

ORAL ARGUMENT NOT YET SCHEDULED
No. 18-3052

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

IN RE: GRAND JURY INVESTIGATION

ANDREW MILLER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

*On Appeal from the United States District Court
For the District of Columbia
Grand Jury Action No. 18-GJ-34 (BAH)*

**RESPONSE OF APPELLANT ANDREW MILLER TO MOTION FOR
LEAVE TO INTERVENE OF CONCORD MANAGEMENT AND
CONSULTING LLC**

Appellant Andrew Miller does not oppose the Motion for Leave to Intervene of Concord Management and Consulting LLC. However, Appellant wishes to clarify the proceedings below and Mr. Miller's status.

1. Mr. Miller was first interviewed by two agents of the Federal Bureau of Investigation who visited him unannounced on or about May 9, 2018, in Saint Louis, MO, where he resides. He was cooperative, answering all their questions for approximately two hours, and at the conclusion of the interview, was handed a subpoena to produce documents and testify as a witness before the grand jury. *See* Miller Declaration, paras 8-9, Exhibit 1 to Motion By Witness Andrew Miller To Be Held In Civil Contempt For Refusing To Testify Before The Grand Jury And To Stay Such Order To Permit Him To Appeal It To The U.S. Court Of Appeals For The District Of Columbia Circuit. ECF No. 33.

2. Following disputes between Mr. Miller's local counsel and counsel for the government regarding the scope of the document request, a show cause hearing was held before Chief Judge Beryl Howell on June 18, 2018. At the conclusion of the hearing, Judge Howell issued an Order that the documents requested, as limited in scope by agreement of the parties, were to be produced by June 25, 2018. Minute Order (June 18, 2018). She also ordered Mr. Miller to "appear before the grand jury on June 29, 2018, unless the parties notify the Court of an alternate arrangement." *Id.*

3. The witness complied with this Court's Order requiring that documents subpoenaed be produced by June 25, 2018. *See* Miller's Motion to Quash Subpoena (June 28, 2018) at 4 and Exhibit 6. ECF No. 10. This act of compliance

by Mr. Miller was omitted from both the court's decision and understandably from movant's motion, which cited the court's decision. *See* Concord Mot. at 3.

4. Shortly before the submission of the documents, Mr. Miller retained additional counsel to challenge the constitutionality of the Special Counsel. In the course of drafting the motion to quash the subpoena with respect to his appearance before the grand jury, movant Concord Management subsequently filed a motion to dismiss its indictment on June 25, 2018, raising the same issue. Concord Mot. at 3. Due to the exigencies of time regarding Mr. Miller's upcoming appearance before the grand jury on June 29, 2018, Mr. Miller incorporated Concord's motion with his motion on June 28, which the court accepted.

5. After holding a hearing on the motion on July 18, the court denied the motion to quash, rejecting Mr. Miller's constitutional arguments, and by reference those of Concord. ECF No. 32-3. The court also rejected an additional argument raised only by Mr. Miller, namely, that if Special Counsel is an inferior officer as the government asserts, he was required to be appointed by the Head of the Department under Article II, who is Attorney General Jeff Sessions, not Deputy Attorney General Rod Rosenstein. *Id.*

6. Because Mr. Miller desired to appeal the order denying his motion, ensuing discussions with Special Counsel to stipulate that Mr. Miller be held in

contempt for not appearing on the upcoming appearance before the grand jury on August 10, 2018, and to stay the contempt pending appeal did not succeed.

7. Consequently, two days before his appearance, on the evening of August 8, 2018, counsel emailed government counsel and Judge Howell's clerk (and on the following morning of August 9, hand-filed with the clerk's office), a Motion By Witness Andrew Miller To Be Held In Civil Contempt For Refusing To Testify Before The Grand Jury And To Stay Such Order To Permit Him To Appeal It To The U.S. Court Of Appeals For The District Of Columbia Circuit and citing authorities for granting a stay of contempt. ECF No. 33. The government served and a response on the evening of August 9 (ECF. No. 35) and Mr. Miller served a reply early morning on August 10. ECF No. 37.

8. On August 10, undersigned counsel for Mr. Miller met government counsel at 9:00 a.m. as previously agreed to at the entrance to the grand jury offices, and was advised by government counsel that a motion to show cause was filed shortly before 9:00 a.m. ECF No. 34.

9. Approximately two hours later, the court held the show cause hearing, with the Mr. Miller and local counsel appearing telephonically from Saint Louis, MO.

10. The court granted Mr. Miller's and the government's request that he be held in contempt and stayed the order if the notice of appeal were filed by 9:00 a.m. August 14, 2018. ECF No. 36.

11. On August 13, 2018, Mr. Miller timely filed his notice of appeal to this Court. ECF No. 39.

12. Lest there be any misunderstanding, Mr. Miller was not a "target of grand jury subpoenas" (Concord Mot. at 1), but rather a fact witness or at most a subject of the grand jury; nor was he a "recalcitrant witness." *Id.* at 13. As the foregoing background demonstrates, Mr. Miller has been a cooperative witness in this proceeding.

Respectfully submitted,

Date: August 23, 2018

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to FRAP 25(d), the undersigned hereby certifies that on the 23d day of August, 2018, he caused the foregoing response to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Pursuant to Circuit Rule 27(d), the undersigned also caused four copies of the foregoing response to be hand-delivered to the Clerk of the Court. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

The undersigned further certifies that foregoing response complies with FRAP 27(d) (2) (A) and contains 842 words, as determined by Microsoft Word 2010 and complies with FRAP 32(a) (5)-(6) because it has been prepared with proportionally spaced font typeface using Microsoft Word 2010 in 14-point Times New Roman.

/s/ Paul D. Kamenar
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