "no . . . maybe on Friday." Similarly, in a voicemail that Lopez left for Scott several days later, Lopez said "call me, it's ready."<sup>5</sup> Neither the conversation nor the voicemail revealed the identity of the "it." The Government argues that suppression of this information could not possibly have made a difference at trial given Naylor's extensive testimony about his and Scott's dealings with Lopez and all of the other evidence against Scott. Scott has not argued otherwise and, in any event, we agree.

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surveillance ends. See United States v. Vastola, 915 F.2d 865, 875 n.16 (3d Cir. 1990). In light of Scott's waiver or forfeiture of this issue, we decline to resolve it in this case.

<sup>5</sup> The conversation and voicemail were admitted at trial as the Government's Exhibits 94a and 100a and are included in the appendix filed in Scott's previous appeal, C.A. No. 13-3572, at App'x 1149-50 and 1156.

Second, Scott also has provided no basis to disturb the District Court’s conclusion that it was not necessary to address the sealing of the Dimatteo wiretap evidence. Scott asserts without elaboration in his opening brief that “[e]vidence derived from those wires was used at trial.” (Appellant’s Br. at 5.) For the first time in reply, he then asserts that the warrant used for a GPS search that resulted in his apprehension “contained evidence derived directly from the two Dimatteo wiretaps.” (Appellant’s Reply Br. at 8.) Even in reply, however, Scott has provided no details in that regard. Among other things, he has not specified what evidence derived from the Dimatteo wiretaps was included in that warrant or provided any reason to believe that its exclusion would have resulted in a lack of probable cause (which the Government argues at length it would not have done).<sup>6</sup>

Finally, Scott argues that the District Court erred in denying his Brady claim based on the Government’s belated production of the sealing orders. The District Court denied that claim on the ground that, as it discussed in connection with the Marchant wiretap, earlier production of the sealing orders would not have resulted in suppression.

Once again, Scott has not addressed that issue. Instead, he devotes most of his briefing on this point to arguing that the Government waived any objection to his Brady claim by failing to contest it below. Even if the Government had waived any objection, it is rarely appropriate to disturb a conviction on the basis of a default. Cf. Bleitner v. Welborn, 15 F.3d 652, 653 (7th Cir. 1994) (addressing habeas challenge). In any event,

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<sup>6</sup> It appears to remain an open question in this Circuit whether a delay in sealing wiretap evidence prevents its use to show probable cause for other searches. See Carson, 969 F.2d at 1500; Vastola, 915 F.2d at 876 n.19. We need not address that issue today.

the Government argued below that the sealing orders did not reveal a basis to suppress the wiretap evidence, and that is the ground on which the District Court denied Scott's Brady claim. Scott has not meaningfully challenged that point as discussed above.

### III.

For these reasons, we will affirm the judgment of the District Court. Scott's emergency motion to stay this appeal is denied.<sup>7</sup> To the extent that Scott's filings can be construed to request any other form of relief, including oral argument, they are denied as well.

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<sup>7</sup> Scott asks that we stay this appeal so that the Government can "respond" to new evidence that he claims to have discovered and so that he can raise his new evidence with the District Court. Scott's motion is not an emergency, and there is no reason for a stay. The Merchant wiretap evidence at issue here was from 2010, and there is no dispute that (the sealing issue aside) the Government fully disclosed that evidence. Scott now claims that he recently discovered the existence of a previous Merchant wiretap in 2009 that the Government never disclosed. That issue is different and does not warrant consideration by the District Court before resolution of this appeal. Thus, Scott's request to stay this appeal is denied. Scott further requests that, if we decline to stay this appeal, we provide instructions on how he should proceed with his new claim in the District Court. We decline to provide that legal advice. See Mala v. Crown Bay Marina, Inc., 704 F.3d 239, 243-44 (3d Cir. 2013). Thus, we express no opinion on whether or how Scott can raise this claim with the District Court, which can address that issue if necessary in the first instance.

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Submitted Pursuant to Third Circuit LAR 34.1(a)  
August 26, 2019  
Before: MCKEE, COWEN and RENDELL, Circuit Judges

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**JUDGMENT**

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This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on August 26, 2019.

On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered October 4, 2017, be and the same is hereby affirmed. Costs will not be taxed.

All of the above in accordance with the opinion of this Court.

UNITED STATES OF AMERICA v. ADAM SCOTT  
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA  
2017 U.S. Dist. LEXIS 164937  
CRIMINAL ACTION NO. 10-677-1  
October 4, 2017, Decided  
October 4, 2017, Filed

**Editorial Information: Prior History**

United States v. Scott, 607 Fed. Appx. 191, 2015 U.S. App. LEXIS 6025 (3d Cir. Pa., Apr. 14, 2015)

**Counsel** {2017 U.S. Dist. LEXIS 1}For USA, Plaintiff: MARIA M. CARRILLO,  
LEAD ATTORNEY, U.S. ATTORNEY'S OFFICE, PHILA, PA.

**Judges:** Hon. Petrese B. Tucker, United States District Judge.

**Opinion**

**Opinion by:** Petrese B. Tucker

**Opinion**

**MEMORANDUM**

Tucker, J.

Presently before the Court is Defendant Adam Scott's *Pro Se* Rule 33(b) Motion for New Trial (Doc. 197). Upon careful consideration of Defendant's Motion, the Government's Response in Opposition thereto (Doc. 201), and each Party's argument presented during the January 26, 2016 evidentiary hearing, Defendant's Motion is DENIED for the reasons set forth below.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

During the course of an investigation, the Chester County District Attorney's Office suspected Vincent Merchant and Adam Scott of trafficking drugs throughout the Commonwealth of Pennsylvania. The district attorney's office sought authorization from the Honorable Paula Francisco Ott of the Superior Court of Pennsylvania to conduct wiretap surveillance on telephones utilized by Merchant and Scott.

**A. The Merchant Wiretap**

On April 26, 2010, Judge Ott issued an order authorizing the wiretap of Merchant's cell phone for thirty (30) days. On May 26, 2010, Judge Ott's order was extended for thirty (30) days, until June 25, 2010. The wiretap{2017 U.S. Dist. LEXIS 2} surveillance of Merchant's phone ended on June 2, 2010, as a result of Merchant's arrest.

Judge Ott informed the Assistant District Attorney ("ADA") assigned to the case that her practice was to seal wiretap disks only if court security was present to take custody of the disks upon her sealing and to transport them immediately to the office of the Superior Court Prothonotary in Philadelphia. Judge Ott directed the ADA to report to her chambers for the sealing of the wiretaps on June 10, 2010. In accordance with Judge Ott's practice, the disk for the Merchant Wiretap was sealed and

transported to the office of the Superior Court Prothonotary on June 10, 2010, fifteen (15) days before the June 25, 2010, expiration date of the wiretap order.

### **B. The Scott Wiretaps**

On May 18, 2010, Judge Ott authorized the wiretap of a cell phone used by Scott in the name of "Leonardo DiCaprio." On May 19, 2010, Judge Ott authorized the wiretap of another cell phone used by Scott in the name of "Jason James." Because Defendant Scott used the Leonardo DiCaprio line to communicate with Marchant, beginning on May 18, 2010, conversations between Scott and Marchant were recorded on both the Marchant Wiretap and {2017 U.S. Dist. LEXIS 3} the Scott Leonardo DiCaprio Wiretap. The order for the Leonardo DiCaprio line expired on Thursday, June 17, 2010, and the order for the Jason James line expired on Friday, June 18, 2010.

During the week of June 21, 2010, security was unavailable to assist Judge Ott in sealing the Scott wiretap. In addition, Judge Ott was not in chambers from June 28, 2010 to July 6, 2010. Given the security and storage concerns that the location of Judge Ott's chambers presented, Judge Ott ordered that the wiretap disks be stored in the police department during the interim period. In accordance with Judge Ott's direction, the Scott Wiretap disks were stored in a compartment of a safe in the police department. Upon her return to chambers on July 6, 2010, Judge Ott directed the Scott Wiretaps to be sealed. The Scott Wiretaps were sealed eighteen and nineteen days, respectively, after the expiration of the wiretap orders.

On March 30, 2011, a federal grand jury returned a second superseding indictment charging Scott and co-Defendant Marchant with conspiracy to distribute five kilograms or more of cocaine and 280 grams or more of cocaine base ("crack"), in violation of 21 U.S.C. § 846. The indictment also charged Scott {2017 U.S. Dist. LEXIS 4} with one count of distribution of 28 grams or more of crack, in violation of 21 U.S.C. § 841(a)(1); one count of possession of crack with intent to distribute, in violation of 21 U.S.C. § 841(a)(1); one count of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c); and one count of possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1).

Scott proceeded to trial on July 9, 2012. Count 11, charging Scott with possession of a firearm by a convicted felon, was bifurcated from the other counts for trial. On July 16, 2012, the jury returned a verdict finding Scott guilty, having made specific findings that Scott conspired to distribute five kilograms or more of cocaine and conspired to distribute 280 grams or more of crack. Count 11, the felon in possession charge, was then submitted to the jury and Scott was found guilty.

Prior to his sentencing, Scott filed: (1) a request for an evidentiary hearing (Doc. 154); in which he asserted that the Government had not produced the sealing orders for the wiretaps; (2) a motion to compel discovery (Doc. 158); and (3) motions for new trial and judgment of acquittal (Docs. 161, 162), in which he alleged that the Government had committed discovery violations including {2017 U.S. Dist. LEXIS 5} failure to produce wiretap sealing orders.

During Scott's sentencing proceeding on August 8, 2013, the Court heard argument on Scott's motions and denied Scott's motions for new trial and judgment of acquittal. The Court determined that the mere fact that Scott did not receive the sealing orders until after trial did not entitle him to relief.<sup>2</sup> Scott was required to show that he suffered prejudice from the delayed production, but he failed to meet that burden. The Court stated that Scott could file a motion to suppress, however, he made no such motion.

The Court imposed a below-guideline range sentence of twenty (20) years imprisonment and a mandatory consecutive term of five (5) years imprisonment on the conviction for violating 18 U.S.C. § 924(c). The Court also imposed ten (10) years supervised release, a fine of \$1,000, and a \$500

special assessment. On appeal, the Third Circuit affirmed the judgment of the Court after finding that Scott's failure to move for suppression of the wiretaps after receiving the sealing orders constituted a waiver of the motion. *United States v. Adam Scott*, 607 F. App'x. 191, 200 (3d Cir. 2015) (not precedential).

On July 13, 2015, Scott filed the instant motion for new trial pursuant to Federal Rule of Criminal Procedure 33(b)(1) alleging that: (1) the sealing order, disclosed to Scott after trial, is newly discovered evidence justifying a new trial; and (2) the Government's failure to disclose the sealing orders for the Marchant and Scott Wiretap disks prior to trial constitutes a *Brady* violation.<sup>3</sup>

## II. STANDARD OF REVIEW

Federal Rule of Criminal Procedure 33 governs motions for a new trial: "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). A decision under Rule 33 is committed to the sound discretion of the district court. *United States v. Cimera*, 459 F.3d 452, 458 (3d Cir. 2006); "Unlike an insufficiency of the evidence claim, when a district court evaluates a Rule 33 Motion it does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government's case." *United States v. Silveus*, 542 F.3d 993, 1004, 50 V.I. 1101 (3d Cir. 2008) (quoting *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002)). Even if the court believes the jury verdict is contrary to the weight of evidence, it cannot order a new trial unless it believes "that there is a serious danger that a miscarriage of justice has occurred—that is, that an innocent person has been convicted." *Id.* at 1004-05 (quoting *Johnson*, 302 F.3d at 150)).

Five requirements must be satisfied before a court may grant a new trial on the basis of newly discovered evidence:

(a) the evidence must be in fact newly discovered, i.e., discovered since trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal. *United States v. Quiles*, 618 F.3d 383, 388-89 (3d Cir. 2010) (quoting *United States v. Saada*, 212 F.3d 210, 216 (3d Cir. 2000)). While the decision to grant or deny a motion for a new trial lies within the discretion of the district court, "the movant has a 'heavy burden' of proving each of these requirements." *Cimera*, 459 F.3d at 458 (citing *Saada*, 212 F.3d at 216). Rule 33 Motions are disfavored and should be "granted sparingly and only in exceptional cases." *Silveus*, 542 F.3d at 1005 (quoting *Gov't of V.I. v. Derricks*, 810 F.2d 50, 55, 23 V.I. 449 (3d Cir. 1987)).

## III. DISCUSSION

Scott's Rule 33(b) Motion for New Trial is denied because: (1) the Government has offered a satisfactory explanation for any sealing delay that may have occurred; and (2) the newly discovered evidence would not likely result in an acquittal. To succeed on a motion for new trial based on newly discovered evidence, the movant has the heavy burden of establishing that: (a) the evidence is in fact newly discovered; (b) the movant was diligent; (c) the evidence relied on is not merely cumulative or impeaching; (d) the newly discovered evidence is material to the issues involved; and (e) it is probable that the newly discovered evidence would produce an acquittal. *Quiles*, 618 F.3d at 388.

The Government does not dispute that the orders were not produced until after trial, that Scott was diligent in requesting the sealing orders, or that the orders are not cumulative or impeaching.

evidence. However, the Parties dispute whether the newly discovered evidence is material and whether the newly discovered evidence would probably produce an acquittal. The Government contends that the newly discovered evidence—the sealing orders—is not material because the sealing orders demonstrate that the recordings were timely sealed. Therefore, the recordings would not have been suppressed, even if the sealing orders were produced before trial. Further, the Government argues that, because the recordings were sealed in accordance with the law, and because the evidence of Scott's guilt was overwhelming even without the recorded conversations, a new trial would not result in an acquittal.

Scott contends that, had the sealing orders been produced prior to trial, he would have moved to suppress the recordings and all other evidence derived from the recordings pursuant{2017 U.S. Dist. LEXIS 9} to 18 U.S.C. § 2518(10)(a) because the sealing orders demonstrate that the wiretap recordings were not timely sealed. Scott argues that in the absence of this evidence, a new trial would produce an acquittal.

#### **A. The Merchant Wiretap Disk was Properly Sealed.**

The Court finds that the Merchant Wiretap was properly sealed.<sup>4</sup> The Federal Wiretap Act ("Wiretap Act"), which governs wiretap sealing, provides that:

Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders.18 U.S.C. § 2518(8)(a).<sup>5</sup> The purpose of this sealing requirement "is to ensure the reliability and integrity of evidence obtained by means of electronic surveillance." *United States v. Carson*, 969 F.2d 1480, 1487 (3d Cir. 1992).

In *United States v. Carson*, the Third Circuit Court of Appeals established that courts must consider two questions when determining whether wiretaps should be suppressed because of sealing delays. 969 F.2d at 1491 (citing *United States v. Vastola*, 915 F.2d 865, 875 (3d Cir. 1990)). First, the court must consider whether the wiretaps were sealed immediately. *Carson*, 969 F.2d at 1491. If the court finds that the wiretaps were sealed immediately, the court's inquiry must end. *Id.* However, if the court finds that the wiretaps{2017 U.S. Dist. LEXIS 10} were not sealed immediately, the court must determine whether the Government has offered a satisfactory explanation for the sealing delay that was objectively reasonable. *Id.*

Section 2518(8)(a) requires that wiretap recordings be sealed "immediately upon the expiration of the period of the order, or extension thereof . . ." The Third Circuit has defined "immediately," in the context of § 2518(8)(a), to mean "as soon as practical" *Id.* However, where surveillance ends prior to the expiration of the order authorizing the wiretap, our case law is silent as to which date—the date surveillance ends or the date the order expires—is controlling for purposes of determining whether there was a delay in sealing. Neither the United States Supreme Court nor the Third Circuit has resolved the issue of whether the Government must seal the tapes upon the termination of the surveillance or upon the expiration of the order authorizing the wiretap. *United States v. Mastronardo*, 987 F. Supp. 2d 545, 558 n.8 (E.D. Pa 2013) (citing *Vastola*, 915 F.2d at 875 n.16).

Scott argues that the recordings should have been sealed immediately after surveillance ceased. Thus, according to Scott, the recordings should have been sealed on Wednesday, June 2, 2010, when surveillance ended as a result of Merchant's arrest. There is a basis to support{2017 U.S. Dist. LEXIS 11} Scott's contention that the wiretap should have been sealed as soon as practical after the surveillance ended. The Wiretap Act's legislative history indicates that "the period of authorized interception is intended to begin when the interception—in fact—begins and terminates when the

interception-in fact-terminates." S. Rep. No. 90-1097, at 103 (1968). Considering this legislative history, Scott's argument that the wiretap recordings should have been sealed after surveillance ended is plausible.

However, the Court need not resolve the issue because, even if the Court were to find that the Marchant Wiretap was not sealed immediately, the Court finds that the Government's reliance on the express provision of the Wiretap Act was reasonable, and therefore the delay, to the extent any occurred, was excusable. A literal reading of § 2518(8)(a) necessitates a finding that the Marchant wiretap was sealed "immediately" within the meaning of § 2518(8)(a). The statute states that the Government's sealing obligation arises "immediately upon the expiration of the period of the order, or extensions thereof . . ." 18 U.S.C. § 2518(8)(a). The recording period for the Marchant wiretap was set to expire on June 25, 2010. However, the Marchant wiretap{2017 U.S. Dist. LEXIS 12} was sealed 15 days before the expiration of the extension of Judge Ott's order on June 10, 2010. Thus, if § 2518(8)(a) is read literally, there is no question that the wiretap was sealed immediately. See *United States v. Vastola*, 915 F.2d 865, 875 n.16 (3d Cir. 1990) (stating that the Supreme Court, in *United States v. Ojeda Rios*, 495 U.S. 257, 110 S. Ct. 1845, 109 L. Ed. 2d 224 (1990), read § 2518(8)(a) literally). Therefore, it was objectively reasonable for the Government to rely on the statute's express provision for sealing after the order or extension expires. See *United States v. Ojeda Rios*, 495 U.S. 257, 266, 110 S. Ct. 1845, 109 L. Ed. 2d 224 (1990) ("In establishing a reasonable excuse for a sealing delay, the Government is not required to prove that a particular understanding of the law is correct, but rather only that its interpretation was objectively reasonable at the time.").

In addition, the ADA's reliance on Judge Ott's decision to wait until June 10, 2010, to seal the wiretap disk provides adequate justification for the delay. The ADA responsible for the wiretap contacted Judge Ott to arrange the sealing of the Marchant wiretap disk on Monday, June 7, 2010. Judge Ott informed the ADA that her practice was to seal the wiretap disk only if court security was available to take custody of the disk upon her sealing. In keeping with this practice, Judge Ott instructed the ADA to report to her chambers on June 10, 2010, in order{2017 U.S. Dist. LEXIS 13} to seal the disk. The disk was sealed in accordance with Judge Ott's directions. See 18 U.S.C. § 2518(8)(a) (providing that the "recording shall be made available to the judge issuing such order and sealed under his directions"). Therefore, the Court finds that the seven-day delay, which included an intervening weekend, constituted an excusable administrative delay. See *Carson*, 969 F.2d at 1488 (explaining that short delays necessitated by the process required to comply with the provisions of the Wiretap Act are justified).

Finally, Scott's motion for new trial must be denied because, even if the wiretap recordings had been suppressed, a new trial would not result in an acquittal given the overwhelming evidence establishing Scott's guilt. Scott's co-defendant, Vincent Marchant, testified against Scott at length and described everything that was discussed in his telephone conversations with Scott. Thus, the substance of the wiretap disk was available through Marchant's testimony. This testimony was corroborated by testimony provided by several of Scott's co-conspirators. Physical evidence also corroborated the witnesses against Scott. Therefore, while the recordings were useful corroboration of the testimony presented at trial,{2017 U.S. Dist. LEXIS 14} their absence in a new trial would not likely result in an acquittal.

## **B. Brady Violation**

Scott contends that the Government's failure to produce the wiretap seal orders prior to trial constituted a *Brady* violation. *Brady v. Maryland* stands for the proposition that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the

evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *United States v. Reyeros*, 537 F.3d 270, 281 (3d Cir. 2008). "A *Brady* violation has three components: the evidence at issue must be favorable to the defendant; it must be material; and it must have been suppressed by the prosecution." *Id.* According to Scott, the wiretap seal order was favorable to his defense because, had it been produced, Scott would have used the seal order to demonstrate that the wiretap was not timely sealed. This would have resulted in the suppression of the wiretap recordings. Scott contends that the wiretaps are material because they were used as justification for search warrants that resulted in the seizure of evidence, and the wiretap recordings were played to the jury at trial. Finally, Scott alleges that the Government has{2017 U.S. Dist. LEXIS 15} clearly suppressed evidence because he did not receive the seal orders until after his trial.

Scott's motion for new trial based on a *Brady* violation is denied because the sealing order was not material. The failure to disclose *Brady* evidence only requires a new trial when "the evidence is material, meaning there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Hill*, 659 F. App'x 707, 711 (3d Cir. 2016) (internal quotations omitted), cert. denied, 137 S. Ct. 1109, 197 L. Ed. 2d 212 (2017). Here, the sealing order was not material because it is not likely that the introduction of the sealing order would have changed the outcome of Scott's trial. While Scott argues that the production of the sealing order would have led to the suppression of the wiretap recordings, the Court disagrees. As discussed above, the wiretap recording would have been admitted into evidence because any delay in sealing the wiretap was excusable in light of the Government's objectively reasonable reliance on the express language of the Wiretap Act and the Government's reliance on Judge Ott's directives for sealing wiretaps. Because the sealing orders were not material, there was no *Brady* violation.

#### **IV. CONCLUSION{2017 U.S. Dist. LEXIS 16}**

For the reasons stated above, Scott's *Pro Se* Rule 33(b) Motion for New Trial is DENIED. An appropriate order follows.

#### **ORDER**

**AND NOW**, this 4th day of October, 2017, upon consideration of Defendant Adam Scott's *Pro Se* Rule 33(b) Motion for New Trial (Doc. 197), **IT IS HEREBY ORDERED AND DECREED** that the Motion is **DENIED**.<sup>1</sup>

**BY THE COURT:**

**/s/ Petrese B. Tucker**

**Hon. Petrese B. Tucker, U.S.D.J.**