

Appendix A

Opinion of 11th Circuit

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-11690

D.C. Docket No. 1:13-cr-00130-SCJ-JFK-3

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

MARLON R. MILLER,
a.k.a. Marlon Raashon Miller,

Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(May 30, 2019)

Before MARCUS and BLACK, Circuit Judges, and RESTANI,* Judge.

PER CURIAM:

Marlon R. Miller appeals following his conviction and sentence for offenses

* Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

related to trafficking heroin. Miller was convicted of conspiracy to possess with intent to distribute 1 kilogram or more of heroin, attempting to possess with intent to distribute 1 kilogram or more of heroin, and possession with intent to distribute 100 grams or more of heroin, in violation of 21 U.S.C. §§ 841 and 846. On appeal, Miller challenges the district court's orders sealing certain documents related to a joint internal investigation by the Drug Enforcement Administration ("DEA") and Department of Justice as a violation of his right to a public trial under the First and Sixth Amendments and the common-law right of access. Miller also argues that the sealing order prevented him from presenting a complete defense. Finally, Miller claims that the district court erred in stating that the government may be permitted to introduce rebuttal evidence related to a confidential informant's work for the DEA after his arrest. After careful review, we affirm Miller's conviction and sentence. Because we write for the parties, we set out facts only as they are needed in support of our analysis.

As an initial matter, we deny Miller's claim that this merits panel should decide his previous motion for reconsideration of his motion to lift the protective order. "A party may file only one motion for reconsideration with respect to the same order. Likewise, a party may not request reconsideration of an order disposing of a motion for reconsideration previously filed by that party." 11th Cir. R. 27-3. Because Miller has filed two motions to lift the protective order to this

Court, Miller's renewed motion is an impermissible successive motion for reconsideration.

We generally review for abuse of discretion a district court's refusal to unseal documents, *see United States v. Ignasiak*, 667 F.3d 1217, 1238 n.25 (11th Cir. 2012), and evidentiary rulings. *See United States v. Perez-Oliveros*, 479 F.3d 779, 783 (11th Cir. 2007). Where an issue is raised for the first time on appeal, however, this Court reviews the issue for plain error. *United States v. Clark*, 274 F.3d 1325, 1326 (11th Cir. 2001). Under plain error review, the defendant must show (1) an error, (2) that was plain, and (3) affected the defendant's substantial rights. *United States v. Olano*, 507 U.S. 725, 732 (1993). When these factors are met, this Court may exercise its discretion and correct the error if it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736. To preserve an issue for appeal, a party "must articulate the specific nature of his objection . . . so that the district court may reasonably have an opportunity to consider it." *United States v. Carpenter*, 803 F.3d 1224, 1237 (11th Cir. 2015); *see also United States v. Straub*, 508 F.3d 1003, 1011 (11th Cir. 2007) (stating that a party must object in a manner "sufficient to apprise the trial court and the opposing party of the particular grounds upon which appellate relief will later be sought"). Although Miller objected to the sealing of the documents and the denial of copies of those documents on grounds under *Brady v. Maryland*, 373 U.S. 83 (1963), he

did not object that such action deprived him of a right to a public trial or of the right to a complete defense as he does now. Thus, we review for plain error.

The district court did not plainly err in sealing the investigation documents and adopting procedures limiting access to those documents. The presumption of openness in court proceedings granted by the Constitution “may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *See Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984). “The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.” *Id.* Here, the district court sealed the documents and adopted proposed disclosure procedures “for good cause shown” in the government’s motions. In doing so, it agreed with the government’s argument that Miller had minimal interest in the materials because they were likely irrelevant and inadmissible under Federal Rules of Evidence (“FRE”) 401 and 402, and because the government would not call certain individuals referenced in those investigation documents at trial. Moreover, the court also adopted the government’s position that its interest was grounded in protecting sensitive non-public information contained in an ongoing investigation involving government agents and confidential informants. At base, the district court found that closure was essential to preserve the government’s higher interest

and its adoption of procedures preventing disclosure of information solely related to the investigation ensured that the order was narrowly tailored to serve that interest.¹ Moreover, because Miller was permitted to access the investigation documents under the adopted disclosure procedures, the district court did not violate Miller's common-law right to access with regard to those documents. *See Romero v. Drummond Co.*, 480 F.3d 1234, 1246 (11th Cir. 2007). Accordingly, the closure order was properly entered.

In addition, the district court did not commit plain error in denying Miller's request for copies of the investigation documents. First, Miller claims that the court applied an exceedingly narrow definition of relevance to determine if the investigation documents should be disclosed to him. But Miller never identified specific information within the documents to grant the court the opportunity to determine if such documents were relevant, either as impeachment or direct evidence, to the elements of the crime or to support a defense. As extensively discussed in submitted filings and pretrial conferences, information in the documents was determined to be relevant to Miller's defense only as to a

¹ Relying largely on *United States v. Ochoa-Vasquez*, 428 F.3d 1015 (11th Cir. 2005), Miller argues that the court was required to explicitly articulate in its order the overriding interest and findings that the sealing order was essential and narrowly tailored. But in *Ochoa-Vasquez*, neither the "district court's sealing orders nor its denials of access to court records articulated the reason for the closure or *the evidence that supported the need for closure.*" *Id.* at 1030 (emphasis added). Here, however, the court's adoption of the government's submission is sufficient support for the need for closure and enables this Court to adequately determine whether the sealing order was properly entered.

confidential informant's alleged role in the charged conspiracy before Miller's arrest. The court's *in camera* review, therefore, was limited to determining whether the confidential informant worked for the DEA before Miller's arrest, such that, as part of Miller's entrapment defense, it would tend to prove government inducement of the crime. Because the court's review revealed that it was implausible for the documents to tend to show this fact, it was deemed not relevant. Thus, the court did not err in determining that the alleged relevancy of the documents was not a sufficient reason to unseal the documents and grant Miller copies.

Second, Miller claims that the failure to provide him with copies of these documents violated his right to present a complete defense. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (stating that the Constitution guarantees a right to present a complete defense). But Miller's right to present a complete defense was not violated because Miller had access to all of the sealed documents and was not prohibited from making a defense based on the information contained in those documents. Miller's decision not to present a defense at trial based on the information in the investigation documents appears to have been a strategic choice to avoid further unfavorable evidence by the government.

Finally, the district court did not err in stating that Miller could potentially open the door to unfavorable evidence obtained by the government if he elicited

testimony regarding the confidential informant's work for the DEA after his arrest. The government had repeatedly indicated that it would not introduce the unfavorable evidence, which was obtained as the result of the informant's work for the DEA after Miller's arrest. Because the evidence was pertinent to the informant's work for the DEA after Miller's arrest, the district court did not commit plain error in giving Miller such a warning or in deferring the issue of the admissibility of the government's rebuttal evidence for trial.

AFFIRMED.

Appendix B

District Court Judgment

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

UNITED STATES OF AMERICA

-vs-

Case No. 1:13-CR-0130-03-SCJ

**MARLON R. MILLER
a/k/a Marlon Raashon Miller**

**Defendant's Attorney:
Elizabeth Vila Rogan**

**JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)**

The defendant was convicted by a jury of Counts 1, 2 and 3 of the Indictment.

Accordingly, the defendant is adjudged guilty of such count(s) which involves the following offense:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Count No.</u>
21 U.S.C. §§846, 841(b)(1)(A)(i), 851	Possession with the Intent to Distribute at Least 1 Kilogram of Heroin	1
21 U.S.C. §§846, 841(b)(1)(A)(B)(i), 851	Possession with the Intent to Distribute at Least 1 Kilogram of Heroin	2
21 U.S.C. §§841(a)(1), 841(b)(1)(B)(i), 851	Possession with the Intent to Distribute at Least 100 Grams of Heroin	3

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

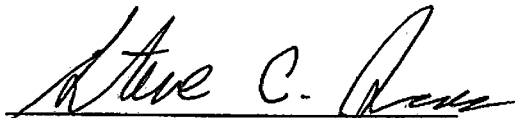
It is ordered that the defendant shall pay the special assessment of **\$300.00** which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No. XXX-XX-3162
Defendant's Date of Birth: 1972
Defendant's Mailing Address:
Robert A. Deyton Detention Facility
11866 Hastings Bridge Road
Lovejoy, GA 30250

Date of Imposition of Sentence: April 12, 2016

Signed this the 12th day of April, 2016.


STEVE C. JONES
UNITED STATES DISTRICT JUDGE

1:13-CR-0130-03-SCJ: MARLON R. MILLER

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **TWO HUNDRED FORTY (240) MONTHS** as to **Counts 1 and 2**, and **ONE HUNDRED TWENTY (120) MONTHS** as to **COUNT 3**, with all such terms to be served **CONCURRENTLY**.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

1:13-CR-0130-03-SCJ: MARLON R. MILLER

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **TEN (10) YEARS as to each of Counts 1, 2 and 3, with all such terms to run CONCURRENTLY.**

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard and special conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which he is released.

The defendant shall submit to one drug urinalysis within 15 days after being placed on supervision and at least two periodic tests thereafter.

The defendant shall participate in a drug/alcohol treatment program under the guidance and supervision of the United States Probation Officer and if able, contribute to the cost of services for such treatment.

Pursuant to 42 U.S.C. §14135a(d)(1) and 10 U.S.C. §1565(d) which require mandatory DNA testing for federal offenders convicted of felony offenses, the defendant shall cooperate in the collection of DNA as directed by the United States Probation Officer.

The defendant shall not own, possess or have under his control any firearm, dangerous weapon or other destructive device.

The defendant shall submit to a search of his person, property (real, personal or rental), residence, office and/or vehicle, at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

1:13-CR-0130-03-SCJ: MARLON R. MILLER

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer within **72** hours of any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **72** hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Appendix C

11th Circuit Denial of Petition for
Rehearing and Rehearing En Banc

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-11690-GG

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

MARLON R. MILLER,
a.k.a. Marlon Raashon Miller,

Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Georgia


ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: MARCUS and BLACK, Circuit Judges, and RESTANI,* Judge.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE

*Honorable Jane A. Restani, Judge for the United States Court of International Trade,
sitting by designation.

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