

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-12549

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN DAVID MELTON,
a.k.a. David Melton,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Georgia
D.C. Docket No. 4:20-cr-00081-RSB-BKE-4

Before JILL PRYOR, BRANCH, and LAGOA, Circuit Judges.

PER CURIAM:

John David Melton appeals from the district court's order denying his motion to dismiss the indictment based on challenges to a standing order regarding grand jury procedures utilized during the COVID-19 pandemic. In his motion, Melton argued that the standing order violated his Fifth Amendment right to a grand jury and Federal Rule of Criminal Procedure 6 because it did not ensure grand jury secrecy, improperly permitted videoconferencing, and resulted in less than a quorum of the grand jurors being present in the same room. The government moves to dismiss this appeal for lack of jurisdiction, arguing that the district court's order is not appealable under the collateral order doctrine.

We conclude that the district court's order is neither final nor immediately appealable. *See* 28 U.S.C. § 1291. The order is not final because Melton has yet to be convicted or sentenced. *See Flanagan v. United States*, 465 U.S. 259, 263 (1984). And it is not appealable under the collateral order doctrine because it does not involve a right not to be tried, which means it can be effectively reviewed on appeal from a final judgment. *See United States v. Shalhoub*, 855 F.3d 1255, 1260 (11th Cir. 2017); *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 800, 802 (1989) (stating that, to be effectively unreviewable on appeal from a final judgment, an order

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must deprive a defendant not of the right not to be convicted, but of the right “*not to be tried at all*”).

To the extent Melton argued that the standing order failed to ensure grand jury secrecy, that alleged violation does not implicate a right not to be tried because it is not “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.” See *Midland Asphalt Corp.*, 489 U.S. at 802. Additionally, we recently held that to the extent the same standing order at issue here violated Rule 6, that violation is not a “fundamental error” that “change[s] the basic nature of [the] grand jury or fatally infect[s] [the] indictment.” See *United States v. Graham*, 80 F.4th 1314, 1317-18 (11th Cir. 2023).

The district court’s order is therefore not appealable at this time, under the collateral order doctrine or otherwise. The government’s motion to dismiss is GRANTED and this appeal is DISMISSED.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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February 20, 2024

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 23-12549-DD
Case Style: USA v. John Melton
District Court Docket No: 4:20-cr-00081-RSB-BKE-4

Opinion Issued

Enclosed is a copy of the Court's decision issued today in this case. Judgment has been entered today pursuant to FRAP 36. The Court's mandate will issue at a later date pursuant to FRAP 41(b).

Petitions for Rehearing

The time for filing a petition for panel rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing is timely only if received in the clerk's office within the time specified in the rules. **A petition for rehearing must include a Certificate of Interested Persons and a copy of the opinion sought to be reheard.** See 11th Cir. R. 35-5(k) and 40-1.

Costs

No costs are taxed.

Bill of Costs

If costs are taxed, please use the most recent version of the Bill of Costs form available on the Court's website at www.call.uscourts.gov. For more information regarding costs, see FRAP 39 and 11th Cir. R. 39-1.

Attorney's Fees

The time to file and required documentation for an application for attorney's fees and any objection to the application are governed by 11th Cir. R. 39-2 and 39-3.

Appointed Counsel

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation via the eVoucher system no later than 45 days after issuance of the mandate or the filing of a petition for writ of certiorari. Please contact the CJA Team at (404) 335-6167 or

cja_evoucher@call.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Clerk's Office Phone Numbers

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OPIN-1 Ntc of Issuance of Opinion