APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-14301-GG

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

CHRISTOPHER DAVID COBB,

Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: LUCK, LAGOA, and TJOFLAT, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

APPENDIX B

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-14301
Non-Argument Calendar

D.C. Docket No. 7:09-cr-00486-LSC-GMB-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

CHRISTOPHER DAVID COBB,

Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

(May 19, 2021)

Before LUCK, LAGOA, and TJOFLAT, Circuit Judges.

PER CURIAM:

Christopher Cobb, proceeding *pro se*, appeals the denial of his motion to unseal grand jury transcripts and his signed indictment. In this appeal, Cobb first argues that the District Court that presided over his original criminal action had the duty to ensure that the Assistant United States Attorney (AUSA) that presented evidence to the grand jury took the proper oath of office. But because the District Court allegedly did not, Cobb contends that the grand jury transcripts and signed indictment should be unsealed. He then argues that the District Court applied *United States v. Mechanik*, 475 U.S. 66, 106 S. Ct. 938 (1986)—which holds that a petit jury's guilty verdict means that the criminal defendant is in fact guilty as charged beyond a reasonable doubt—too broadly.

We disagree with Cobb on both points. On the former, the District Court did not abuse its discretion in denying Cobb's motion because there was no currently pending judicial proceeding connected to Cobb's request to unseal. And on the latter, the District Court correctly concluded that any error that may have occurred before the grand jury was harmless beyond a reasonable doubt because a petit jury found Cobb guilty. Accordingly, we affirm.

I.

On October 27, 2010, a grand jury charged Cobb with knowing receipt of child pornography, in violation of 18 U.S.C § 2252A(a)(2) (Count 1), knowing distribution of child pornography, in violation of 18 U.S.C. § 2252A(a)(2) (Count

2), and knowing possession of child pornography, in violation of 18 U.S.C § 2252A(a)(5)(B) (Count 3). A jury found Cobb guilty on Counts 1 and 3, but not guilty on Count 2. The District Court sentenced Cobb to a total term of 210 months' imprisonment, and a panel of this Court affirmed Cobb's sentences, *United States v. Cobb*, 479 F. App'x 210, 211–12 (11th Cir. 2012).

In February 2018, Cobb filed a motion purportedly seeking relief under Federal Rule of Civil Procedure 60(b), which provides grounds for relief from a final judgment, order, or proceeding. Cobb's motion asserted that AUSA Mary Ann Gallagher—the prosecutor for Cobb's criminal case—did not file her oath of office and appointment affidavit that provided her with the legal authorization to act as a representative of the federal government. In support, Cobb pointed to a Freedom of Information Act response he received from the Executive Office for the United States Attorneys (EOUSA), which stated that a search for the records Cobb requested "revealed no responsive records" and that the "records ha[d] been destroyed pursuant to Department of Justice guidelines."[1] The District Court denied the motion because Cobb's case had been closed since 2011, and thus the Court "lack[ed] jurisdiction to modify or reduce his sentence."

[1] It is worth noting that EOUSA's response to Cobb's FOIA request states only that his request did not turn up an Oath of Office signed by AUSA Gallagher, not that she did not sign one.

So, in December 2018, Cobb filed a motion to unseal the grand jury transcripts and the signed indictment. Cobb claimed that, based on his FOIA request, he had determined that AUSA Gallagher did not have an oath of office on file with EOUSA when she appeared before the grand jury in his case. In support, he attached the FOIA response letter he received from EOUSA that stated that the information he requested had been destroyed pursuant to Department of Justice guidelines. Cobb later filed a second FOIA response he received from EOUSA, which noted that "records of former AUSAs are not maintained by EOUSA upon separation from employment."

The District Court ultimately denied Cobb's motion. Recognizing that it is generally "well-settled policy of federal law that grand jury proceedings remain secret," the District Court found that Cobb had not demonstrated a compelling need for the grand jury materials. Likewise, the Court—relying on *United States v. Mechanik*, 475 U.S. 66, 70, 106 S. Ct. 938, 941–42 (1986)—concluded that any alleged error in the grand jury proceedings would have been harmless beyond a reasonable doubt because the petit jury ultimately found Cobb guilty on Counts 1 and 3.

Cobb timely appealed the denial of his motion to unseal the grand jury transcripts and the signed indictment. But we affirm on two grounds. First, the

District Court's denial was not an abuse discretion because no judicial proceeding was anticipated or currently pending that was connected to Cobb's request to unseal. And second, even if an error occurred before the grand jury, it was harmless beyond a reasonable doubt because a petit jury later found Cobb guilty.

II.

A district court's refusal to unseal court documents is reviewed for abuse of discretion. *Romero v. Drummond Co.*, 480 F.3d 1234, 1242 (11th Cir. 2007). District courts have wide discretion in evaluating whether disclosure of grand jury materials would be appropriate. *United Kingdom v. United States*, 238 F.3d 1312, 1320 (11th Cir. 2001).

III.

We'll start with whether Cobb can satisfy the Federal Rule of Criminal Procedure 6(e)(3)(E)(i) exception that permits the disclosure of grand jury materials "preliminary to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E)(i). We'll then turn to whether the error Cobb alleges—assuming that it indeed occurred—is enough to require disclosure in this case.

With a few limited exceptions, the disclosure of grand jury materials must first be authorized by a court. *See* Fed. R. Crim. P. 6(e)(2), (3). We have held that, to obtain disclosure of protected grand jury materials, a person must show a "particularized need" for the documents. *United Kingdom*, 238 F.3d at 1320.

Parties seeking grand jury materials "must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only the material so needed." *Id.* at 1320–21. Critically, under Rule 6(e), the "[]other judicial proceeding" must be one that is already pending, or, at the very least, anticipated. *United States v. Baggot*, 463 U.S. 476, 479–80, 103 S. Ct. 3164, 3167 (1983) ("[Federal Rule of Criminal Procedure 6(e)] contemplates only uses related fairly directly to some identifiable litigation, *pending or anticipated*." (emphasis added)). And the Supreme Court has repeatedly emphasized that district courts are given wide discretion to determine whether disclosure of grand jury materials is appropriate. *See United States v. John Doe, Inc. I*, 481 U.S. 102, 116, 107 S. Ct. 1656, 1664 (1987).

Here, the District Court did not abuse its discretion when it denied Cobb's motion to unseal the grand jury records. Cobb has not satisfied Rule 6(e)(3)(E)(i)'s exception because he has not pointed to any *pending* or *anticipated* judicial proceedings connected to his request for the transcripts. The only potential proceeding that this Court could identify—Cobb's criminal case—has been closed since 2011. Under *Baggot*, this lack of a pending or anticipated proceeding is dispositive. 463 U.S. at 479, 103 S. Ct. at 3167.

The District Court did suggest, however, that Cobb may "anticipate[]" filing a motion to dismiss his indictment and vacate his conviction and sentences based on the contents of the grand jury records. But if the mere possibility of a motion to dismiss an indictment qualified as an "anticipated" judicial proceeding under Rule 6(e)(3)(E)(i), every criminal defendant would seek to unseal their grand jury proceedings in order to dig around for some error. Given that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings," *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 218, 99 S. Ct. 1667, 1672 (1979), we will not stretch *Baggot* that far. And regardless, this does not alter our conclusion that the District Court did not abuse its discretion. Although the District Court relied on different reasoning when denying Cobb's motion, we may affirm on any ground supported by the record. *LeCroy v. United States*, 739 F.3d 1297, 1312 (11th Cir. 2014).

But we will nevertheless give Cobb the benefit of the doubt and assume (1) that there was a "pending or anticipated proceeding" and (2) that there was some error before the grand jury when the AUSA (allegedly) failed to take the proper oath of office. Even with the aid of these assumptions, Cobb's motion to unseal still fails. Any error in a grand jury proceeding is harmless beyond a reasonable doubt when a petit jury enters a guilty verdict, as the guilty verdict means that there was probable cause to believe that the defendant was guilty, and that the

defendant was in fact guilty as charged beyond a reasonable doubt. *Mechanik*, 475 U.S. at 70, 106 S. Ct. at 941–42. Thus, Cobb—who was found guilty by a petit jury on two counts—cannot demonstrate a "compelling" or "particularized need," *United Kingdom*, 238 F.3d at 1316, 1320, for the grand jury records because the error that allegedly occurred before the grand jury is harmless beyond a reasonable doubt.

Accordingly, we affirm the District Court's denial of Cobb's motion to unseal.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**7:09-cr-00486-LSC-GMB-1**
	)	
	)	
CHRISTOPHER DAVID COBB,	)	
	)	
Defendant/Movant.	)	

MEMORANDUM OF OPINION AND ORDER

This matter is before the Court on several *pro se* motions filed by Defendant, Christopher David Cobb:

1) Motion to Unseal Grand Jury Transcripts (Doc. 80);

2) Motion to Introduce Additional Evidence with regard to Doc. 80 (Doc. 82);

3) Motion for Information Regarding Which Judge Unseals Grand Jury Transcripts (Doc. 83);

4) Motion (Request) for a Decision re: Doc. 80 (Doc. 84).

For the following reasons, the motions are due to be denied.

I. Background

This action has been closed since 2011. Cobb was convicted by a jury of one count of receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2), and

[Lord Hellund]
McKinney v. State, 917 P.2d 1214, 1220 (Ariz. 1996) "A structural defect is an error that 'affects the framework within which the trial proceeds, rather [1] than simply an error in the trial process itself'" Fulminante, 499 U.S. at 309, 111 S.Ct. 1265. In general, perse structural defects affect 'the entire conduct of the trial from beginning to end' Id, at 310
∅ unauthorized individual had both control of the evidence presented, AND significant influence over Grand Jury. which created a potential structural defect in the proceedings

three counts of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B), and sentenced to 210 months' imprisonment. (Doc. 51.) His convictions and sentence were affirmed on direct appeal by the Eleventh Circuit. (Doc. 64.) Cobb subsequently filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255, but this Court denied the motion. In 2018, Cobb filed a motion pursuant to Federal Rule of Civil Procedure 60, asserting that his indictment should be dismissed, and his convictions and sentence vacated, because Assistant United States Attorney, Mary Anne Gallagher, who had originally prosecuted his case, had not signed an Oath of Office as Assistant United States Attorney. (Doc. 75.) This Court denied that motion for lack of jurisdiction. (Doc. 76.) Cobb appealed this Court's denial to the Eleventh Circuit. (Doc. 77). On appeal, the United States argued, and the Eleventh Circuit agreed, that Cobb's Rule 60 motion was in actuality a successive 28 U.S.C. § 2255 petition that this Court lacked jurisdiction to consider without an authorizing order from the Eleventh Circuit. Thus, the Eleventh Circuit dismissed Cobb's appeal of this Court's denial of his Rule 60 motion. Cobb subsequently filed the four motions in this Court that remain pending.

II. Cobb's Argument

All of these *pro se* motions deal with Cobb's request that this Court unseal his grand jury proceedings because, according to Cobb, an unauthorized individual was present in the grand jury room during the proceedings. Cobb asserts that the unauthorized individual was Mary Anne Gallagher, a former Assistant United States Attorney for the Northern District of Alabama, who is noted on the docket sheet as being the attorney of record in this case until December 2010, when she was replaced by Assistant United States Attorney Daniel Fortune. Cobb contends that Gallagher was not authorized to be present at his grand jury proceedings because she did not sign the Oath of Office as an Assistant United States Attorney. In support of this claim, Cobb states that he submitted a Freedom of Information Act request, requesting a copy of Gallagher's signed Oath of Office as an Assistant United States Attorney, but he received a response stating that no responsive records had been found at the Executive Office of the United States Attorney. Cobb asserts that he needs to know whether Gallagher was present during his grand jury proceedings to know if Federal Rule of Criminal Procedure 6(d)(1) has been violated. That rule limits the persons authorized to be at grand jury proceedings to "attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device." Fed. R. Crim. P. 6(d)(1). Although Cobb does not say so, the Court presumes—considering

Cobb's earlier-filed Fed. R. Civ. P. 60 motion—that Cobb seeks a dismissal of his indictment and a complete vacatur of his convictions and sentence.

III. Analysis

It is the well-settled policy of federal law that grand jury proceedings remain secret. *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 424 (1983). The traditional rule of grand jury secrecy is codified at Fed. R. Crim. P. 6(e). *Id.* at 425. The rule specifically states:

> Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:
>
> (i) a grand juror;
>
> (ii) an interpreter;
>
> (iii) a court reporter;
>
> (iv) an operator of a recording device;
>
> (v) a person who transcribes recorded testimony;
>
> (vi) an attorney for the government; or
>
> (vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

Fed. R. Crim. P. 6(e)(2)(B).

Rule 6(e)(3), however, provides for several exceptions under which a district court may, in its discretion, authorize disclosure of grand jury materials. In particular, a district court may order disclosure:

> (i) preliminarily to or in connection with a judicial proceeding; [or]
>
> (ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury[.]

Fed. R. Crim. P. 6(e)(3)(E)(i)-(ii).

The exception in subsection (ii) of Rule 6(e)(3)(E), for dismissal of indictments, does not apply here, because Cobb has already been tried and convicted and his convictions were affirmed on direct appeal back in 2012. *See* Fed. R. Crim. P. 12(b)(3)(A)-(B) (requiring certain motions to be filed before trial, including those claiming a defect in the indictment).

This leaves the exception in subsection (i), for disclosure of grand jury materials "preliminarily to or in connection with a judicial proceeding." For a request to be "in connection with" a judicial proceeding, the proceeding "must already be pending." *See United States v. Baggot*, 463 U.S. 476, 479 (1983). The Eleventh Circuit dismissed Cobb's appeal from this Court's denial of his Fed. R. Civ. P. 60 motion, and Cobb has no other proceeding currently pending. Cobb must therefore show that he seeks the grand jury transcripts "preliminarily to" a judicial

"Although Rule 6(e)(3) enumerates the exceptions to the traditional rule of grand jury secrecy, the Supreme Court and this Court have recognized that the district courts have inherent power beyond the literal wording of Rule 6(e)(3) to disclose grand jury material and that Rule 6(e)(2) is but declaratory of that authority." U.S. v. Aisenberg (citing Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399-400, 79 S.Ct. 1237, 3 L.Ed. 2d 1323 (1959))

proceeding that is "anticipated." *See Baggot*, 463 U.S. at 480; Fed. R. Crim. P. 6(e)(3)(E)(i). Presumably, Cobb "anticipate[s]" filing a motion to dismiss his indictment and vacate his convictions and sentences, due to what he deems to be an error in the grand jury proceedings.

A party seeking disclosure of grand jury materials for use in a judicial proceeding must show: (1) that the material he seeks is needed to avoid a possible injustice in another judicial proceeding; (2) that the need for disclosure is greater than the need for continued secrecy; and (3) that the request is structured to capture only the material so needed. *United States v. Aisenberg*, 358 F.3d 1327, 1347-48 (11th Cir. 2004). To show that the need for disclosure outweighs the need for secrecy, the party seeking disclosure must establish a "compelling and particularized need for disclosure." *Id.* at 1348. A particularized need may be shown by demonstrating that "circumstances had created certain difficulties peculiar to [the] case, which could be alleviated by access to specific grand jury materials, without doing disproportionate harm to the salutary purpose of secrecy embodied in the grand jury process." *Id.* at 1348-49 (quoting *United States v. Elliott*, 849 F.2d 554, 558 (11th Cir. 1988)). "Particularized need is not shown by a general allegation that grand jury materials are necessary for the preparation of a motion to dismiss [an indictment]." *Elliott*, 849 F.2d at 557. Likewise, a blanket request for all

"an abuse of discretion occurs if a judge fails to apply the proper legal standard or to follow proper procedures in making a determination, or bases an award or a denial upon findings that are clearly erroneous."

again, trying to put it off on the need for "another judicial proceeding" under Rule 6(e)(3)(C)(i)(I)'s "increase"

Also, district court is citing a case that does not deal w/ an unauthorized individual present in GJ proceedings' (this is about Hyde Amendment)

to start, did not involve "unauthorized individual" present at GJ proceedings

"as to the transfer orders and letters, neither a showing of particularized need nor an explanation of how disclosure would assist in establishing government misconduct before the indictment grand jury"

"Elliot must show that these circumstances had created certain difficulties peculiar to this case, which could be alleviated by access to specific grand jury materials, without doing disproportionate harm to the salutary purpose of secrecy embodied in the grand jury process in order to justify a district court's order of the production of grand jury documents" Liuzzo, 739 F.2d at 545"

A showed particularized need by showing the "unauthorized individual" was also the government's agent - everything that the government agent said and did during these proceedings was illegal, and thus the entire proceeding with respect to appellant's indictment is the particularized need, and was clearly requested in the Motion.

grand jury materials is not the "kind of particularized request required for the production of otherwise secret information." *United Kingdom v. United States*, 238 F.3d 1312, 1321 (11th Cir. 2001).

Cobb has not demonstrated a compelling need for the grand jury materials in this case. Cobb was tried and convicted by a petit jury. The petit jury found him guilty beyond a reasonable doubt on four of the five counts charged in the indictment. While Rule 6(d) ensures that grand jurors are not subject to undue influence that may come with the presence of some unauthorized person present at the proceedings, which in turn protects against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty, a petit jury's subsequent guilty verdict "means not only that there was probable cause to believe that the defendant [was] guilty as charged, but also that [he is] in fact guilty as charged beyond a reasonable doubt." *United States v. Mechanik*, 475 U.S. 66, 70 (1986). Thus, when a petit jury returns a guilty verdict, "any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt." *Id.*[1] Accordingly, even if this Court were to assume as true Cobb's unfounded assertions that (1) Assistant United States

[1] As the Supreme Court noted, there are some exceptions to this rule, like racial discrimination in the composition of the grand jury that indicted the defendant. *See id.* at 70 n.1. Nothing of the sort is alleged here.

Attorney Gallagher had not signed an Oath of Office,[2] (2) so she did not have a "legal" appointment as a federal prosecutor, and (3) so she was thus not "authorized" to be present during his Grand Jury proceedings as contemplated by Fed. R. Crim. P. 6(d), any error is harmless considering Cobb was found guilty beyond a reasonable doubt by a jury in 2010.

IV. Conclusion

In sum, Cobb has not shown either a compelling or a particularized[3] need for the transcripts of his grand jury proceedings. *Aisenberg*, 358 F.3d at 1348-49. Because Cobb has not demonstrated a need for the requested materials, there is no reason to disturb the general rule requiring secrecy of grand jury proceedings. Accordingly, the pending motions (docs. 80, 82, 83, 84) are **DENIED.**

The Clerk is **DIRECTED** to forward a copy of the foregoing to Cobb as well as to the Eleventh Circuit Court of Appeals, because on October 19, 2020, that court entered an order holding in abeyance a petition for writ of mandamus filed by Cobb for 60 days to allow this Court to rule on the motion to unseal (doc. 80). *See*

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[2] Cobb asserts only that his Freedom of Information Act request did not turn up an Oath of Office signed by Gallagher, not that she did not sign one. Indeed, the response Cobb received to his FOIA request states: **"[R]ecords of former AUSAs are not maintained by EOUSA upon separation from employment."** (Doc. 82 at 3 (emphasis added).) they may not be maintained, but they are still controlled by EOUSA, and therefore a FOIA request to EOUSA Personell dept is still the only route to discover

[3] Cobb's blanket request to unseal the proceedings is also not structured to capture only the presence or absence those materials he requires. *Aisenberg*, 358 F.3d at 1347-48; *see also United States v. Cole*, 755 F.2d of an Oath of Office 748, 759 (11th Cir. 1985) (unsubstantiated allegations do not satisfy particularized need standard). - see Exhibit E

Eleventh Circuit Case 20-13034, Order filed October 19, 2020. This case remains **CLOSED**.

DONE and **ORDERED** on November 3, 2020.

L. Scott Coogler
United States District Judge

160704

"[O]pinions formed ... on the basis of facts introduced or events occurring in the course of current proceedings" will not sustain a recusal motion "unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible" Liteky v United States, 510, U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed 2d 474 (1994) at 555

28 USCS § 144 provides for disqualification of Fed. Judge upon a timely filing & sufficient affidavit that Judge has a personal bias or prejudice

- For Terry, Judge's repeated reference to "rape" that was not charged or convicted of show "a deep-seated ... antagonism that would make fair judgment impossible"

" § 455(a) - an entirely new "catch all" recusal provision requiring disqualification in any proceeding in which the impartiality of a justice, judge, or magistrate might reasonably be questioned - covers both 'interest and relationship' and 'bias or prejudice' grounds, but required them all to be evaluated on an objective basis, so that what matters is not the reality of bias or prejudice but its appearance" Liteky, at 478 (emphasis added)

"a favorable or unfavorable predisposition can also deserve to be characterized as 'bias' or 'prejudice' - even though the predisposition springs from the facts adduced or the events occurring at trial - when the predisposition is so extreme as to display clear inability to render a fair judgment" Liteky, at 479