No. 23-12549-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN DAVID MELTON,

Defendant-Appellant.

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

UNITED STATES' REPLY TO MELTON'S RESPONSE TO THE 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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Brown, Patrick S.

Christine, Bobby L.

Copeland, Amy Lee

Davids, Justin G.

DeLaney, Andrew N.

Dixon, Harry D., Jr.

Donnie Dixon Attorney at Law LLC

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Fredricks, James J.

Gilluly, E. Greg, Jr.

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Maloney, Julia

Melton, Gregory

Melton, John David

Ossick, John J., Jr.

Pedrick, James Clayton

Peterson, Thomas A. IV

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Steinberg, Jill

Stegman, Matthew

Strand, Stratton C.

Strickland, Timothy Tommy

Tanner, R. Brian

There are no publicly traded corporations to disclose.

UNITED STATES' REPLY TO MELTON'S RESPONSE TO THE MOTION TO DISMISS FOR LACK OF JURISDICTION

Defendant-Appellant John David Melton opposes Plaintiff-Appellee United States' motion to dismiss, arguing that this interlocutory appeal satisfies the narrow collateral-order exception to the final-judgment rule. But his efforts to distinguish Supreme Court and Eleventh Circuit precedent fail, and the one out-of-circuit case on which he relies is inapposite. This Court should dismiss for lack of jurisdiction.

I. Argument

Melton's Response echoes several legal principles articulated in the motion to dismiss: the collateral-order exception is interpreted "with the utmost strictness in criminal cases," *see* Document 14 (Response) at Page 6 of 13 (quoting *Flanagan v. United States*, 465 U.S. 259, 265 (1984)); to qualify for immediate appeal under the exception, the challenged ruling must be (inter alia) "completely separate from" the merits and "effectively unreviewable" on appeal from final judgment, *id.* at Pages 6, 9 of 13; and to be effectively unreviewable on appeal from final judgment, the denial of a motion to dismiss an indictment must implicate a right not to be tried—"'an explicit statutory or constitutional guarantee that trial will

not occur,'" *id.* at Page 9 of 13 (quoting *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989)).

Melton argues that he meets these demanding requirements because his motion claimed violations of Fed. R. Crim. P. 6 that allegedly rendered his indictment invalid—and, according to him, the Fifth Amendment's Grand Jury Clause guarantees that a person will not be tried for a felony absent a "*valid*" indictment. Response at Pages 7-9 of 13 (emphasis in original). But *Midland Asphalt* forecloses this argument. As the Supreme Court explained, the Grand Jury Clause confers a "right not to be tried" only "when there is no grand jury indictment" at all, or when there is a "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." 489 U.S. at 802; *see also id.* at 801 ("There is a crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges.") (internal quotation marks omitted). And *United States v. Graham*, No. 22-11809, 2023 WL 5011734, at *2 (11th Cir. Aug. 7, 2023), shows that claimed violations of Rule 6 involving the same Standing Order videoconference procedures at issue here are not such a "fundamental" defect.

Melton attempts to distinguish *Graham* on three grounds. First, alluding to footnote 1 of the opinion, he argues that interlocutory appeal is appropriate here "[g]iven the *Graham* panel's reliance on [*United States v.*] *Mechanik*[, 475 U.S. 66 (1986)]." Response at Pages 9-10 of 13. But *Graham* cited *Mechanik* only in discussing the differing tests for evaluating prejudice for *non-fundamental* defects in a grand-jury proceeding. *Graham*, 2023 WL 5011734 at *2 & n.1 (after noting that some grand-jury defects can be sufficiently "fundamental" as to require no showing of prejudice because they "give[] rise to the constitutional right not to be tried," Court describes how to evaluate prejudice "[w]hen this sort of structural error is *not* at play" (internal quotation marks omitted) (emphasis added)).[1] *Graham*'s citation to *Mechanik*, then, had

[1] In *Mechanik*, which involved a post-trial denial of a challenge to a grand-jury proceeding based on Rule 6(d), the Court held that the supervening guilty verdict, by itself, rendered any error in the grand jury proceeding harmless. 475 U.S. at 69-70. By contrast, in *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), the Court held that, for motions to dismiss alleging non-constitutional grand-jury errors brought *before* the conclusion of the trial, "dismissal of the indictment is appropriate only if it is established that the violation substantially influenced the grand jury's decision to indict, or if there is grave doubt that the decision to indict was free from the substantial influence of such violations." *Id.* at 256 (internal quotation marks omitted).

nothing to do with its holding that the alleged grand-jury defect—that "the grand jurors met in three secure locations and communicated via videoconference"—was "not a fundamental error." *Id.* at *2.

Second, again alluding to footnote 1, Melton argues that interlocutory appeal is appropriate "[g]iven . . . the conflict in squaring circuit precedent." Response at Pages 9-10 of 13. After describing the *Mechanik* and *Bank of Nova Scotia* tests for evaluating prejudice for *non-fundamental* grand-jury defects, *Graham* noted that "[t]his Court has acknowledged some difficulty in squaring these two cases" but said: "We need not consider that problem here because a petit jury convicted Graham on all counts, which means that *Mechanik*'s reasoning also supports our decision." *Graham*, 2023 WL 5011734 at *2 & n.1. *Graham*, then, did not describe a conflict in *circuit* precedent, and the difficulty it acknowledged in squaring Supreme Court precedent—like its citation to *Mechanik*—had nothing to do with its holding that the alleged Rule 6 violation was "not a fundamental error." *Id.* at *2. Having concluded that prejudice could not be presumed, this Court simply held that Graham could not show prejudice under either *Mechanik* or *Bank of Nova Scotia*. *Id.* at *2 & n.1.

Third, Melton argues that interlocutory appeal is appropriate "[g]iven . . . the nature of [his] claims." Response at Pages 9-10 of 13. He does not elaborate, other than to cite *United States v. Deffenbaugh Industries, Inc.*, 957 F.2d 749 (10th Cir. 1992). *Id.* But the specifics of his claims do not help him. His claim that the Standing Order violates Rules 6(d)(1) and 6(d)(2) regarding who may be "present" during a grand-jury proceeding (Response at Pages 7-8 of 13) fails 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. As the Third Circuit explained in *United States v. Alexander*, 985 F.3d 291 (2021), "[u]nder *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.'" *Id.* at 296 (quoting *Midland Asphalt*, 489 U.S. at 800). Melton's claim under Rule 6(e)—that the Standing Order failed to consider "cyber security" (Response at Page 8 of 13; *see also* Dist. Ct. Dkt. 349, at 7-10)—likewise is barred by *Midland*

Asphalt. *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").

Melton's final claim is that the Standing Order violated Rule 6(b)(2), which requires that at least 12 qualified grand jurors concur in the indictment. Response at Pages 7-8 of 13. But Melton did not object to the Report and Recommendation on that basis, *see generally* Dist. Ct. Dkt. 349,[2] and he thus has forfeited any such challenge, *see* 11th Cir. Rule 3-1.[3] In any event, his claim is not actually that too few jurors concurred,

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[2] Melton argued that the grand-jury procedures "did not require a *quorum* of grand jurors at any single courthouse," *see* Dist. Ct. Dkt. 349 at 14 (emphasis added); *see also id.* at 12 (citing Rule 6(a)(1)), but he did not object on the basis of Rule 6(b)(2). Nor would such an objection have been fruitful; the record established that the requisite number of jurors concurred in the indictment. *See* Dist. Ct. Dkt. 239, Government Response to Motion to Dismiss (Aug. 22, 2022), at 3 ("[T]he grand jury foreperson's signature on the Indictment itself indicates that the requisite number of grand jurors voted to charge Defendants.") (citing Dist. Ct. Dkt. 1, Indictment (Sept. 2, 2020), at 11.).

[3] *See also Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1250 (11th Cir. 2017); *United States v. Schultz*, 565 F.3d 1353, 1360 (11th Cir. 2009) ("After a

but rather that "at least 12 grand jurors were *never present together*." *See* Response at Page 8 of 13 (emphasis added). This simply restates the alleged Rule 6(d) violation, which (as discussed) is not immediately appealable. *Supra* at 5.

Nor does *Deffenbaugh* help Melton. There, the Tenth Circuit allowed an interlocutory appeal from the denial of a discovery request regarding the number of grand jurors who concurred in the indictment, reasoning that, if too few grand jurors concurred, that would represent a fundamental defect under *Midland Asphalt*. *Deffenbaugh*, 957 F.2d at 755. But the Tenth Circuit itself has "refused to extend *Deffenbaugh* beyond its peculiar facts," *United States v. Tucker*, 745 F.3d 1054, 1068-69 (10th Cir. 2014), and those facts are not at issue here. Melton has no preserved Rule 6(b)(2) claim, and (preserved or not) his actual claim is that the grand jurors were not sufficiently present; he does not deny that the requisite number of grand jurors actually voted to charge him. By

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magistrate judge has issued a report and recommendation. . . a party that wishes to preserve its objection must clearly advise the district court and pinpoint the specific findings that the party disagrees with."). Melton was provided the required notice of the risk of forfeiture, *see* Dist. Ct. Dkt. 342, Order (Apr. 20, 2023), and he asserts no basis for plain-error review.

contrast, *Graham* evaluated the precise circumstances at issue here and concluded that the Standing Order procedures did not create a fundamental defect. *Supra* at 2.

II. Conclusion

Accordingly, and for the reasons discussed in the motion to dismiss, this Court lacks jurisdiction over this appeal.

Respectfully submitted.

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September 5, 2023

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 1,623 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.

September 5, 2023

/s/ Andrew N. DeLaney
Andrew N. DeLaney

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 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.

September 5, 2023

/s/ Andrew N. DeLaney
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