No. 23-12549-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN MELTON,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Georgia

UNITED STATES' MOTION TO DISMISS FOR LACK OF JURISDICTION

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Circuit Rule 26.1-1, the United States files its Certificate of Interested Persons and Corporate Disclosure Statement as follows:

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There are no publicly traded corporations to disclose.

UNITED STATES' MOTION TO DISMISS FOR LACK OF JURISDICTION

Plaintiff-Appellee, the United States, hereby moves to dismiss Defendant-Appellant John David Melton's appeal for lack of jurisdiction. This appeal is from a non-final order—the denial of a motion to dismiss the indictment—and does not qualify for immediate review under the collateral-order doctrine. Accordingly, this Court should dismiss.

I. Background

On September 2, 2020, a grand jury in the Southern District of Georgia charged Melton and several co-defendants with (as relevant here) conspiring to restrain trade, in violation of 15 U.S.C. § 1. *See* Case 4:20-cr-00081-RSB-BKE (Dist. Ct. Dkt.), Document 1, Indictment at ¶ 2 (Sept. 2, 2020). The grand jury met in accordance with the procedures the district court established in response to the Covid-19 pandemic. *See* Dist. Ct. Dkt. 341, Magistrate Judge's Report and Recommendation at 4-5 (Apr. 20, 2023); *see also* Dist. Ct. Dkt. 290, Stipulation at Exhibit 1 (Nov. 14, 2022) (In re Coronavirus/COVID-19 Pandemic and the Use of Grand Jury Telecommunication Facilities, 1:20-mc-011 (S.D. Ga. May 13, 2020) (Standing Order)). Specifically, grand jurors sat in one of three

federal courthouses within the district (based on each grand juror's residence), but each group was connected to the others via videoconferencing. *See* Dist. Ct. Dkt. 341 at 4-5.

Melton moved to dismiss the indictment, arguing that "[c]onstituting the grand jury in this manner runs afoul of Fed. R. Crim. P. 6 and the CARES [Coronavirus Aid, Relief, and Economic Security Act] Act, and it exceeds the supervisory powers afforded to district courts over grand jury practice." Dist. Ct. Dkt. 206, Motion to Dismiss Indictment due to Error in the Grand Jury Proceeding, at 1-2 (Jul. 18, 2022).

The magistrate judge recommended denial of Melton's motion. Dist. Ct. Dkt. 341 at 5. Relying on *United States v. Graham*, No. 2:20-CR-47, 2021 WL 2593630, at **5-9 (S.D. Ga. Jun. 24, 2021), *adopted by* 2021 WL 4352320, at *1 (S.D. Ga. Sept. 24, 2021),[1] the magistrate judge held that the Standing Order "does not violate the CARES Act, Rule 6, or the Fifth Amendment." Dist. Ct. Dkt. 341 at 5. Specifically, "[t]he procedures sufficiently preserved grand jury secrecy and fell well within the Court's grand jury regulatory powers." *Id.* The magistrate judge

[1] *Graham* later was affirmed by this Court. *See United States v. Graham*, No. 22-11809, 2023 WL 5011734, at *1 (11th Cir. Aug. 7, 2023).

further held that, "[e]ven if there were any procedural infirmities, the harmless error doctrine precludes dismissal." *Id.*

Melton objected to the report and recommendation, Dist. Ct. Dkt. 349, Objections to the Report and Recommendation (May 8, 2023), arguing that (1) the Standing Order violated the CARES Act, *id.* at 4-7; (2) the Standing Order violated Fed. R. Crim. P. 6 by failing to ensure grand-jury secrecy and to require the "presence" of all grand jurors in the same courthouse, *id.* at 7-14; (3) given the claimed violations of Rule 6, the Standing Order exceeded the district court's supervisory powers and violated the Fifth Amendment's Grand Jury clause, *id.* at 7, 14-20; and (4) the claimed grand-jury-clause violation allegedly was structural error and so could not have been harmless, *id.* at 20-22. "After a careful, de novo review of the entire record," the district court adopted the report and recommendation and denied the motion to dismiss. Dist. Ct. Dkt. 369, Order at 2-4 (Jul. 24, 2023).

On August 3, 2023, Melton filed the instant "Notice of Interlocutory Appeal," purporting to appeal from the district court's "order denying his motion to dismiss the indictment due to error in the grand [jury]

proceeding." Dist. Ct. Dkt. 372, Notice of Interlocutory Appeal (Aug. 3, 2023).

II. Argument

A. Legal Principles

"Courts of appeals have jurisdiction over 'final decisions of the district courts of the United States.'" *United States v. Shalhoub*, 855 F.3d 1255, 1260 (11th Cir. 2017) (quoting 28 U.S.C. § 1291). For purposes of § 1291, "a final judgment is normally deemed not to have occurred until there has been a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989). In criminal cases, this final-judgment rule "prohibits appellate review until conviction and imposition of sentence." *Flanagan v. United States*, 465 U.S. 259, 263 (1984).

There is a "narrow exception" to the normal application of the final-judgment rule—the collateral-order doctrine. *Midland Asphalt*, 489 U.S. at 798. The "collateral order doctrine [] permits appellate review of an interlocutory order that (1) 'conclusively determines the disputed question,' (2) 'resolves an important issue completely separate from the

merits of the action,' and (3) 'is effectively unreviewable on appeal from a final judgment.'" *Shalhoub*, 855 F.3d at 1260 (quoting *Flanagan*, 465 U.S. at 265; alterations omitted). These requirements are "stringent"; indeed, "although the [Supreme] Court has been asked many times to expand the 'small class' of collaterally appealable orders," the Court has "instead kept it narrow and selective in its membership." *Will v. Hallock*, 546 U.S. 345, 349-50 (2006) (quoting *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996)).

Because "the reasons for the final judgment rule are especially compelling in the administration of criminal justice," the Supreme Court "has interpreted the requirements of the collateral-order exception . . . with the utmost strictness in criminal cases." *Flanagan*, 465 U.S. at 265; *see also United States v. Gulledge*, 739 F.2d 582, 584 (11th Cir. 1984) ("The rule of finality has been stringently applied in criminal prosecutions because the delays of intermediate appeal have the potential to disrupt the effective administration of the criminal law."). The Supreme Court has thus permitted appeal of the denial of a motion to dismiss an indictment under only two circumstances: where the motion was based on the Double Jeopardy Clause, *Abney v. United States*, 431

U.S. 651, 660-662 (1977), or on the Speech or Debate Clause, *Helstoski v. Meanor*, 442 U.S. 500, 506-507 (1979).

Interlocutory appeal is appropriate in those circumstances, the Supreme Court has explained, because the right being invoked is "the right not to be tried"—a right whose "legal and practical value . . . would be destroyed if it were not vindicated before trial." *Midland Asphalt*, 489 U.S. at 799-800 (citation omitted); *accord Shalhoub*, 855 F.3d at 1260. In permitting such appeals, the Supreme Court has emphasized the "crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges." *Midland Asphalt*, 489 U.S. at 801 (citation omitted). And it has repeatedly held that orders denying motions to dismiss on grounds that do not involve immunity from trial—including other constitutional grounds—are not immediately-appealable collateral orders. *See, e.g., United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 270 (1982) (per curiam) (denial of motion to dismiss based on alleged prosecutorial vindictiveness); *United States v. MacDonald*, 435 U.S. 850, 863 (1978) (denial of motion to dismiss based on Sixth Amendment speedy-trial right).

B. This Court Lacks Jurisdiction over Melton's Appeal

Melton's self-avowed "interlocutory" appeal (Dist. Ct. Dkt. 372) does not satisfy the collateral-order doctrine. The appeal thus is barred by 28 U.S.C. § 1291.

The order denying Melton's motion dismiss is not of a type the Supreme Court has approved for immediate appeal. *See, e.g., United States v. Harpo-Brown*, No. 21-13162-G, 2022 U.S. App. LEXIS 4550, at **1-2 (11th Cir. Feb. 18, 2022) (dismissing appeal of, inter alia, order denying motion to dismiss indictment, where order did not involve "motion[] to dismiss on double jeopardy grounds" or "motion[] to dismiss under the Speech or Debate Clause"). Nor does the order independently meet the requirements of the collateral-order doctrine. Specifically, the order is not "effectively unreviewable on appeal from a final judgment," *Midland Asphalt*, 489 U.S. at 800 (internal quotation marks omitted), because the right invoked is not a "right not to be tried," *id.* at 800-01.

"A right not to be tried in the sense relevant to the [collateral-order] exception rests upon an explicit statutory or constitutional guarantee that trial will not occur—as in the Double Jeopardy Clause ('nor shall any person be subject for the same offence to be twice put in jeopardy of

life or limb'), . . . or the Speech or Debate Clause ('[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place')." *Midland Asphalt*, 489 U.S. at 801. Melton based his claim of grand-jury error on the CARES Act, Fed. R. Crim. P. 6, and the Fifth Amendment's Grand Jury Clause. Dist. Ct. Dkt. 206, at 1-2; Dist. Ct. Dkt. 349, at 4. But none of these provisions afford such a guarantee in the event of the type of violations claimed here.[2]

First, neither the CARES Act nor Fed. R. Crim. P. 6 provides any right to be free from trial. As Melton acknowledged below (Dist. Ct. Dkt. 349 at 4-5), the CARES Act *allowed* district-court chief judges during the COVID-19 pandemic, if certain conditions were met, to authorize the use of video conferencing for specified types of criminal proceedings. Pub. L. 116-136, § 15002(b), 134 Stat. 281 (Mar. 27, 2020). The Act contains no mention of grand-jury proceedings; it does not *proscribe* the use of video conferencing for such proceedings, much less explicitly guarantee that such use would immunize a defendant from standing trial. *Id.* The text

[2] Melton also challenged the Standing Order as exceeding the district court's grand-jury supervisory power, but that argument depended on the alleged "contraven[tion] [of] Rule 6." Dist. Ct. Dkt. 349, at 15-16.

of Fed. R. Crim. P. 6 likewise neither proscribes video conferencing in grand-jury proceedings nor explicitly guarantees that a defendant will not stand trial if the rule's secrecy and presence prescriptions are violated. *See Midland Asphalt*, 489 U.S. at 802 (holding order denying motion to dismiss based on alleged violation of Rule 6(e) was not immediately appealable because "[t]he text of Rule 6(e) contains no hint that a governmental violation of its prescriptions gives rise to a right not to stand trial"). To the contrary, Fed. R. Crim. P. 52(a) directs courts to disregard "[a]ny error, defect, irregularity, or variance which does not affect substantial rights"—a directive that applies to Rule 6 errors, just as it does to errors occurring during trial. *See United States v. Mechanik*, 475 U.S. 66, 71–72 (1986).[3]

[3] To the extent that Melton seeks to appeal based on an alleged violation of Rule 6(d), then his appeal fails to satisfy the second condition of the collateral-order doctrine: the requirement that the disputed order "resolve an important issue completely separate from the merits." *Flanagan*, 465 U.S. at 265. *See United States v. Alexander*, 985 F.3d 291, 295 (3d Cir. 2021) ("Under *Midland [Asphalt]*, a Rule 6(d) violation is not an issue 'completely separate from the merits' for the same reason that a conviction renders a Rule 6(d) violation harmless beyond a reasonable doubt: both the grand jury's decision to indict and the petit jury's decision to convict turn on the sufficiency of the evidence, an issue 'enmeshed in the merits.'") (quoting *Midland Asphalt*, 489 U.S. at 800).

Second, the Grand Jury Clause does confer a right not to be tried, but only when there is "*no* grand jury indictment," *Midland Asphalt*, 489 U.S. at 802 (emphasis added), *see* U.S. Const. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury"), or when there is a grand-jury defect "so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment," *id.* As this Court recently held in *United States v. Graham*, No. 22-11809, 2023 WL 5011734 (11th Cir. Aug. 7, 2023), a grand jury's returning an indictment under the procedures of the Standing Order is not such defect: "[E]ven if [appellant] were correct that grand jurors must all be present in the same room to comply with Rule 6 . . ., that kind of violation of Rule 6 is not a fundamental error." *Id.* at *2. Specifically, "the fact that the grand jurors met in three secure locations and communicated via videoconference did not change the basic nature of [appellant's] grand jury or fatally infect his indictment." *Id.*; *see also, e.g., Bank of Nova Scotia v. United States*, 487 U.S. 250, 257-58 (1988) (finding no fundamental error despite numerous Rule 6 violations); *Midland Asphalt*, 489 U.S. at 802 ("[E]ven the grand jury's violation of the defendant's right against self-

incrimination does not trigger the Grand Jury Clause's 'right not to be tried.'") (citing *Lawn v. United States*, 355 U.S. 339, 349 (1958)).

In sum, Melton's interlocutory appeal does not satisfy the stringent requirements of the collateral-order doctrine. He thus "must accept the burdens of trial and sentencing before he obtains appellate review." *Shalhoub*, 855 F.3d at 1261.

III. Conclusion

For the foregoing reasons, this Court should dismiss this interlocutory appeal for lack of jurisdiction.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rules 32(a)(7)(B) and 29(a)(5) of the Federal Rules of Appellate Procedure because it contains 2,172 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word with 14-point Century Schoolbook font.

August 18, 2023

/s/ Andrew N. DeLaney
Andrew N. DeLaney

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2023, I electronically filed the foregoing United States' Motion to Dismiss for Lack of Jurisdiction with the Clerk of the Court of the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system, which will send a notice of filing to all registered CM/ECF users.

August 18, 2023

/s/ Andrew N. DeLaney
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