

BERYL HOWELL'S WHACK-A-MOLE GRAND JURIES

Coverage of the May 29 court hearing that led Roger Stone aide Andrew Miller to testify before a different grand jury describes how his attorney, Paul Kamenar, tried to argue it would be an abuse of the grand jury, because Stone has already been indicted. But after prosecutors (including former Mueller prosecutor Aaron Zelinsky) explained why they needed Miller's testimony ex parte, Howell upheld the contempt order. (See also CNN and ABC's coverage.)

Miller, of St. Louis, was on speakerphone Wednesday for the hearing at which U.S. District Chief Judge Beryl A. Howell denied a last-ditch motion by Miller's attorney, Paul D. Kamenar, to block his client's grand jury appearance.

Kamenar argued it is an abuse of grand jury process for prosecutors to seek pretrial testimony from a witness about a subject who has already been indicted, also noting that Mueller has issued his final report.

[snip]

Howell said it was long-settled law that prosecutors can properly obtain grand jury testimony to develop additional charges against an indicted target, or to investigate individuals not yet facing charges. Prosecutors can also use evidence against Stone in his pending November trial if it was collected incidentally and not the primary focus of Miller's questioning, she said.

"The government is not abusing the grand jury process in this case, and the government has need of Mr. Miller's

testimony,” Howell ruled from the bench, upholding her August contempt finding when Miller failed to testify.

“If Mr. Miller does not appear before the grand jury on Friday, he will be in contempt and there will be an arrest warrant issued for him. Do you understand, Mr. Miller?” Howell asked.

“Yes, your honor,” Miller answered over speakerphone.

Prosecutors told the judge in a sealed bench conversation about the ongoing matters in which they seek Miller’s help, but not before Kamenar said that in a May 6 email prosecutors confirmed that one question would regard “what work he did for Stone from 2016 on.”

Presumably, Howell would have known (because she has presided over Mueller’s grand jury from the start) that Miller would testify before a different grand jury.

We now know that Howell had a similar conversation *over two months* earlier in a hearing (starting at PDF 166) in the Mystery Appellant’s somewhat successful effort to withhold information the government wanted about a state-owned bank. At the hearing, DC Assistant US Attorney Zia Faruqui had replaced Zainab Ahmad as lead prosecutor on the issue (he had started to take over earlier in March, certainly by March 21).

Howell started the hearing by asking why the subpoena was still pending given that Mueller had announced the end of his investigation a week earlier.

Howell: [T]he first question I am going to ask the Government is in the last paragraph of their reply which is: What are we doing here? Why isn’t this whole matter over as of 5 p.m., March 22, when Mr. Mueller delivered his report?

Faruqui: Your Honor, I can say with absolute certainty that the case is robust, ongoing; we are working within our office. The matter was transferred back in fact to the U.S. Attorney's Office. We have met numerous times with agents. We have reviewed materials, and our plan is to go forward with our investigative steps. We are in constant communication with the special counsel's office.

It's very different, I think, to the outside world; but, within the Government, theoretically we are one Government. One AUSA may leave, one prosecutor; but, when there is a case of this import, there is no reason that it would stop because a separate focused matter has been presented with a letter and report.

In response, Howell makes it *very clear* that this subpoena – for which she would have seen abundant sealed description – was originally presented to her as part of the investigation into Russian influence in the 2016 election, which leads her to be really confused about why the government would still need the information.

Howell: Well, correct me if I'm wrong, but this matter was presented to the Court as one part of the investigation into whether there was Russian influence with the 2016 election, presidential election; and that's been resolved by the – at least the summary of the special counsel's report. So there are other aspects of that investigation that led in other directions. So I thought this part – this particular subpoena and leg of the investigation was also related precisely to what Mr. Mueller said he resolved in his report delivered at 5 p.m. on March 22.

So are you saying that this is a

different aspect of this investigation related to different inquiries than that?

Faruqui: Yes. That's correct, Your Honor. I am happy to approach. I think it's –

Howell: Well, there's been nothing submitted that – in the Government's opposition papers that provides any detail about how these records have continuing relevancy to something subject to investigation by the grand jury to warrant continued fines to coerce additional compliance, which we're going to get to in a minute, or whether there is anything all relevant to an ongoing grand jury investigation from these records that the Government's continuing to seek.

Faruqui then explains that this matter started in the DC US Attorney's Office, got bumped to Mueller, and has now been passed back to DC.

Faruqui: So if we can have an opportunity now, or we can refer to portions of the ex parte prior affidavits of the special counsel, I think we can either now or file supplemental briefing to Your Honor to try to further elucidate that. Certainly, the special counsel's remit, I think, allowed them to take this investigation in.

The investigation initially came into our office and was passed to the special counsel at that time because I think there was a question within the realm of their remit. However, I think it's very clear I think the matter –

Howell: So are you saying that this investigation started with the D.C. U.S. Attorney's Office, spent some time within the special counsel's

jurisdiction, so to speak, and is now being given back to the U.S. Attorney's Office?

Faruqui describes the investigation as being very time consuming and resource-intensive.

Faruqui: That is correct, Your Honor. And it does in fact involve issues that have not or are in any way close to being resolved and very much is a live issue that requires, I think, a great deal of resources, time, and attention by the Government, which is why we believe the subpoena is in fact still a live controversy that requires, I think, a great of [sic] deal resources, time, and attention by the Government, which is why we believe the subpoena is in fact still a live controversy that requires contempt because it goes to the core of the question in this investigation.

Howell: All right. Well, before I got the Government's opposition, I didn't know whether the Government's opposition was going to be, oh, forget the whole thing. I have read all of the ex parte filings, and I am puzzled.

Faruqui: We can supplement –

Howell: What's still going on here?

Faruqui: We can certainly supplement, Your Honor, with an additional ex parte supplement that will go into greater detail explaining what is being investigated and how it is in no way resolved by what may or may not be in the Mueller report or in AG Barr's letter to Congress and the public.

These are live issues that require immediate attention from the U.S. Attorney's Office and from which the grand jury – because the grand jury

matter is still alive and being thoroughly investigated, we require the Court to intervene and assist us as we try to force the contemnor to comply fully with our subpoena.

Howell then makes sure the government still is really using a grand jury and Faruqui – in a detail that probably parallels and precedes what happened with Stone’s case – explains that they’re still using the existing grand jury but plan to move onto a new one when the Mueller one expires.

Howell: So you are still presenting evidence to this grand jury that was being used by the special counsel’s office?

Faruqui: We – yesterday, anticipating that the grand jury may or may not – what its life cycle is, it’s a little unclear.

Howell: Well, I am very aware of its life cycle.

Faruqui: We are unaware. I apologize, Your Honor, Yes. It’s your grand jury; you certainly know.

We are trying to sort those issues out with the special counsel. However, we have reopened it yesterday in the grand jury, understanding that the current grand juries that are soon to expire; but with the intention that, when those expire, we will reopen a new one. We do plan to seek additional records, both in – and, potentially, additional testimony as well.

This exchange has significance beyond the Mystery Appellant matter, to Stone and (because the government insists there is are ongoing investigations pertaining to the stuff covered in Paul Manafort’s plea breach hearing) Manafort

as well. This case might not even be considered a referral in Mueller's report, given that it started in DCUSA0. But from Faruqui's description – and Mystery Appellant's invocations, at times, to only being bound by Presidential sanctions and turning this into a diplomatic incident – this is a very significant and serious investigation.

Howell, having read multiple secret filings that led her to believe this was about Russian interference in the US election, got really confused after reading Bill Barr's 4-page memo declaring victory and then learning that something this big, that must, in some way, relate to Russian interference, is still pending.

Aside from being a testament to just how misleading Barr's memo was, that such confusion was possible for someone privy to the details of the investigation should focus far more attention on the limited scope of Barr's exonerations. They pertain just to Russian election interference (not, say, graft), and just conspiring with the Russian government (though, if it's a Russian bank, the Mystery Appellant clearly counts as that). And even the election-related events continue only through the Transition, not afterwards.

The Mueller Investigation is over and Trump has declared victory, but it appears that what Mueller achieved was protecting significant aspects of it long enough to see them metastasize to new grand juries.

As I disclosed last July, I provided information to the FBI on issues related to the Mueller investigation, so I'm going to include disclosure statements on Mueller investigation posts from here on out. I will include the disclosure whether or not the stuff I shared with the FBI pertains to the subject of the post.