

APPENDIX A

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOUR TH CIRCUIT**

No. 21-7334

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

ROBERT KOGER, a/k/a Rick Thompson,
a/k/a John Stern
Defendant - Appellant.

Appeal from the United States District Court for the
Eastern District of Virginia, at Alexandria. Liam
O'Grady, Senior District Judge. (1:14-cr-00018-LO-1)

Submitted: February 17, 2022
Decided: February 23, 2022

Before AGEE and RUSHING, Circuit Judges, and
SHEDD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Robert Koger, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Robert Koger appeals the district court's order denying his petition for a writ of error coram nobis, pursuant to 28 U.S.C. § 1651 (a), and his motions to unseal and for discovery. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *United States v. Koger*, No. 1:14-cr-00018-LO-1 (E.D. Va. filed Aug. 31, 2021 & entered Sept. 1, 2021). We grant Koger's motions to exceed page limitations and to seal his informal brief, and we dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division

UNITED STATES OF AMERICA,

v.

CASE NO. 1:14cr18

**ROBERT TIMOTHY KOGER
Defendant**

ORDER

The Court has before it the following motions:

1. Petitioner Robert T. Koger's Motion to Vacate his Convictions pursuant to Coram Nobis under Title 28 U.S.C. 1651(a);
2. Petitioner Robert T. Koger's Motion to Unseal Documents and Grand Jury materials;
3. Petitioner's Motion for Discovery on Coram Nobis Petition.

The Government has responded to each of these motions and Mr. Koger has replied. The Motions are ripe for decision, and for the reasons that follow, each

of the motions is **DENIED**.

I. BACKGROUND

Mr. Koger was charged in a sealed complaint on September 4, 2013. Dkt. 1. After he had an initial appearance on September 5, 2013 his retained counsel, Peter Greenspun, entered an appearance on September 9, 2013.

On September 27, 2013 the United States sought an extension of time in which to indict Koger. As the government's motion explained, while executing a warrant for Koger's home and car, agents learned that Koger had been working out of Greenspun's office for several weeks that covered the time period of the charged offenses. The office was then sealed and a filter process established to identify evidence relevant to the charges against Koger. These circumstances, the government explained, could make Greenspun a witness against Koger. The government also explained that Greenspun received a wire transfer of \$900,000 on July 10, 2013, and that those funds could be proceeds of Koger's crimes. As a result, the government required additional time to determine whether Greenspun would serve as a witness in the case and have a conflict that prevented him from representing Koger in the criminal case. As the government noted, "A lawyer is prohibited, of course, from being a witness while serving in a representative capacity at trial." *United States v. Howard*, 115 F.3d 1151, 1155 (4th Cir. 1997.) On October 4, 2013 the Court heard argument on the United States' motion to extend time to indict and

granted the motion. Dkt. 20. Mr. Koger was present during this hearing.

On October 15, 2013 the government filed a sealed motion to seize \$900,000 from the Greenspun Shapiro bank account and on October 15, 2013 Koger, through defense counsel, filed an emergency Motion to Stay Seizure.

On October 17, 2013 the court granted, in part, the government's motion to seize the funds in the Greenspun Shapiro bank account. Mr. Koger was present at this hearing.

On November 4, 2013 the government issued two separate Grand Jury subpoenas to defense counsel Greenspun for documents and testimony and on November 20, 2013 defense counsel filed a Motion to Quash Grand Jury subpoenas.

On November 21, 2013 Judge Brinkema entered a sealed order setting deadlines for briefing and a hearing on the Grand Jury subpoenas for December 18, 2013.

On December 12, 2013 the government filed a motion in Response to Motion to Quash Subpoena.

On December 17, 2013 Mr. Koger filed his Reply to Government's Response to Motion to Quash.

On December 18, 2013 a hearing was held under seal in front of the Honorable Leonie Brinkema for

both sides to present arguments relative to the Grand Jury subpoenas. The focus of the argument was whether Mr. Greenspun would produce documents relevant to the \$900,000 fraud perpetrated by Mr. Koger while he was working from Mr. Greenspun's office. Mr. Koger was present at this hearing. The Court recalls that the subpoena issue was resolved by Mr. Greenspun producing certain documents.

On January 16, 2014 the United States filed a two-count criminal information, and Koger executed a waiver of indictment and pleaded guilty to the information. Count one of the information charged Koger with conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349, and count two charged Koger with wire fraud, in violation of 18 U.S.C. § 1343.

Paragraph 3 of the plea agreement identified a potential conflict between Koger and Greenspun and stated that Koger was waiving any such claim:

Waiver of Actual or Potential Conflict with Undersigned Counsel for Defendant. In October 2012 the United States executed a search warrant on the defendant's home in Oakton, Virginia. Since then, the defendant has been represented by Peter D. Greenspun of the law firm of Greenspun Shapiro PC in all matters related to the offenses referenced in this plea agreement and the statement of facts. Through the course of the matters described in the

statement of facts related to Count 2, there have been references in pleadings, court hearings, and discussions between the undersigned counsel for the United States and the defendant of assertions by the United States that Peter D. Greenspun of a possible conflict of interest in continuing to represent the defendant, including because Mr. Greenspun could be called as a witness by the United States. Defendant, nevertheless, has had the full opportunity to make inquiry about this issue and has discussed it with Mr. Greenspun. In the event of a conflict may or does in fact exist, Defendant hereby *waives* such a conflict, and defendant affirms he is fully satisfied with the representation by his undersigned counsel and will not be able to claim he was not properly and competently represented due to a conflict of interest by his counsel.

Dkt. No. 35 at 2

The plea agreement also provided that Koger was satisfied with Greenspun's performance:

The defendant is satisfied that the defendant's attorney has rendered effective assistance. The defendant understands that by entering into this

agreement defendant surrenders certain rights as provided in this agreement. The Defendant understands that the right of criminal defendants include the following:

- a. the right to plead not guilty and to persist in that plea;
- b. the right to a jury trial;
- c. the right to be represented by counsel - and if necessary have the court appoint counsel - at trial and at every other stage of the proceedings; and
- d. the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses.

Koger personally signed the plea agreement. Dkt. 35 at 13. Immediately above his signature, Koger agreed that he had "consulted with my attorney" and that he had "read this plea agreement and carefully reviewed every part of it with my attorney. I understand this agreement and voluntarily agree to it." *Id.*

At the plea hearing, Koger acknowledged that he was then 47 years old and had graduated from

college with two degrees. Dkt. 68 at 2. Koger again agreed that he was satisfied with Greenspun's services on his behalf. *Id* at 3. And he agreed that he had gone over the plea agreement with Greenspun. *Id*.

The Court also specifically asked Koger about the paragraph in the plea agreement addressing conflicts between Koger and Greenspun.

The Court: One of the paragraphs in the plea agreement brings up the issue of a conflict of interest between Mr. Greenspun and yourself because, as you I am sure recall, there was an issue as to whether Mr. Greenspun might be a possible witness in the case against you if it went to trial. Do you recall that conversation?

Defendant: Yes. I do.

The Court: And in the agreement you have waived any conflict of interest that may be perceived, is that correct?

Defendant: That is correct.

The Court: Have you had separate counsel to talk to about that potential conflict of interest?

Defendant: No, I have not.

The Court: Have you fully discussed it with Mr.

And I would note that Judge Brinkema very closely brought up the issue of a possible conflict and what that may mean. So there have been a number of discussions between myself and the Government, but, more importantly, between myself and Mr. Koger about seeking other counsel, whether private retained, which he doesn't have the means to do, but also or either the Public Defender's Office or private but appointed counsel. And Mr. Koger is aware fully of the availability of such assistance, even if it is to address the possibility of any conflict for plea negotiation purposes. So he's been involved and in the loop for the entirety of those issues as well. *Any documents I have received from the Government have been shared with Mr. Koger.*

Dkt. 68 at 15 (emphasis added).

Greenspun agreed that he believed that Koger's plea was knowing and voluntary. Dkt. 68 at 16. Mr. Koger never disagreed with anything that Mr. Greenspun said at the Rule 11 plea hearing.

II. Legal Analysis

A. Petition for Coram Nobis

A defendant seeking coram nobis relief must

satisfy four threshold prerequisites: First, a more usual remedy, such as relief through 28 U.S.C. § 2255, must be unavailable; second, the petitioner must have a valid basis for not having attacked his convictions earlier; third, the consequences to the petitioner must be sufficiently adverse to satisfy Article III's case or controversy requirement; and fourth the error must be of the most fundamental character. *Bereano v. United States*, 706 F.3d 568, 576 (4th Cir. 2013).

As the government states in its opposition, "A writ of *coram nobis* is an exceptional remedy that may be granted only when a fundamental error has occurred and no other available remedy exists." *United States v. Swaby*, 855 F.3d 233, 238 (4th Cir. 2017)(citing *United States v. Mandel*, 862 F.2d 1067, 1075 (4th Cir. 1988)). Under the standard for obtaining relief through *coram nobis*, a petitioner must provide a valid basis for not having attacked his conviction earlier, using direct appeal or a motion under 28 U.S.C. § 2255. "Although there is no firm limitation of time within which a writ of *coram nobis* will lie, petitioners are required to demonstrate 'sound reasons exist[] for failure to seek appropriate earlier relief.'" *United States v. Rocky Mountain Corp*, 442 F. App'x. 875, 876 (4th Cir. 2011) (second alteration in original) (quoting *United States v. Morgan*, 346 U.S. 502, 512 (1954)). For example a defendant's "bare assertion that [he] received ineffective assistance of counsel is insufficient to demonstrate a valid reason for waiting more than one year to challenge [his] conviction." *Id.*

Mr. Koger states that he has served his sentence

and therefore cannot file a § 2255, which is correct. However, Mr. Koger could have filed a § 2255 over the previous six years, as he points to no valid reasons why his delay was necessary.

Mr. Koger states that his ineffective assistance claim is based on Mr. Greenspun's per se actual conflict of interest as well as the potential conflict of interest. His recitation of the circumstances demonstrating that he was unaware of the full measure of the conflict is unavailing. Mr. Koger was well aware of the potential conflict, as he was working in Mr. Greenspun's office when the seizure of the \$900,000 took place. He was present at each of the pretrial hearings where the potential conflict was discussed. He was carefully examined at his Rule 11 plea colloquy about the potential conflicts. He was present when Mr. Greenspun repeated to the Court that he had shared all of the pleadings with Mr. Koger, and Mr. Koger did not disagree. Whether or not Mr. Koger received copies of the earlier pleadings some time after the plea and sentencing is of little moment, as he had the information real time in the courtroom. He was present at the hearing held before Judge Brinkema concerning the request for subpoenas for his attorney's records and the potential conflict of interest it raised.

Moreover, a lawyer's potential conflict of interest alone is insufficient to satisfy a claim of ineffective assistance of counsel. *Burger v. Kemp*, 483 U.S. 776, 783 (1987).

Mr. Koger has presented no evidence in this petition that Mr. Greenspun assisted him in his crimes while working in his offices or otherwise. If he had evidence that would support such an actual conflict he surely would have presented it herein. The absence of any such allegation demonstrates that there is none.

The Court carefully followed the evidence of the potential conflict between Mr. Koger and Mr. Greenspun as this case progressed, and determined that there was no reason for the court to intercede, as it never found evidence of an actual conflict or a potential conflict. The Court carefully examined Mr. Koger concerning the potential conflict nonetheless and was satisfied that Mr. Koger understood the nature of the potential conflict and had voluntarily and intelligently waived it. His claim of ineffective assistance of counsel therefore fails.

Accordingly, Mr. Koger's petition for Coram Nobis is **DENIED**.

B. Motion to Unseal

Mr. Koger has filed a motion to unseal a number of documents identified in a sealed submission, all of which Mr. Koger possesses, and the parties have fully briefed the issue.

The majority of these documents concern grand jury materials, including grand jury subpoenas, the pleadings concerning the grand jury subpoenas, as well as the transcript of that hearing. They are

identified as Items 4-11 of the government brief in opposition (Dkt. 115).

As the government aptly wrote, first, as to these (4-11) grand jury materials that Koger seeks to unseal, his First Amendment and common law rights fail at their inception. "Since the 17th century, grand jury proceedings have been closed to the public and records of such proceedings have been kept from the public eye." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979). "Although many governmental processes best operate under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly. A classic example is that 'the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.'" *Press-Enterprise Co. v. Superior Court of Calif for County of Riverside*, 478 U.S. 1, 8-9 (1986)(quoting *Douglas Oil Co.*, 441 U.S. at 218). "The long-standing policy of upholding the secrecy of the grand jury helps to protect the innocent accused from facing unfounded charges, encourages full and frank testimony on the part of witnesses and prevents interference with the grand jury's deliberation." *United States v. Pitch*, 953 F.3d 1226 (11th Cir.) (en banc) (citing *Douglas Oil Co.*, 441 U.S. at 219) *cert. denied*, 141 S. Ct. 624 (2020).

These materials are appropriately covered by the law governing grand jury secrecy under Fed. R. Crim. P. 6(e) and the sealing of warrants and affidavits. First, grand jury secrecy covers more than simply witness testimony before a grand jury. "The

substantive content of 'matters occurring before the grand jury' can be anything that may reveal what has transpired before the grand jury". *In re Grand Jury*, 920 F.2d 235, 241-42 (4th Cir. 1990). Thus courts have deemed as properly sealed proceedings in the district court addressing a motion to quash a grand jury subpoena, compel testimony, immunize a witness, and the like. *See, e.g., In re Motions of Dow Jones & Co.*, 142 F.3d 496, 502 (D. C. Cir. 1998). We construe the secrecy provisions of Rule 6(e) to apply not only to disclosures of events which have already occurred before the grand jury, such as a witness's testimony, but also to disclosures of matters which will occur, such as statements which reveal the identity of persons who will be called to testify or which report when the grand jury will return an indictment." *In re Grand Jury Investigation*, 610 F.2d 202, 216-17 (5th Cir. 1980).

Item 1, the opposition to extend the time to indict, falls into these same protections, as it concerns the timing of when the grand jury will return an indictment and outlines conduct subject to the grand jury subpoena.

Items 2 and 3, the warrant to seize property and affidavit in support thereof, are investigative and as Mr. Koger knows, no charges resulted from the investigation. Items 1, 2, and 3 were sealed in part to protect the privacy of a subject not charged with an offense, whose conduct was found not to involve criminal acts. The court has an obligation and a right to protect innocent persons from disclosure of

embarrassing or professionally damaging investigative matters. *See U.S. v. Pitch, supra.*

While the Court is mindful of the public's First Amendment rights to access of judicial records, each of the eleven documents sought by Mr. Koger were properly sealed at inception and shall remain sealed for the reasons articulated herein. Mr. Koger has raised no valid compelling reason why they should be unsealed.

Therefore his Motion to Unseal is **DENIED**.

C. Motion for Discovery

Mr. Koger's motion for discovery is **DENIED**. The Court has found that Mr. Koger voluntarily and intelligently waived any potential conflict, and that he did not suffer from ineffective assistance of counsel. The discovery Mr. Koger seeks amounts to nothing more than a fishing expedition. As stated above, had Mr. Koger possessed evidence of a conflict he would have proffered it, and he did not.

It is so **ORDERED**.

/s/

Liam O'Grady

United States District Judge

Alexandria, Virginia
August 31, 2021

APPENDIX C

FILED: April 26, 2022

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

No. 21-7334
(1:14-cr-00018-LO-1)

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

ROBERT KOGER, a/k/a Rick Thompson,
a/k/a John Stern
Defendant - Appellant

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc and motion to seal.

For the Court

/s/ Patricia S. Connor, Clerk