IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2010

No.

LEVAUGHN COLLINS,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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August 1, 2018

QUESTION PRESENTED FOR REVIEW

Whether the District Court erred in its two decisions, on August 16, 2018, R. 546 and Hrg. Tr. I; and January 22, 2019, R. 625 and Hrg. Tr. II, denying Mr. Collins' Motions to Suppress Wire Tap evidence., and the Court of Appeals erred in affirming the District Court's decisions., in violation of Title 18, United States Code, Section 2518(8)(a) and the Fourth And Fifth Amendments to the Unites States Constitution.

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Petitioner, LEVAUGHN COLLINS, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, which was entered in the above-entitled case on February 1, 2023. .

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is a published opinion reported at *United States v. Collins, et. al*, 59 F.4th 286 (7th Cir. 2023), and is included in the appendix attached hereto at page A-1.

JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to Title 28, United States Code, Section 1254(1). The judgment of the Court of Appeals was entered on February 1, 2023. The Court of Appeals' decision is included in the appendix attached hereto at page A-1. Petitioner did not seek rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property without due process of law. . ."

Title 18, United States Code, Section 2518(8)(a) provides:

(8)

(a) The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter [18 USCS §§ 2510 et seq.] shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. 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. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter [18 USCS § 2517] for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517 [18 USCS § 2517].

18 U.S.C.S. § 2518 (LexisNexis, Lexis Advance through Public Law 117-362,

approved January 5, 2023)

STATEMENT OF THE CASE

The criminal prosecution was brought pursuant to Title 21, United States Code, Sections 841(a)(1) and 846 [Count 1]; Title 18, United States Code, Section 924(c)(1)(A) [Count 20]; and Title 18, United States Code, Section 1956(a)(1)(A)(i) [Count 25]. The jurisdiction of the district court was based on Title 18, United States Code, Section 3231. The Court of Appeals for the Seventh Circuit has jurisdiction pursuant to Title 28, United States Code, Section 1291, and Title 18, United States Code, Section 3742(a).

On June 23, 2015, defendant Levaughn Collins was charged by complaint, R. 61, with conspiracy to knowingly and intentionally possess with the intent to distribute a quantity of a mixture and substance containing 1000 grams or more of a mixture or substance containing heroin, in violation of Title 21, United States Code, Section 841(a)(1) and 846. Subsequently, the Grand Jury returned an indictment on September 29, 2015, R. 159, charging Mr. Collins with violations of Title 21, United States Code, Sections 841(a)(1) and 846 [Count 1]; Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2 [Counts 12, 16, 19]; Title 18, United States Code, Section 924(c)(1)(A) [Count 20]; and Title 18, United States Code, Section 1956(a)(1)(A)(i) [Count 25].

On July 31, 2019, Mr. Collins entered a written guilty plea, R. 688, to Counts 1, 20 and 25 of the indictment, allowing for appeal from the denial of motions to suppress the wiretap evidence. The District Court imposed sentence on Mr. Collins on November 2, 2021. R. 1044. Final judgment was entered on November 3, 2021. R. 1045, 1046. The District Court entered an Amended Judgment Order to correct a clerical mistake on November 5, 2021. R. 1049.

Notice of appeal was timely filed on November 16, 2021. R. 1051.The appeal was briefed and argued. The Court of Appeals issued its opinion, affirming the decisions of the District Court, on February 1, 2023. The opinion in *United States v. Collins,* 59 F.4th 286 (7th Cir. 2023) is attached hereto at A-1. No petition for rehearing was filed.

1 References to the record in this case will be designated "R.__" with the appropriate docket number and page number where relevant. Reference to the transcripts will be designated, Hrg. Tr. I [August 16, 2018] or Hrg. Tr. II [January 21, 2019] "date, page.

STATEMENT OF FACTS

The case against Mr. Collins began with an investigation of associates of James Triplett who were engaged in the distribution of heroin on the west side of Chicago, on the 3700 block of West Grenshaw Street. R. 688 at 4. The government sought and obtained Title III wiretap orders for the cellular phones belonging to Mr. Triplett and his associates. A series of orders resulted in a wiretap order for Larry Collins, Mr. Levaughn Collins' brother, whose phone was designated as Phone #5. Based largely on voice identification and telephone numbers recorded on Phone 5, wiretap orders were entered for Levaughn Collins' first cellular phone, designated Phone 8, and two subsequent cellular numbers belonging to Levaughn Collins, Target Phones 9 and 12.

Based largely on the wiretap surveillance, on June 23, 2015, defendant Levaughn Collins was charged by complaint, R. 6, with conspiracy to knowingly and intentionally possess with the intent to distribute a quantity of a mixture and substance containing 1000 grams or more of a mixture or substance containing heroin, in violation of Title 21, United States Code, Section 841(a)(1) and 846.

Subsequently, the Grand Jury returned an indictment on September 29, 2015, R. 159, charging Mr. Levaughn Collins with violations of Title 21, United States Code, Sections 841(a)(1) and 846 [Count 1]; Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2 [Counts 12, 16, 19]; Title 18, United States Code, Section 924(c)(1)(A) [Count 20]; and Title 18, United States Code, Section 1956(a)(1)(A)(i) [Count 25].

In September 2017, the government first informed counsel that some of the disks containing Title III recordings had been sealed prematurely before certain calls could be added to the disks. R. 343-1. The improperly sealed disks were identified as those containing recordings from Target Phone 9, from March 20 through April 18, 2015; Target Phone 11, from April 9 through May 8, 2015. *Id.* The government voluntarily decided to forego use of the recordings that were improperly sealed but claimed that it should not be barred from using evidence derived from the improperly sealed recordings. *Id.*

Mr. Collins objected to the government's proposed solution on the ground that it undermined the specific protections provided for by the statute, Title 18, United States Code, Section 2518. Mr. Collins requested suppression of the improperly sealed recordings and any subsequent reauthorizations that were based on these recordings, as "fruit of the poisonous tree." In the alternative, Mr. Collins requested a hearing to determine whether at the time of sealing, the government provided the District Court with a satisfactory reason for the failure to include certain calls from disk during the time period authorized by the Court's order. Further briefing followed. *See,* R. 349 and 540.

On August 16, 2018, Judge Feinerman, the third judge assigned to the case,2 denied Mr. Collins' Motion to Suppress Wire Tap Evidence. R. 546; Hrg. Tr. I at 12. [August 16, 2018]. Based on the government's representations that it would not use the unsealed disk for Target Phone 11, or the unsealed portion of the disk for Target Phone 9, the District Court found the issue moot with respect to those two phones. *Id.* The District Court then

2 Judge Der Yeghiayan retired and was followed by Judge St. Eve, who left the District Court for the Court of Appeals, following which the Executive Committee assigned the case to Judge Feinerman.

discussed whether to suppress the information from Target Phones 5, 8, 10, 12, recorded subsequent to the improperly sealed time periods on Phones 9 and 11, based on the equivalent of the "fruit of the poisonous tree" doctrine. Hrg. Tr. I at 13. The District Court found that "the materials that the government filed established that the affidavits from after that time frame, 21st to the 29th, did not rely on the calls from the unsealed period. So, even if there were a poisonous tree, even if there was something -- something wrong with the failure to seal beyond the mere fact of unsealing, if there was a reasonable concern of tampering, there would be no fruit of that poisonous tree because nothing that happened after the juncture of unsealing -- of non-sealing impacted the calls that were obtained after that."

The District Court took its analysis a step further by finding that:

> As it turns out, though, as well, there was no poisonous tree in the first place. The government explained what happened here. The agent thought that the other phones were recorded through March 29th, as opposed to having stopped on March 21st. The government established that it was an innocent mistake and not anything that would raise a reasonable concern of tampering. And so under the relevant authorities, there was no problem in the first place.

Hrg. Tr. I at 13-14. Based on this finding, the District Court stated that there was no need for an evidentiary hearing on the sealing issue. *Id.* at 14.

In November 2018, a second issue with the handling of wiretap evidence arose, regarding the failure to seal the disk for the recordings taken from Target Phone 5, the cellular phone belonging to Larry Collins, Mr. Levaughn Collins' brother. R. 599. The government disclosed that it had failed to seal the wiretap recordings from Target Phone 5 immediately, as required by statute, Title 18, United States Code, Section 2518(8)(a).. Mr.

Collins asserted that Target Phone 5 was the basis for obtaining authorization to record Levaughn Collins first phone – Target Phone 8 – and that without Target Phone 5, there would have been no basis for recording Target Phone 8, or the subsequent authorizations for two other numbers associated with Mr. Levaughn Collins, Target Phones 9 and 12. *Id.* at 3. Mr. Collins sought suppression of the recordings contained in Target Phone 5 and Target Phones 8, 9, and 12, as "fruit of the poisonous tree." *Id.*

Mr. Collins outlined the sequence of events that supported his request. The government's investigation began with Marcetteaus McGee [Target Phone 1] and a transaction between McGee and Anton Higgins in September 2014. R. 6 at 18 [Criminal Complaint]. Levaughn Collins was not a known subject or target of the investigation until January 2015. R. 6 at 20.

Surveillance on the 3700 block of West Greenshaw and Independence Avenue area of Chicago began on August 26, 2014. R. 6 at 23. Levaughn Collins was never surveilled at this location.

Target phones 1-4 [McGee, Tidwell and Triplett] were monitored beginning with Marcettaeus McGee in the summer of 2014. Larry Collins was not identified as the user of Target Phone 5 until November 22, 2014. R. 6 at 53, n. 17.

Levaughn Collins was identified on December 27, 2014, through phone calls from Target Phone 5 to Target Phone 8 and surveillance at 5040 S. St. Lawrence Avenue, in Chicago, which established that both Larry and Levaughn Collins arrived separately and entered a multi-unit apartment building at that address. R. 6 at 54-55, n. 18. The very same information included in the Affidavit for the Complaint was used in the initial

Affidavit in Support of the Initial Interception of Wire and Electronic Communications of Target Phone 8 and Other Relief. R. 599 at 4, Bates Stamp TIII_006-000025-124, signed on January 16, 2015.

Subsequently, in January 2015, Levaughn Collins was identified as the user of Target Phone 9, based on the calls between Target Phone 5 [Larry Collins] and Target Phone 8-[Levaughn Collins] as well as the conversations between Larry Collins and James Triplett, and the timing of Larry's calls to Target Phone 9. R. 6 at 94, n. 28.3

Levaughn Collins was identified as the user of Target Phone 12, based on the previous identification of Target Phones 8 and 9, which were identified using Larry Collins' Target Phone 5. R. 6 at 193, n. 47. Briefing on the second Motion to Suppress Wiretap Evidence ensued. *See,* R. 614.

On January 22, 2019, the District Court again denied Mr. Collins' Motion to Suppress Wiretap Evidence, ruling without convening an evidentiary hearing. The District Court began by asking Mr. Collins' counsel to respond to the government's written filing [R. 614]. Counsel raised several issues that were not addressed at all, or were inadequately addressed by the government's response to the second motion to suppress: (1) the response ignored the provisions of Title 18, United States Code, Section 2518(10)(a) which requires suppression of the evidence if the interception was not made in conformity with the order authorizing it; (2) the disk for Target Phone 5 was not only improperly sealed – it was not sealed immediately after the Order expired as required, but not for the following three

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3 Co-defendant Kevin Gardner would not have been identified as the user of Target Phone 10, but for the identification of Levaughn Collins through the use of Larry Collins' Target Phone 5. R. 6 at 127, n. 33.

years; and (3) the government provided no satisfactory explanation for the failure to seal. Hrg. Tr. II at 3.

The District Court focused on the time lapse between when the disk for Target Phone 5 should have been sealed and when it was used to authorize interceptions for Target Phone 8, contending that the three-day period was the relevant time-period for analysis of the issue. Hrg. Tr. II at 3. Trial counsel argued that the unsealed disk should not have been used until it was properly handled in accordance with the statute. *Id.*

The District Court inquired about the government's contention that the wiretap applications for Target Phones 9 and 12 did not depend on Target Phones 5 and 8. Hrg. Tr. II at 7. Counsel pointed out that the government's position in the Affidavit of Complaint was contrary to the position that they took in response to the Motion to Suppress Wiretap Evidence. *Id.* The government asserted that their position in response to the Motion was correct, not the position taken in the Complaint. Hrg. II at 8-9.

Ultimately, the District Court denied the Motion, finding that following the conclusion of the interceptions for Target Phones 5 and 6, authorized from December 15, 2014, to January 13, 2015, the Chicago Police copied the recording files to two disks which were given to the government. The government sealed the two disks wrongly believing that they were sealing one disk for each of Target Phones 5 and 6. In fact, they sealed two copies of Target Phone 6 and never sealed a copy of Target Phone 5. The government discovered this in October 2018 and "at that point, the government made another optical disk of the Phone 5 recordings from the hard drive and then sealed it, which was very late." Hrg. Tr. II at 10.

The Court found that Phone 5 was not properly sealed for three years and that there were three "allegedly downstream phones, which are 8, 9, and 12. And those phones were properly sealed, but they were allegedly derivative of Phone 5; in other words, the recordings on 8, 9, and 12, the permission for those recordings were based on content from Phone 5." Hrg. Tr. II at 10-11.

The District Court agreed the Section 2518(10)(a) called for the suppression of the improperly sealed phone – Phone 5 – and that all evidence derived from the improperly sealed phone must be suppressed unless there is a satisfactory explanation for the failure to properly seal. Hrg. Tr. II at 11. Relying on this Court's decision in *United States v. Martin,* 618 F.3d 705 at 717, the Court denied the motion to suppress as moot with respect to Phone 5, because the government "says it does not plan to use the Phone 5 recordings at trial." Hrg. Tr. II at 11.

With respect to Phone 8, the Court found that while the government admitted that the affidavit in support of the interceptions for Phone 8 – Levaughn Collins' first tapped number – did rely on the recordings from Phone 5, "there are two independent reasons why I don't think the mishap with Phone 5 requires Phone 8 to be suppressed." Hrg. Tr. II at 12.

The first reason was that at the time Phone 5 was used to authorize the tap on Phone 8 "there had not yet been an improper failure to seal. The governing statute is 2518(8)(a), and that statute requires that the recordings be sealed immediately. What does immediately mean? Does it mean immediately, or does it mean something else, another concept of immediately?" Hrg. Tr. at 13.

Citing to this Court's holding in *United States v. Coney,* 407 F.3d 871 at 873, the Court found that "immediately" means "a couple of days at most. And that appears to be what we have right here." *Id.* Rather than examining the three-year actual delay in sealing, the District Court instead found that "So -- and the -- what the concept here is is that the fruit on which the government relied in obtaining authorization for the Phone 8 recording, the fruit being Phone 5, was not yet poisonous within the meaning of 2815 --I'm sorry, 28 -- 2518(8)(a) at the time the Phone 5 recording was used for the Phone 8 affidavit because the government had not yet failed to immediately seal the tapes. It was three days. That's around the time that *Connelly* says is required. So, the time for the government to seal Phone 5 properly had not yet expired." Hrg. Tr. II at 13.

The District Court credited the Second Circuit with this interpretation of 2518(8)(a), stating that it avoids a "needlessly rigid construction of 2518(8)(a)." *Id.* The District Court acknowledged that no other Circuit, including this Circuit, had adopted the Second Circuit's interpretation as set out in *United States v. Donlan,* and that this Court in *Martin* declared this an open question. *United States v. Martin,* 618 F.3d 717, fn. 14 The District Court asserted that ". . .I think *Donlan* got it right. The statute, another statute, 2517(3), provides that the admissibility of intercepted communications in court proceedings turns on whether they were intercepted in accordance with Title III at the time the affiant received them, not on whether all post-interception procedures were followed."

"So, allowing the use of the Phone 5 recordings in the Phone 8 wiretap application did not violate the statute as long as the government had not at that point breached the immediacy requirement. And as I mentioned, at that point, the

government had not yet breached the immediacy requirement, given Coney's understanding of what immediate means.

Accordingly, because at the time the Phone 5 recording was used in the Phone 8 application, because at that time, the government was not yet obligated to seal and, therefore, had not yet improperly failed to seal the tapes,
the use of the recording was not improper at all." Hrg. Tr. II at 14-15.

Mr. Collins' counsel argued that the District Court was reading the sealing requirement out of the statute by interpreting it as it did. The District Court found that even if counsel were correct on that point, the Court also found that the government had offered a satisfactory explanation for the failure to seal. Hrg. Tr. II at 15.

"In other cases, and these cases are cited in – by the Seventh Circuit in *Martin*, the Seventh Circuit has deemed the prosecutor's mistaken belief caused by a recording technician's delay about the time needed to secure a replacement recording device or a bureaucratically caused delay or the accidental sealing of blank recording disks, the Seventh Circuit considers all of those to be satisfactory explanations.

And the government's mistake here, which was sealing Phone 6 twice instead of Phone 6 once and Phone 5 once, is similar to the circumstances that Martin says constitute a satisfactory explanation, in particular, where the government accidentally sealed blank rather than recorded disks. As *Martin,* the error here had more to do with the mechanics of the recording process than with the government's established sealing procedures. And by saying this, I[;m not applauding the government for – whoever it was in th4 government; it certainly wasn't this AUSA – for messing up the sealing of Phone 5 or Phone 6. It may have

even been – it may have been the Chicago Police Department's fault. It may have been the FBI;s fault. There was a mistake made. But the question is, under the statute and under the Seventh Circuit's precedence, whether there's a satisfactory explanation, and the answer is yes." Hrg. Tr. II at 16-17.

The District Court also noted that the government did not gain a tactical advantage as a result of the failure to seal, the government had not acted in bad faith, and that the defendant's notoriety and nature of the case with Mr. Collins were not dissimilar to other cases in which the Seventh Circuit had approved a satisfactory explanation of the government's failure to properly seal the recordings as required by the statute. Hrg. Tr. II at 17.

The District Court reiterated its reliance on this Court in making its ruling, stating that ". . . in sum, although the repeated --although the failure to seal is not praise-worthy, the Seventh Circuit has emphasized that whether the recording is reliable -- the Seventh Circuit has emphasized the importance of whether the recording is reliable, not simply whether the government was conscientious or whether the statute was strictly observed, in setting forth the proper test. And again, I'll cite *Coney*, 407 F.3d at 875, where the court held that strictly interpreting the statute to mandate suppression whenever there is carelessness may minimize the likelihood of tampering with electronic evidence but is not compelled by the language or purpose of the statute.

So, I agree with Ms. Gambino that there was – the failure to seal Phone 5 was neglectful; but given the statute and given the Seventh Circuit's understanding of what is a satisfactory explanation, the government's neglect here does not warrant applying the fruit

of the poisonous tree concept in order to rope in all the downstream phones from Phone 5, whether it's just Phone 8 or whether it's also Phones 9 and 12." Hrg. Tr. II at 20.

Due to the Court's ruling on the Motions to Suppress Wiretap evidence, on July 31, 2019, Mr. Collins entered a written conditional guilty plea, R. 688, to Counts 1, 20 and 25 of the indictment. The District Court imposed a 240-month sentence on Mr. Collins on November 2, 2021. R. 1044. Final judgment was entered on November 3, 2021. R. 1045, 1046. The District Court entered an Amended Judgment Order to correct a clerical mistake on November 5, 2021. R. 1049.

Notice of appeal was timely filed on November 16, 2021. R. 1051.

REASONS FOR GRANTING THE WRIT

I. The District Court erred in interpreting the language of Title 18, United States Code, Section 2518(10)(a) too broadly to prevent suppression of the recordings that were derivative from the unsealed recordings.

.

A. The District Court erred in denying the first Motion to Suppress Wiretap Evidence by interpreting the Wiretap Statute too broadly.

In discussing the interpretation of the wiretap statute, Title 18, United States Code, Section 2018(10)(a), the Supreme Court has found that "where the Government fails to comply with conditions set forth in the authorizing order, an aggrieved person may suppress its fruits under subparagraph (iii) (as an "interception . . . not made in conformity with the order of authorization or approval"). *Dahda v. United States*, ___U.S.___ , ___, 138 S. Ct. 1491, 1500 (2018). The statutory section provides in relevant part:

(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter [18 USCS §§ 2510 et seq.], or evidence derived therefrom, on the grounds that—
…..; or
(iii) the interception was not made in conformity with the order of authorization or approval.
Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter [18 USCS §§ 2510 et seq.].

18 U.S.C.S. § 2518 (LexisNexis, Lexis Advance through Public Law 117-80, approved December 27, 2021).

In this case, the recordings obtained from Target Phones 9 and 11 were sealed prior to including all relevant recordings on disks, leaving all of the disk for Target Phone 11 and a part of the disk for Target Phone 9 unsealed. The improperly sealed disks include the recordings for the following Target phones and time periods: Target Phone 9, from March 20, 2015, to April 18, 2015; and Target Phone 11, from April 9, 2015, through May 8, 2015. At the time this error was discovered the government took no position on whether or not there was a satisfactory explanation for the statutory violation and took the position that the improperly sealed recordings should not bar the admissibility of evidence obtained as a result of those recordings. The defense took issue with these contentions and filed a Motion to Suppress Wiretap Evidence. R. 343.

The District Court, without conducting a hearing or taking evidence of any kind found that "[t]he government explained what happened here. The agent thought that the other phones were recorded through March 29th, as opposed to having stopped on March 21st. The government established that it was an innocent mistake and not anything that would raise a reasonable concern of tampering. And so under the relevant authorities, there was no problem in the first place." Hrg. Tr. I at 13-14. This was error.

The government asserted in its motion that there had been an "innocent mistake", but did not identify the responsible party or parties, let alone provide affidavits from those parties, attesting to the "facts" asserted by the government. The District Court's decision amounted to finding that because the government says so, it must be true. Such a finding, taking fact finding out of the adversarial process, allowing no opportunity to hear the evidence, cross-examine it, or subject it to any challenge before accepting the government's assertions as true, short circuits Due Process, in violation of the defendant's rights.

The District Court ignored the specific protections provided for in Title 18, United States Code, Section 2518, namely the immediate sealing requirement and the participation of the Court to ensure that there has been no opportunity for tampering with the evidence and that the integrity of the process may be maintained.4 *See, e.g., United States v. Ojeda Rios,* 495 U.S. 257 (1990); *United States v. Martin,* 618 F.3d 705 (7th Cir. 2010); *United States v. Gigante,* 538 F.2d 502 (2nd Cir. 1976).

The Supreme Court has made clear that violations of the statutory provisions for obtaining and maintaining the results of a wiretap subject the information obtained to suppression, to limit the use of what the Court views as an "extraordinary measure" and to prevent wiretaps from becoming a tool of first resort rather than its intended use in exceptional circumstances. In *Giordano,* for example, the Court found that "[t]he words "unlawfully intercepted" are themselves not limited to constitutional violations, and we

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4 Section 2518(8)(a) provides that:
(a) The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter [18 USCS §§ 2510 et seq.] shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. 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. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter [18 USCS § 2517] for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517 [18 USCS § 2517].

18 U.S.C.S. § 2518 (LexisNexis, Lexis Advance through Public Law 117-80, approved December 27, 2021)

think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device. We have already determined that Congress intended not only to limit resort to wiretapping to certain crimes and situations where probable cause is present but also to condition the use of intercept procedures upon the judgment of a senior official in the Department of Justice that the situation is one of those warranting their use." *United States V. Giordano,* 416 U.S. 505, 527 (1974).

The government conceded error in the handling of the recordings obtained from the wiretap. The District Court had an obligation to conduct a hearing to determine whether there was a reasonable explanation for the failure to comply with the statute, and whether the failure to comply infected other parts of the investigation and the collection of additional evidence, also in violation of the statute. The District Court, in choosing to accept the government's proffered explanation without requiring any evidence in support of that explanation, violated Mr. Collins' right to Due Process, in addition to permitting the government's violation of the statute to go unredressed.

B The District Court erred in denying the second Motions to Suppress Wiretap Evidence, where it's interpretation undermined the protections provided by Title 18, United States Code, Section 2518, et seq..

The Supreme Court in *United States v. Giordano,* 416 U.S. 505, 524 (1974), rejected the use of the judicially created exclusionary rule as a basis for deciding whether or not to exclude recordings that had not been sealed in accordance with the provisions of Title 18, United States

Code, Section 2518. Instead, the Court relied upon the language of the statute government wiretap evidence:

> The issue does not turn on the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights, but upon the provisions of Title III; and, in our view, the Court of Appeals correctly suppressed the challenged wiretap evidence. Section 2515 provides that no part of the contents of any wire or oral communication, and no evidence derived therefrom, may be received at certain proceedings, including trials, "if the disclosure of that information would be in violation of this chapter." What disclosures are forbidden, and are subject to motions to suppress, is in turn governed by **§ 2518 (10)(a)**, which provides for suppression of evidence on the following grounds:
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or,
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

United States v. Giordano, 416 U.S. 505, 524 (1974). The Supreme Court found that the words "unlawfully intercepted" "are not limited to constitutional violations, and that Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention *to limit* the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Id.* at 527. [emphasis added]

As in Mr. Collins' case, the government in *Giordano* argued that communications intercepted after the improperly sealed communications are admissible because they are not "evidence derived" from the contents of

communications intercepted under earlier order. The Supreme Court found that under §§2515 and 2518(10)(a) the government's position was "untenable," finding that:

> Under **§ 2518**, extension orders do not stand on the same footing as original authorizations but are provided for separately. "Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section." **§ 2518 (5)**. Under subsection (1)(e), applications [**1834] for extensions must reveal previous applications and orders, and under (1)(f) must contain "a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results." HN14 Based on the application, the court is required to make the same findings that are required in connection with the original [****40] order; that is, it must be found not only that there is probable cause in the traditional sense and that normal investigative procedures are unlikely to succeed but also that there is probable cause for believing that particular communications concerning the offense will be obtained [***362] through the interception and for believing that the facilities or place from which the wire or oral communications are to be intercepted are used or will be used in connection with the commission of such offense or are under lease to the suspect or commonly used by him.

United States v. Giordano, 416 U.S. 505, 529-530 (1974). The Court further found that "whether or not the application, without the facts obtained from monitoring Giordano's telephone, would independently support original wiretap authority, the Act itself forbids extensions of prior authorizations without consideration of the results meanwhile obtained. Obviously, those results were presented, considered, and relied on in this case.

Moreover, as previously noted, the Government itself had stated that the wire interception was an indispensable factor in its investigation and that ordinary surveillance alone would have been insufficient. In our view, the results of the

conversations overheard under the initial order were essential, both in fact and in law, to any extension of the intercept authority. Accordingly, communications intercepted under the extension order are derivative evidence and must be suppressed." *Id.* at 533.

The government argued that the disk that was sealed on April 20, 2015, was properly sealed and that the calls on that disk should be admitted into evidence. This claim ignores that fact that all of the calls that were legally supposed to be on that disk, were not on the disk, so the disk was not properly sealed. None of the calls that were on the improperly sealed disk should be admitted into evidence. Doing so would defeat the purpose of the statute, which is to ensure that recordings are not tampered with and that the information contained in the sealed format can be relied upon. The failure to include some calls but not others from a time-period that is the subject of a single order, renders suspect the totality of the recordings from that time and undermines the purpose of sealing in the first instance.

In denying the Motions to Suppress Wiretap evidence, the District Court relied on this Court's decision in *United States v. Martin,* 618 F.3d 705 (7th Cir. 2010). The facts of Mr. Collins' case are distinguishable from the Seventh Circuit's decision in *United States v. Martin,* 618 F.3d 705 (7th Cir. 2010).

In the *Martin* case, at issue was the failure of certain recordings to work, resulting in MO disks that were blank. The District Court held an evidentiary hearing on the derivative use of the information that was supposed to have been recorded on the blank disks and did not initially address the government's contention that it was a

technician's error that constituted the "satisfactory explanation" for the failure to properly record and seal the MO disk(s) at issue in that case.

In *Martin*, the government volunteered to suppress the information that was improperly recorded and sealed. The District Court and the Court of Appeals found that there was still reason to consider what derivative use, if any, was made of the information. In the *Martin* case, the government submitted an Affidavit from the agent in charge, who attested that:

> After the DEA learned in mid-October 2003 that some previously-sealed MO discs did not contain any or complete call data for certain wiretap interception periods, DEA conducted an investigation into the particular reason why the equipment used to intercept and record communications would produce a blank or incomplete MO disc. DEA concluded that a number of operator errors could have occurred, including the failure to properly input or activate a job order, as required by the program, or the assignment of a job to the incorrect MO disc. Any one of those errors could have been the cause, but no final determination could be made because the computer system's log did not reflect which of the possible errors occurred.
>
> [ ] Tests performed on the equipment determined that it was functioning within its design specifications. DEA determined that the same operator was involved in the job orders creating those MO discs which were found to be partially or completely blank. DEA has reassigned this technician to other responsibilities and taken other steps to ensure that the problem does not recur. Following the change in technicians, DEA has not experienced any similar problems.

United States v. Martin, 618 F.3d 705, 711, (7th Cir. 2010).

The explanation provided by the Agent in *Martin* suggests that the recording process and interception process are simultaneous. It also suggests that the processes are maintained by a program designed and used for that purpose. No affidavit was produced, nor detailed explanation of the recording process provided by testimony at a hearing or by the submission of an affidavit, that would have permitted the District Court to make an informed decision about

whether the government's explanation for the failure to properly seal at least three disks was satisfactory for the purpose of the statute.

Furthermore, as argued in the District Court by counsel for Mr. Martin, it is not possible to say that no derivative use of the relevant recordings was made because the "the Government conceded that it had used information obtained from the blank-sealed recordings in order to prepare officers while the wiretaps were still active--*i.e.*, during the investigation." In addition, during the evidentiary hearing, government witnesses testified that agents listened to the recordings in real time, maintained logs, line-sheet summaries, and transcripts of the calls, and used those logs, summaries, and transcripts to inform their investigation. *Id.* at 712.

In Mr. Collins' case, the recordings on Target Phone 5, the unsealed disk of intercepts from the phone used by Larry Collins, were the basis for identifying Levaughn Collins as the user of Target Phone 8. Without the Target Phone 5 recordings, Mr. Collins would not have been a part of the wiretap interceptions.

The identification of Levaughn Collins, using Target Phone 5, also led to the identification of Target Phones 9 and 12, through comparison with the voice on Target Phone 8. In short, none of the target phones used by Levaughn Collins would be legitimate without the admission and use of the improperly unsealed Target Phone 5 disk.

The Supreme Court and the First Circuit have both identified the danger of normalizing the "mistake" and rendering it permissible for the future conduct of those responsible for Title III investigations. If the government is allowed to cherry-pick the calls or days within an interception period that it may seal -- or not-- and have the sealed group admitted into evidence, the very purpose of the statute – to secure against tampering with the evidence – is defeated.

The District Court relied on the Seventh Circuit's opinion in *United States v. Coney,* 407 F.3d 871 (7th Cir. 2005), to support its denial of Mr. Collins' second motion, by finding that the

government had offered a "satisfactory explanation" for the improper sealing of the recordings from Target Phone 5.

In *Coney,* the Court described the factors upon which the District Court may rely when determining whether the government has offered a "satisfactory explanation" such that concerns about evidence tampering are dispelled. The Assistant United States Attorneys in *Coney* submitted Affidavits in which they each explained the delay in sealing – rather than the failure to seal – intercepts. Each believed that the other was responsible for taking care of it, when neither did. The Court found that "[t]here was neglect, but it was harmless and therefore, while it was not justifiable, it was excusable. Cf. *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 394-95, 123 L. Ed. 2d 74, 113 S. Ct. 1489 (1993)." The Court noted, however, that "for future reference . . . the government would be in a stronger position if, back in 1997, the assistant U.S. attorneys had memorialized the circumstances giving rise to the delay in the sealing of the tapes." *United States v. Coney*, 407 F.3d 871 (7th Cir. 2005).

Here, unlike in *Coney*, the government's only evidence against Mr. Collins was the intercepts. No witnesses[5] were identified who agreed to testify against him, he was not caught with any drugs on his person, in his apartment, or in any of his vehicles. No controlled buys occurred in which Mr. Collins was a participant, and the government had only the intercepted phone conversations to link Mr. Collins to using the "stash houses" or areas in which drugs were allegedly sold at Mr. Collins' behest.

The Court's decision in *United States v. Jackson*, 207 F.3d 910 (7th Cir. 2000), is inapt as well. Factually, *Jackson* – like *Coney* and unlike this case – involved the production of an

5 The girlfriend of one of Mr. Collins' co-defendants, Chiquetta Jackson, made hearsay statements about what she had heard from her boyfriend about Mr. Collins, but Mr. Collins had no interaction with Ms. Jackson or any personal knowledge about his activities or alleged role in the conspiracy.

Affidavit from the Assistant United States Attorney, attesting to the reasons for the delay in sealing the intercepts. The Court rejected the reason put forward, as being objectively unreasonable: "Safer's affidavit, the only evidence the government tendered with regard to the reasonableness of the delay, states that he believed that "30 days was well within that reasonable period of time given the nature of this extension, i.e., the same place of intercept, [**14] same criminal conduct, same interceptees," but the affidavit gives no reason for picking 30 days; nor is the fact that good grounds existed for the extension a rational basis for delay in seeking it--the opposite might well be argued. The affidavit adds that Safer "wanted to have the original tapes available for comparison to tapes produced by the new device," but does not explain why this was necessary when there were three sets of original tapes." *United States v. Jackson*, 207 F.3d 910, 916-917 (7th Cir. 2000). 6

The decision in *United States v. Plescia,* 48 F.3d 1452 (7th Cir. 1995), concerned a delay in sealing rather than the failure to seal – as occurred in Mr. Collins' case. The government provided three reasons for its failure – none of which is applicable in this case:

> The government notes first that because a second surveillance period followed the first, it was treated as an extension of the first, preventing any need for sealing between the periods. *United States v. Carson,* 969 F.2d 1480, 1488 (3d Cir. 1992). Second, the government reasonably explains the delay between the periods as necessary to draft the Title III surveillance request affidavit and to get the request processed by the federal bureaucracy. Third, the government points out that it did seal the tapes two weeks after the end of the first period in a good-faith effort to comply with the statute in the face of an innocent delay in processing the request for a second surveillance period. We believe that the government has provided good cause for the delay and has fulfilled the demands of the sealing statute.

United States v. Plescia, 48 F.3d 1452, 1463 (7th Cir. 1995). Unlike the reasons offered in

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6 The Seventh Circuit relied on yet a different explanation for the delay in sealing that was not contained in the Assistant United States Attorney's Affidavit but was presented

Plescia, which appear to demonstrate that the government was both aware of and took some contemporaneous remedial action to compensate for the delay in sealing, the explanation offered in this case was afforded to counsel on the eve of trial – three years after the fact, and after a separate incident concerning the omission of other intercepts from sealed disks for Target Phones 9 and 11.

Although not provided in the context of a hearing or by affidavit, the District Court accepted the government's proffered explanation for the failure to seal yet another disk in its entirety, blaming the error on a mistake by unnamed Chicago Police officers who neither testified at a hearing nor provided affidavits in support of what occurred. Based on the purpose of the sealing requirement--the prevention of tampering with electronic evidence—this Court has held that an explanation for a delay in sealing is satisfactory "if, in the circumstances, it dispels any reasonable suspicion of tampering." *United States v. Coney,* 407 F.3d 871, 875 (7th Cir. 2005). Factors the court should consider in making that determination are, most importantly, the believability of the explanation, as well as the length of the delay, the nature of the crime along with the notoriety of the defendant, and the importance of the recordings at issue. *Id.* *United States v. Martin*, No. 04 CR 495-1, 2010 U.S. Dist. LEXIS 451, at *11 (N.D. Ill. Jan. 4, 2010).

Unlike other cases in which the delay in sealing is measured in days or months, in this case the delay in sealing was at least three years. A delay in years – rather than hours, days, or even months, is sufficient to raise a suspicion of tampering. When combined with the problems raised with respect to Target Phones 9 and 11, the integrity of all the wire intercepts is brought into question. At best the treatment of the intercepts in this case was careless and certainly

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to the Court of Appeals as having been relied on by the District Court– the delay was due to a mistake about when a new "bug" was going to be available.

with respect to the intercepts that have been left unsealed for three years – negligent. Even the District Court agreed that this was the case. Hrg. Tr. II at 20.

Rather than apply the statute and suppress the intercepts that were derived from the improperly unsealed intercepts of Target Phone 5, the District Court discounted the three-year delay and, in a feat of imagination, treated the delay as if it were only a three-day delay. The District Court posited that since this Court has approved a delay of "a couple of days", and the improperly unsealed intercepts were used within three days to obtain authorization for intercepts from Target Phone 8 – the first to be associated with Levaughn Collins – it did not matter that Target Phone 5 intercepts were left unsealed for three years.

The District Court's approach eviscerates the statute's requirement that the recordings be sealed immediately, by stretching the term immediately to mean three years if the unsealed intercepts are used within a "couple of days." Such an interpretation would allow the government to fail to seal in every case as long as they made use of the improperly handled intercepts within "a couple of days." This distortion of the statutory requirement that sealing occur immediately, renders the provision superfluous.

The Justice Manual, formerly the United States Attorneys Manual, addresses the importance and purpose of the sealing Affidavits and accompanying information: "The purpose of this sealing requirement is to ensure the integrity of the Title III materials and to protect the privacy rights of those individuals implicated in the Title III investigation. *See* S.Rep. No. 1097, *reprinted in*1968 U.S. Code Cong. & Admin. News 2112, 2193-2194. The applications may be unsealed only pursuant to a court order and only upon a showing of good cause under 18 U.S.C. § 2518(8)(b) or in the interest of justice under 18 U.S.C. § 2518(8)(d)." The care required by law and best practices was not taken in this case.

The First and Third Circuits have found that explanations such as a prosecutor's workload or the need to enhance audibility of the recordings did not rise to the level of "excusable" because such doing so "would be rendering extraordinary that which is ordinary." *United States v. Ojeda Rios*, 875 F.2d 17, 23, (1st Cir. 1989)(government misunderstanding of the law is not a satisfactory explanation); *United States v. Quintero*, 38 F.3d 1317, 1328-30 (3d Cir. 1994) (rejecting the prosecutor's heavy workload as a satisfactory explanation for a sealing delay because to do so "would be rendering extraordinary that which is ordinary"); *United States v. Carson*, 969 F.2d 1480, 1498 (3d Cir. 1992) (rejecting the need to enhance the audibility of tapes as a satisfactory explanation for a sealing delay because that need was "readily foreseeable and could just as readily become routine").

In discussing sealing delays, the First Circuit observed that "an explanation is unlikely to be deemed satisfactory if it is reflective of gross dereliction of duty or willful disregard for the sensitive nature of the activities undertaken by means of the order." *Id.* at 869. In this case, the Chicago Police, agents, or technicians – never specifically identified – failed to show any regard for the sensitive nature of the activities undertaken by means of the District Court's authorization order. They did not fulfill the basic requirements of their responsibilities under the law and should not be supported or encouraged in such acts of gross negligence.

CONCLUSION

WHEREFORE, Levaughn Collins, through counsel, respectfully requests that this Honorable Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on February 1, 2023.

Dated this 30th day of April 2023, at Chicago, Illinois.

Respectfully submitted,

/s/ Andréa E. Gambino
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