"THE FEDERAL CORNER"

Grand Jury Secrecy in the Eleventh and D.C. Circuits

Buck Files

For six years, the United States Court of Appeals for the Eleventh Circuit was concerned with the *Pitch* trilogy of cases. The published opinions in these cases, with headnotes, are 99 pages in length. For this reason, the excerpts from these cases will be quite abbreviated.

In *Pitch I*[1], United States District Judge Marc T. Treadwell of the Middle District of Georgia, Macon Division, relying on Eleventh Circuit authority (*Hastings*), held that district courts have the inherent authority to order disclosure of grand jury records.

In *Pitch II*[2], a divided panel of the Eleventh Circuit held that Judge Treadwell did not abuse his discretion in finding that disclosure, under the court's inherent authority, was warranted and affirmed the judgment.

In *Pitch III*[3], after a rehearing *en banc,* the United States Court of Appeals for the Eleventh Circuit held that district courts lack inherent, supervisory power to authorize the disclosure of grand jury records outside of Fed.R.Crim.Proc. 6(e)'s enumerated exceptions, overruling *In Re Petition to Inspect and Copy Grand Jury Materials* (*Hastings*), 735 F.2d 1261 (11th Cir. 1984), and reversed the judgment of the district court.

This ended the *Pitch* trilogy of cases.

PITCH I

Judge Treadwell's order that the transcripts were to be disclosed in their entirety reads, in part, as follows:

[The Background of the Case]

> Pitch is a historian researching the July 25, 1946 murder of four African–Americans in Walton County, Georgia. The incident is commonly known as the Moore's Ford lynching. The victims, two married couples, were dragged from a car, tied to a tree, and shot multiple times. According to most accounts, a crowd of some considerable size was present. The murders occurred shortly after the racially charged 1946 Democratic Party gubernatorial primary election, the first Democratic primary in Georgia in which black citizens were allowed to vote. In

[1] *In Re Pitch*, 275 F.Supp.3d 1373 (M.D. Ga. 2017) [Order by United States District Judge Marc T. Treadwell]

[2] *Pitch v. United* States, 915 F.3d 704 (11th Cir. 2019) [Panel: Circuit Judges Wilson and Jordan, and District Judge Graham. (Opinion by Wilson; Jordan filed a concurring opinion; James L. Graham, United States District Judge for the Southern District of Ohio, sitting by designation, filed a dissenting opinion)]

[3] *Pitch v. United States,* ___ F.3d ___, 2020 WL 1482378 (11th Cir. 2020) [Panel Chief Judge Ed Carnes, Circuit Judges Wilson, William Pryor, Martin, Jordan, Rosenbaum, Jill Pryor, Newsom, Branch, Grant, Tjoflat and Marcus. (Opinion by Tjoflat; William Pryor filed a concurring opinion in which Ed Carnes, Tjoflat; Marcus; Newsom and Branch concurred. Jordan filed a concurring opinion. Wilson filed a dissenting opinion, which Martin joined, in part, and Jill A. Pryor joined. Rosenbaum filed a dissenting opinion.)]

that election, former Governor Eugene Talmadge lost the popular vote to progressive James V. Carmichael but crushed Carmichael in the county unit vote. Some believe the murders were directly related to that election.

President Truman ordered the Federal Bureau of Investigation to investigate the murders, and on December 3, 1946, District Court Judge T. Hoyt Davis convened a grand jury. According to one account, the FBI interviewed 2,790 people and the grand jury subpoenaed 106 witnesses. Laura Wexler, Fire in a Canebreak: The Last Mass Lynching in America 190 (2003). Notwithstanding the breadth of the investigation and the presence of a number of witnesses, no one identified any of the participants, and no indictments for the murders were returned. The case remains unsolved.

On February 3, 2014, Pitch petitioned this Court for an order unsealing the grand jury transcripts. Doc. 1. This Court denied the petition without prejudice on August 19, 2014 because, at the time, there was no evidence any records existed. Doc. 7 at 3. The assumption then was the records had been routinely destroyed or were somehow lost. On January 17, 2017, Pitch renewed his motion, claiming that his investigation had revealed the records were at the National Archives and Records Administration in Washington, D.C. Docs. 8 at 7, 10. That same day, the Court ordered the Department of Justice to produce the records for in camera inspection. Doc. 9. The Government then confirmed that transcripts, but no other records, had been found and filed copies under seal. Docs. 14; 16. Relying on Fed. R. Crim. P. 6(e), the Government now maintains that the records must remain sealed.

* * *

[The Circuit Authority (*Hastings*) for the Granting of Pitch's Petition]

… it has long been recognized that a district court's authority to order disclosure of grand jury records is not limited to the exceptions found in Rule 6(e). In this circuit, the most comprehensive discussion of the inherent authority of district courts to order disclosure of grand jury records is found in *In re Petition to Inspect and Copy Grand Jury Materials (Hastings)*, 735 F.2d 1261 (11th Cir. 1984). In *Hastings*, a judicial investigating committee sought records of a grand jury that had returned an indictment against a federal district court judge. *Id.* at 1263–65. The judge, who had been acquitted of the charges in the indictment, opposed disclosure of the records. *Id.* at 1264. He argued, among other things, that Rule 6(e) 'is the controlling source of law in this area and that none of its stated exceptions to the rule of secrecy' allowed the judicial investigating committee access to the records. *Id.* at 1267. The district court disagreed, reasoning that Rule 6(e) did not provide 'the exclusive framework' within which a district court could exercise its discretion to release grand jury records. *Id.* Relying on the court's 'general supervisory authority over grand jury proceedings,' the district court ordered the disclosure of the grand jury records. *Id.* at 1267–68. The Eleventh Circuit affirmed, holding that the district court's conclusion 'that it had inherent power beyond the literal wording of Rule 6(e) is

> amply supported.' *Id.* at 1268. To reach this conclusion, the Eleventh Circuit carefully examined the history of Rule 6(e). Noting that the Supreme Court had ruled that Rule 6(e) is 'but declaratory' of the principle that disclosure is committed to the discretion of district judges and that the Advisory Committee's notes on Rule 6(e) acknowledge that the Rule 'continues the traditional practice of secrecy ... except when the court permits a disclosure,' the Eleventh Circuit concluded that 'it is certain that a court's power to order disclosure of grand jury records is not strictly confined to instances spelled out in the rule.' *Id.* at 1268 (quoting Fed. R. Crim. P. 6 advisory committee's note to (e)). Accordingly, the court concluded that 'the exceptions permitting disclosure were not intended to ossify the law, but rather are subject to development by the courts in conformance with the rule's general rule of secrecy.' *Id.* at 1269.
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> [Conclusion]
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> … the Court finds that Pitch has established exceptional circumstances consonant with the policy and spirit of Rule 6(e). The reasons behind the traditional rule of grand jury secrecy, and thus the policy undergirding Rule 6(e), are no longer implicated. … Indeed, it is difficult to imagine a more suitable case for the application of a historical exception to the rule of grand jury secrecy; of the cases applying the historical exception, none has involved events that took place over 70 years before the disclosure was ordered. Accordingly, the Court finds that Pitch has established exceptional circumstances that warrant the exercise of the Court's inherent authority to order disclosure.

The government appealed Judge Treadwell's order.

PITCH II

Judge Wilson's opinion reads, in part, as follows:

> [Conclusion]
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> 'We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings,' but 'a court called upon to determine whether grand jury transcripts should be released necessarily is infused with substantial discretion.' *Douglas Oil*, 441 U.S. at 218, 99 S.Ct. at 1672. Given our binding decision in *Hastings*, and the truly 'exceptional circumstances' presented by the Moore's Ford Lynching, we cannot say that the district court abused its substantial discretion in ordering the release of the grand jury transcripts. The judgment of the district court is affirmed.

The government moved for *en banc* review.

PITCH III

Judge Tjoflat's opinion reads, in part, as follows:

[*En Banc* Review and Other Questions Presented]

> We voted to rehear the case en banc to determine whether we should overrule our holding in *Hastings*—that district courts have inherent power to go beyond the exceptions listed in Rule 6(e) to order the disclosure of grand jury records—and, if not, whether a district court may exercise its inherent power to recognize a historical-significance exception to the general rule of grand jury secrecy.
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> The questions before us implicate the long-established policy that grand jury proceedings in federal courts should be kept secret. … The Supreme Court has long 'recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.' *Douglas Oil*, 441 U.S. at 218, 99 S. Ct. at 1672 (citing *Procter & Gamble*, 356 U.S. at 681, 78 S. Ct. at 986).
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> [Fed. R. Crim. Proc. 6(e)]
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> Rule 6(e) codified the traditional rule of grand jury secrecy. *Id.* Since its promulgation in 1946, Rule 6(e) has governed the disclosure of grand jury records. *Illinois v. Abbott & Assocs.*, 460 U.S. 557, 566, 103 S. Ct. 1356, 1361, 75 L.Ed.2d 281 (1983).
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> * * *
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> [*Hastings* and the Cases That Followed]
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> Since we first interpreted 6(e) in *Hastings*, several other circuits have considered whether district courts may authorize the disclosure of grand jury records outside the circumstances listed in that rule. Some agree with Pitch and so have held, like we did in *Hastings*, that district courts may invoke their inherent, supervisory authority over the grand jury to permit the disclosure of grand jury records outside the text of Rule 6€. *See Carlson*, 837 F.3d at 763–66; *In re Petition of Craig*, 131 F.3d at 103; *see also McKeever v. Barr*, 920 F.3d 842, 853–55 (D.C. Cir. 2019) (Srinivasan, J., dissenting), *cert. denied*, —— U.S. ——, 140 S. Ct. 597, —— L.Ed.2d —— (2020); *cf. In re Grand Jury Proceedings*, 417 F.3d 18, 26 (1st Cir. 2005) (holding that a district court may exercise its inherent judicial power to *impose* an obligation of secrecy on a grand jury witness, even though witnesses are not covered by Rule 6€(2)(B)'s secrecy requirement). Other circuits have refused to authorize the disclosure of grand jury records outside of Rule 6€'s stated exceptions to the general rule of secrecy, finding those exceptions to be exhaustive. *See McKeever*, 920 F.3d at 845; *United States v. McDougal*, 559 F.3d 837, 840–41 (8th Cir. 2009).
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> * * *

In re Grand Jury 89-4-72, 932 F.2d 481, 488 (6th Cir. 1991) ('[W]ithout an unambiguous statement to the contrary from Congress, we cannot, and must not, breach grand jury secrecy for any purpose other than those embodied by the Rule.'); *see also Carlson*, 837 F.3d at 767–68 (Sykes, J., dissenting).

[The Court Rejects *Hastings*]

We now depart from our analysis in *Hastings*, and join the Sixth, Eighth, and District of Columbia Circuits in their interpretation of Rule 6(e). disagree with Pitch that Rule 6(e) is merely a permissive rule—'a rule that permits a court to do something and does not include any limiting language.' *Carlson*, 837 F.3d at 763. …Rule 6(e) provides an exhaustive list of detailed circumstances in which a district court may authorize disclosure. It lays out a general rule of secrecy followed by a set of carefully considered exceptions that limit the district court's authority to disclose the records of a grand jury's proceedings. The rule thus leaves no room for district courts to fashion new exceptions beyond those listed in Rule 6(e). *We therefore hold that Rule 6(e) by its plain terms limits disclosures of grand jury materials to the circumstances enumerated therein.* (emphasis added)

* * *

[The Exceptions to the Rule of Nondisclosure]

Rule 6(e)(3) … lays out a set of five detailed '[e]xceptions' to this general rule of nondisclosure. Fed. R. Crim. P. 6(e)(3).

* * *

The text and structure of Rule 6(e) thus indicate that the rule is not merely permissive. Rather, it imposes a general rule of nondisclosure, then instructs that deviations from that rule are not permitted '[u]nless these rules provide otherwise,' and then provides a detailed list of exceptions that specifies precisely when the rules 'provide otherwise.'

'Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.' *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17, 100 S. Ct. 1905, 1910, 64 L.Ed.2d 548 (1980). We find nothing in the text of Rule 6(e) to indicate an intent to permit a district court to go beyond the enumerated exceptions.

* * *

[The Eleventh Circuit's Interpretation of Rule 6(e)]

Our interpretation of Rule 6(e) as exhaustive is consistent with the Supreme Court's warning that we must be reluctant to conclude that a breach of grand jury secrecy has been authorized in the absence of a clear indication in a Rule or statute. *Sells Eng'g*, 463 U.S. at 425, 103 S. Ct. at 3138; *see also Abbott & Assocs.*, 460 U.S. at 572–73, 103 S. Ct. at 1364.

* * *

[The Supreme Court Has Not Yet Addressed the Question]

Indeed, while the Supreme Court has not yet addressed the question, the Court has on several occasions suggested that Rule 6(e) is exclusive. See McKeever, 920 F.3d at 846 (collecting cases). *More recently, the Supreme Court described Rule 6(e) as 'placing strict controls on disclosure of "matters occurring before the grand jury."' Williams*, 504 U.S. at 46 n.6, 112 S. Ct. at 1741–42 n.6 (citing *Sells Eng'g*, 463 U.S. 418, 103 S. Ct. 3133, 77 L.Ed.2d 743). (emphasis added)

* * *

[Rule 6(e) Limits Disclosure]

For these reasons, we find that the text of Rule 6(e) is best understood as limiting the disclosure of grand jury materials to the circumstances carefully defined in Rule 6(e)(3)(E). We therefore agree with the Government that Rule 6(e)(3)(E)'s list of exceptions to the general rule of grand jury secrecy is exclusive, and that district courts may not rely on their inherent, supervisory power to authorize disclosure of grand jury materials outside the bounds of that rule. To the extent that we held in *Hastings* that such inherent power does exist, that holding is overruled.

* * *

[Rule 6(e) Is Exhaustive]

For the foregoing reasons, we hold that Rule 6(e) is exhaustive. District courts may only authorize the disclosure of grand jury materials if one of the five exceptions listed in Rule 6(e)(3)(E) applies; they do not possess the inherent, supervisory power to order the release of grand jury records in instances not covered by the rule. We therefore overrule our holding in *Hastings* that district courts have inherent power to authorize the release of grand jury materials outside the confines of Rule 6(e).

Reversed.

My Thoughts

- At the same time that the *Pitch* trilogy was making its way through the courts of the Eleventh Circuit, *McKeever* was doing the same in the D.C. Circuit. McKeever was a writer who, like Pitch, wanted to review grand jury records in the course of his researching for a book that he was writing. These records had to do with a 1957 indictment of a former agent of the Federal Bureau of Investigation.

- The district court denied his request for the release of these records and McKeever appealed. The United States Court of Appeals for the D.C. Circuit affirmed.[4] McKeever

[4] *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019) [Panel: Circuit Judges Srinivasan and Katsas, and Senior Circuit Judge Ginsburg. (Opinion by Ginsburg)]

filed his petition for writ of certiorari to the United States Court of Appeals for the D. C. Circuit. On January 21, 2020, the petition for writ of certiorari was denied.[5] So, it is accurate to say that the Supreme Court has not considered the question; however, the Justices of the Court had the opportunity to do so.

- I have no doubt that the United States Court of Appeals for the Fifth Circuit would follow the lead of the Eleventh and D. C. Circuits if presented with a Fed.R.Crim.Proc. 6(e) issue.

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[5] *McKeever v. Barr*, 140 S.Ct. 597, 205 L.Ed.2d 529 (2020)