SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

THE PEOPLE OF THE STATE OF NEW YORK

-against-

DONALD J. TRUMP,

Defendant.

PEOPLE'S OPPOSITION TO DEFENDANT'S MOTIONS IN LIMINE

Ind. No. 71543-23

ARGUMENT

I. Michael Cohen's expected testimony is admissible and proper. (Answering Def.'s Motion #1.)

In an argument that reads more like a press release than a legal filing, defendant makes the obviously unsupportable request that the Court preclude one of the People's witnesses from testifying at trial on the ground that defendant anticipates that he will disbelieve the witness's expected testimony. Def.'s Mem. 4-8. The Court should reject this unprecedented argument.

Justice Arthur F. Engoron—sitting as the finder of fact in the New York Attorney General's civil fraud trial against defendant—expressly found after trial that "Michael Cohen told the truth" and that "the Court found his testimony credible." *People by James v. Trump*, Index No. 452564/2022, NYSCEF Doc. No. 1688, *43 (Sup. Ct. N.Y. Cnty. Feb. 16, 2024). Justice Engoron's finding that Cohen was credible and "told the truth" on the stand, *see id.*, rebuts defendant's repeated assertion that Cohen instead committed perjury at that trial. Def.'s Mem. 8. And it is misleading for defendant to argue otherwise without even advising this Court that Justice Engoron found Cohen's testimony credible and truthful.

The suggestion that the People may suborn perjury by calling Cohen to testify, Def.'s Mem. 8, is intentionally inflammatory and totally meritless. The People expect Cohen's testimony at trial

to be both true and corroborated, including by extensive documentary evidence, the testimony of other witnesses, and defendant's own statements. *See, e.g.*, *New York v. Trump*, No. 23 Civ. 3773 (AKH), 2023 WL 4614689, at *6 (S.D.N.Y. July 19, 2023) ("The People have put forth evidence strongly supporting their allegations that the money paid to Cohen was reimbursement for a hush money payment.").

Among other things, Cohen will testify that he pleaded guilty to making false statements in the past in connection with unrelated matters. But a witness's prior false statements are not a basis for precluding that witness from testifying in a new proceeding, and defendant does not cite a single case that so holds.[1] Indeed, such a categorical preclusion would be inconsistent with New York's standard jury instructions. As those instructions provide, even where a judge in a prior proceeding has found that a witness "testified falsely," that prior determination is "not binding" on a jury's credibility determinations in a subsequent trial where that witness testifies. CJI 2d [NY] Credibility of Witnesses, https://www.nycourts.gov/judges/cji/1-General/CJI2d.Credibility.pdf. The fact that a jury may properly find a witness credible, notwithstanding prior false statements, presupposes that nothing bars such a witness from testifying. And as this Court is undoubtedly aware, criminal trials routinely require testimony from witnesses who, like Cohen, have pleaded guilty to criminal conduct in the past or engaged in other misconduct that may affect their credibility. Generalized arguments like defendant's about a witness's character or general credibility, Def.'s Mem. 7, thus do not present any valid basis for precluding a witness's testimony altogether.

[1] For example, in *United States v. Cromitie*, one of the cases that defendant cites (Def.'s Mem. 7), the Second Circuit observed that a "prosecutor's knowing use of perjured testimony can violate the Due Process Clause." 727 F.3d 194, 222 (2d Cir. 2013). But neither *Cromitie*, nor any other case that defendant cites, involved a court precluding a witness's relevant testimony in its entirety before trial, merely because the witness had previously pleaded guilty to making false statements.

To the extent that defendant nonetheless believes the jury should disbelieve Cohen's testimony at trial, he may challenge Cohen's credibility by cross-examining him about a variety of topics, including his previous guilty pleas. That opportunity to confront Cohen will be more than sufficient to protect defendant's rights and test the veracity of the People's evidence. *See People v. Egan*, 78 A.D.2d 34, 38 (4th Dep't 1980) (the Confrontation Clause promotes the reliability of the evidence against a criminal defendant "by the use of cross-examination, the penalties against perjury and the jury's in-person evaluation of the witness"). And this procedural protection is more than adequate because, at base, defendant's arguments regarding Cohen's credibility go to the weight of Cohen's testimony, not its admissibility. *See, e.g.*, *People v. Mosley*, 282 A.D.2d 314, 315 (1st Dep't 2001) ("[M]atters of credibility . . . went to the weight rather than the admissibility of the evidence." (citing cases)); *People v. Lovacco*, 234 A.D.2d 55, 55 (1st Dep't 1996) ("any inconsistencies" in uncharged-crimes testimony "went to the weight of the evidence, and not its admissibility"); *Goodman v. Genworth Fin. Wealth Mgmt.*, 881 F. Supp. 2d 347, 353 (S.D.N.Y. 2012) (rejecting effort to preclude witness testimony because of prior credibility finding, because "[i]ssues of credibility go to the weight, not admissibility or discoverability of testimony"). Because Cohen's credibility is ultimately "to be resolved by the jury," *Mosley*, 282 A.D.2d at 315, the Court should deny defendant's motion.

II. Defendant's arguments about the "intent to defraud" element are legally incorrect, and the Court has already rejected them. (Answering Def.'s Motion #2 and #3.)

Defendant contends that the People should be precluded from arguing that defendant "sought to improperly 'influence' the 2016 election," on the ground that intent to defraud cannot be established as a matter of law by defendant's "efforts . . . to prevent adverse publicity about himself during the campaign." Def.'s Mem. 9. The Court has already rejected this argument and should do so again.

The crime of falsifying business records in the first degree requires the People to prove, among other things, that defendant acted with intent to defraud that "includes an intent to commit another crime or to aid or conceal the commission thereof." Penal Law § 175.10. The election fraud conspiracy that defendant gamely attempts to minimize as "irrelevant details from years before," Def.'s Mem. 9, is—as defendant knows from nearly every motion the People have filed in this case—one of the crimes the People allege he intended to commit or conceal. In denying defendant's motion to dismiss the indictment, this Court held that this intent prong could be established in part by evidence of defendant's "intent to influence the 2016 presidential election by violating FECA, Election Law § 17-152, and New York Tax Laws." *Trump* Omnibus Decision 19. Moreover, this Court found that there was legally sufficient evidence before the grand jury to support defendant's intent to commit or conceal all of these other crimes. *Id.* at 13-17. There is thus no basis to preclude the People from presenting evidence that this Court has already found is directly relevant to a material element of the charged crimes.

Relatedly, defendant criticizes this Court for "not explain[ing]" the meaning of "intent to defraud" and demands that, "[p]rior to trial, the Court must define 'intent to defraud' in a more concrete fashion." Def.'s Mem. 10. Defendant points to no authority (and we are aware of none) authorizing him to order this Court to educate him on the applicable law. And contrary to defendant's assertion, this Court's February 15 Decision and Order did contain an extended discussion of "intent to defraud" that went well beyond the single line quoted by defendant in his motion *in limine*. *See Trump* Omnibus Decision 7, 18-19.

Defendant's specific arguments about "intent to defraud" are also meritless and provide no basis for limiting the People's evidence at trial. First, defendant contends that "[t]he People should be precluded from arguing at trial" that intent to defraud can be satisfied *solely* by defendant's

"alleged intent to commit or conceal a predicate offense." Def.'s Mem. 11. As an initial matter, this argument is premature. Because the trial has not yet occurred, defendant has no basis for speculating that the People will rely *only* on defendant's intent to commit or conceal another crime to establish his intent to defraud; accordingly, the proper time to raise his argument would be after trial, when the actual presentation of the People's case will allow the Court to determine whether the factual predicate of defendant's legal argument here is even true. In any event, the People have already explained that defendant's intent to defraud can be established by multiple factors going beyond just his intent to commit or conceal other criminal activity, including his intent to deceive the electorate and corrupt the 2016 election; and his intent to defraud the government, including election regulators and tax authorities. *See* Omnibus Opp. 15-21. And this Court agreed that there was legally sufficient evidence before the grand jury to show "that Defendant possessed the requisite intent to defraud either the voting public, the government, or both." *Trump* Omnibus Decision 19.

Second, defendant asserts that, as a matter of law, intent to defraud cannot be established by his intent to deceive the electorate during the 2016 election. Def.'s Mem. 11-13. Setting aside that this exact question was—again—already briefed and decided in this case, defendant has no response to *People v. Lang*, where the Court of Appeals squarely held that a statutory prohibition on fraud in the Election Law "obviously connotes the idea of a deliberate deception (to be committed upon the electorate) and a corrupt act to prevent a free and open election." 36 N.Y.2d 366, 371 (1975). Given the Court of Appeals' repeated directive that the term "fraud" must "be given a wide meaning so as to embrace all deceitful practices contrary to the plain rules of common honesty," *People v. Lexington Sixty-First Assocs.*, 38 N.Y.2d 588, 595 (1976), there is no basis to disregard *Lang*'s understanding of electoral fraud in this election-related case.

Defendant also repeats the sweeping argument that, as a matter of law, it would be impossible for a candidate to engage in criminal fraud merely by "attempt[ing] to prevent negative information about himself coming to light" or "represent[ing] to voters a position that is not his true belief." Def.'s Mem. 11-12. These anodyne and self-serving descriptions of the facts do not accurately characterize the evidence that this Court found legally sufficient to support the grand jury's determination that defendant "sought to suppress disclosure of information" of criminal activity and related information from the voting public and the government. *Trump* Omnibus Decision 18-19.

Defendant's claim that the well-established plain meaning of "intent to defraud" must be narrowed to avoid concerns of unconstitutional vagueness, Def.'s Mem. 12, is likewise incorrect. As this Court has already recognized, a "long line of cases not only within the First Department but in other departments as well," *Trump* Omnibus Decision 19, has rejected defendant's assertion that intent to defraud should be "limited" to a few discrete categories of fraudulent activities. *Id.* at 12-13. And the case that defendant cites to raise the specter of unconstitutional vagueness involved a post-trial challenge to jury instructions that the federal government did not even defend "as an accurate statement of the law." *Percoco v. United States*, 598 U.S. 319, 331 (2023). To the extent defendant is trying to shoehorn a constitutional challenge to the Penal Law into his motions *in limine*, the Court should reject the attempt.

III. Evidence regarding the formation and execution of defendant's conspiracy with others to influence the 2016 presidential election is admissible. (Answering Def.'s Motion #4, #5, #6, #7, and #8.)

In a series of arguments, defendant contends that, under *People v. Molineux*, 168 N.Y. 264 (1901), the People should be precluded from presenting evidence of several incidents in 2015 and 2016 in which defendant, working in coordination with others, sought to make payments to third parties in order to suppress information that would be damaging for his presidential campaign.

Def.'s Mem. 13-19. On the same ground, defendant also seeks to preclude the People from presenting evidence related to the Access Hollywood Tape. *Id.* at 19-20.

The People's motions *in limine* have already presented this Court with extensive arguments explaining the admissibility and relevance of this evidence. First, as the People have explained, this evidence does not fall under *Molineux* at all because the acts were part of the *res gestae* of defendant's criminal conduct, People's Mem. 39-40, and are thus directly relevant to the charges here. Second, even if the *Molineux* doctrine were applicable, the evidence would also be relevant to several material, non-propensity issues, including providing necessary background about the criminal conduct that defendant intended to commit or conceal, completing the narrative concerning the charged crimes, and shedding light on defendant's intent and motives. *Id.* at 40-44. Third, the probative value of this evidence far outweighs any undue prejudicial effect. *Id.* at 44-45; *see also id.* at 45-50 (same arguments as to Access Hollywood Tape).

These arguments largely address the *Molineux* claims that defendant now raises—including, most importantly, his principal claim that the facts about this scheme have "no relevance" to the charges against defendant. Def.'s Mem. 13. Rather than duplicate those arguments, we respond to only a few other miscellaneous points below.

1. As a threshold matter, defendant's insistence that all of this conduct was "completely legal" or "fully legal," Def.'s Mem. 13-14, is at odds with this Court's express finding that there was legally sufficient evidence before the grand jury to establish that defendant had the intent to commit or conceal "another crime" arising out of the very same series of transactions. *See Trump* Omnibus Decision 11-17. In any event, if defendant were correct that there was nothing unlawful about this conduct—which he is not—that argument would directly undercut his efforts to preclude this evidence on *Molineux* grounds. *See, e.g.*, *People v. Thomas*, 26 A.D.3d 188 (1st Dep't 2006)

(conduct that "was not evidence of uncharged crimes" was thus "not subject to *Molineux/Ventimiglia* considerations").

2. It is irrelevant that some of the conduct here involved "third parties rather than" defendant. Def.'s Mem. 14. As this Court has recognized, the defendant does not have to "intend to conceal the commission of *his own* crime" to be guilty of falsifying business records in the first degree; he can also have "the intent to cover up a crime committed by somebody else." *Trump* Omnibus Decision 7 (quotation marks omitted). Separately, the Election Law object crime at issue here applies when "[a]ny two or more persons . . . conspire to promote or prevent the election of any person to a public office by unlawful means and which conspiracy is acted upon by one or more of the parties thereto." Elec. Law § 17-152. By its terms, the conduct of third parties other than defendant is directly relevant to that offense.

3. It is irrelevant that "there is no allegation that AMI paid [Stormy Daniels] in connection with the records entries charged by the People in this case." Def.'s Mem. 14. As the People explained in the opposition to defendant's omnibus motions, AMI and its then-Chairman and Chief Executive Officer David Pecker worked directly with defendant to initiate and carry out a scheme to identify and suppress negative stories about defendant in support of his presidential campaign; that scheme ultimately led to a series of transactions involving Dino Sajudin, Karen McDougal, and finally Stormy Daniels. *See* Omnibus Opp. 3-8. That AMI as a corporate entity was only involved in actually making payments for the first two individuals and not the third does not diminish the many other factual connections demonstrating the unified nature of the scheme—including, but not limited to, the election-related purpose of each transaction, the involvement of a common cast of characters (including AMI's Chairman and CEO), and the nearly identical way

in which, as defendant intended when he launched the scheme in 2015, each of these individuals was paid to suppress potentially damaging information from reaching the electorate.

4. There is nothing inherently prejudicial, much less unduly or unfairly so, about the phrase "catch and kill" when referencing the term of art used in some sectors of the publishing industry. That term describes the practice of using a non-disclosure agreement to purchase damaging information from an individual and then preventing that information from being published in order to benefit a third party. Defendant cites no authority for his request that the term not be referenced at trial. Def.'s Mem. 14, 16.

5. Defendant argues that the transaction involving Dino Sajudin is too "attenuated from the issues in this case" to be relevant, and similarly argues that the transaction involving Karen McDougal "lack[s] any meaningful similarity" to the charged crimes. *Id.* at 14-15. But these arguments rely on defendant's characterization of the facts and the inferences to be drawn therefrom. As outlined above and in the People's response to the omnibus motions, there is legally sufficient evidence for a jury to conclude that the Sajudin and McDougal transactions are related to each other and to the payment to Daniels. Defendant is free to urge the jury to reject any such conclusion; but that argument goes to the weight of the evidence, not to its threshold admissibility.

6. Defendant makes the sweeping claim that testimony from Daniels should be categorically excluded as "unduly prejudicial." *Id.* at 18. As with defendant's baseless attempt to preclude testimony from Michael Cohen, this argument relies on improper speculation that—even under this Court's supervision—Daniels will provide nothing more than irrelevant or prejudicial trial testimony. As defendant does not dispute, the payments to Daniels are relevant to the charges against him; as defendant also does not dispute, Daniels has personal knowledge of evidence regarding those payments. There is absolutely no basis to exclude such indisputably probative

evidence on the basis of rank speculation that Daniels will provide—and this Court will somehow allow—only improper testimony instead.[2]

7. Finally, defendant seeks to exclude any evidence regarding the Access Hollywood Tape on the basis that it has no probative value and will be impermissibly prejudicial. *Id.* at 19-20. As to its probative value, defendant again improperly relies on his own version of the facts. As the People have explained, the Access Hollywood Tape bears directly on defendant's intent and motive, both at the time that he and his confederates made the Stormy Daniels payoff and later when they sought to conceal that payment. *See* People's Mem. 45-47; Omnibus Opp. 6-7, 55; Statement of Facts ¶¶ 16-21. Indeed, the evidence will demonstrate that the release of the Access Hollywood Tape caused a panic within the campaign about defendant's electoral prospects and ultimately served as the catalyst for consummating the Stormy Daniels payoff. As to undue prejudice, defendant bizarrely relies on a federal court's decision to *admit* the Access Hollywood Tape as a basis to somehow *preclude* it here. Def.'s Mem. 19. This argument makes no sense. Rather, as the People have already explained, *see* People's Mem. 47, the federal court's reasoning in admitting the Access Hollywood Tape confirms that the recording is not unduly prejudicial because it "is uniquely probative" of defendant's state of mind.[3] *Carroll v. Trump*, No. 20-cv-7311 (LAK), 2024 WL 97359, at *9-11 (S.D.N.Y. Jan. 9, 2024).

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[2] Defendant quotes Daniels as having recently said "I've been asked to kind of behave," and defendant falsely claims based on that quote that "the People appear to have recognized the risks of presenting this irrelevant and prejudicial testimony." Def.'s Mem. 18. Instead, as the People assured the Court at arraignment that we would do, we have conveyed to all potential witnesses the Court's request that witnesses not engage in words or conduct that may undermine these proceedings. *See* Arraignment Tr. 13 (Apr. 4, 2023).

[3] The court permitted the introduction of the Access Hollywood Tape in both of the *Carroll v. Trump* trials, on different admissibility grounds in the two cases. *See Carroll v. Trump*, No. 20-cv-7311 (LAK), 2024 WL 97359, at *9-11 (S.D.N.Y. Jan. 9, 2024) (admitting the tape in the 2024 defamation damages trial); *Carroll v. Trump*, No. 22-cv-10016 (LAK), 2023 WL 4612082, at *8

IV. Defendant's arguments regarding the Federal Election Campaign Act are both premature and wrong on the law. (Answering Def.'s Motion #9.)

Defendant seeks to preclude at trial any testimony or argument about whether the McDougal and Daniels payments violated the Federal Election Campaign Act ("FECA"), as well as any testimony or argument about whether the parties to those payments subjectively intended to violate FECA. Def.'s Mem. 21-30. Defendant claims that this preclusion is warranted because the McDougal and Daniels payments did not violate FECA "as a matter of law." Def.'s Mem. 21.

This Court can reject defendant's argument for three threshold reasons without having to resolve defendant's incorrect legal arguments. First, this Court already concluded that there was legally sufficient evidence that defendant intended to violate FECA through the McDougal and Daniels payments. *See Trump* Omnibus Decision 14. Defendant's contrary assertion that the evidence is legally insufficient to establish a FECA violation (Def.'s Mem. 20-29) ignores the law of the case; his associated requests to preclude testimony and argument related to FECA should be rejected for this reason alone.

Second, defendant's arguments about the scope of FECA are premature. Defendant relies exclusively on his own characterization of the facts to argue that the McDougal and Daniels payments did not violate FECA because they would have been made "irrespective of [his] candidacy" and thus were not made "'for the purpose of influencing [the] election.'" *Id.* at 25, 29. But the facts relevant to these payments are the subject of the forthcoming trial, and disputes about

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n.20 (S.D.N.Y. July 19, 2023) (explaining that the court admitted the tape in the 2023 sexual assault and defamation trial). Defendant's concern that the Access Hollywood Tape was offered as a confession in the 2023 *Carroll* trial does not apply here, where the People will not offer it as evidence that defendant committed a sexual assault. Instead, the People will offer the Access Hollywood Tape as evidence that is singularly probative of defendant's intent—which is the exact basis for the federal court's decision to admit the Access Hollywood Tape in the 2024 *Carroll* trial. *See Carroll*, 2024 WL 97359, at *9-11.

those facts are for the jury to resolve. Indeed, defendant acknowledged as much in his omnibus motions, when he conspicuously declined to argue that there was legally insufficient evidence before the grand jury to support a finding of a FECA violation, and instead only "reserve[d] the right to make these arguments, if necessary, at trial and in connection with any challenges to the sufficiency of the evidence and fairness of future proceedings" Def.'s Omnibus Mot. 15 n.5. And even if defendant were now to press the dismissal argument that he declined to make in his omnibus motions, there would be good reason to reject it. Aside from the grand jury that returned an indictment in this case and this Court's omnibus decision finding legally sufficient evidence to establish a FECA violation, the Federal Election Commission ("FEC") reviewed the McDougal and Daniels payments and concluded that they violated FECA. *See Matter of A360 Media, LLC f/k/a American Media, Inc., & David J. Pecker*, Fed. Election Comm'n MURs 7324, 7332, & 7366 (Apr. 13, 2021). And the federal district court that accepted Cohen's guilty plea independently concluded there was a sufficient factual basis to establish that the McDougal and Daniels payments violated FECA. *See* Judgment of Conviction, *United States v. Cohen*, No. 18-cr-602 (S.D.N.Y. Dec. 12, 2018), ECF No. 29; *see also* Hearing Tr. 28, *United States v. Cohen*, No. 18-cr-602 (S.D.N.Y. Aug. 21, 2018), ECF No. 7.

Third, defendant's FECA-preclusion argument misapprehends New York law. Defendant makes the flawed assumption that, to establish defendant's guilt for falsifying business records in the first degree on the theory that he intended to commit or conceal a FECA violation, the People would have to prove that a FECA violation *actually* occurred. But this Court recently rejected this view of Penal Law § 175.10, concluding that liability under the statute requires proof that defendant *intended* to commit or conceal another crime, not proof that the crime was in fact committed. *Trump* Omnibus Decision 8 ("The focus here is on the element of *intent*."); *see also*

id. at 14, 26. That view correctly applied settled precedent, *see, e.g.*, *People v. Thompson*, 124 A.D.3d 448, 449 (1st Dep't 2015); *People v. McCumiskey*, 12 A.D.3d 1145, 1145 (4th Dep't 2004), which has upheld convictions for falsifying business records in the first degree even when the defendant was *acquitted* of the crimes that he intended to commit or conceal, *see, e.g.*, *People v. Holley*, 198 A.D.3d 1351, 1351-52 (4th Dep't 2021); *People v. Houghtaling*, 79 A.D.3d 1155, 1157-58 (3d Dep't 2010); *McCumiskey*, 12 A.D.3d at 1145-46. Thus, defendant's legal arguments about whether FECA was in fact violated are beside the point; the relevant question is instead whether defendant *intended* to commit or conceal another crime when he falsified the business records at issue here. *See Trump* Omnibus Decision 8.

In any event—and although the Court need not reach this issue here for the three reasons described above—defendant's FECA preclusion arguments also fail on the merits. Defendant's principal claim is that the People cannot introduce evidence of defendant's or others' subjective intent in making the McDougal and Daniels payments, and must rely solely on objective factors. *See* Def.'s Mem. 22-23, 25-26, 29-30. That argument fundamentally misstates federal law.

FECA considers expenditures by a third party to be FECA-covered "contributions" if, among other things, they are made "for the purpose of influencing any election." 52 U.S.C. §§ 30101(9)(a)(i), 30116(7)(B)(ii). In interpreting that provision, the FEC has found that a third party's payment of a candidate's expenses "shall be a contribution . . . to the candidate unless the payment would have been made irrespective of the candidacy." 11 C.F.R. § 113.1(g)(6). Defendant's claim that this "irrespective of the candidacy" test relies only on objective factors (Def.'s Mem. 27-29) is flatly incorrect. Indeed, the principal FEC ruling cited by defendant (*id.* at 28) expressly acknowledges the relevance of evidence of subjective intent: as that decision explains, whether a third-party payment of a candidate's expenses "is a gift or an excessive

contribution turns on the intent" of the third party making the payment, and individuals' assertions about their state of mind in making the payment constitute "direct evidence of their intent." *Matter of Senator John Ensign et al.*, Fed. Election Comm'n MUR 6200 (Nov. 17, 2010). The other rulings cited by defendant likewise refer repeatedly to the intent of the donor or donee. *See Matter of Mike Lee et al.*, Fed. Election Comm'n MUR 7025, at 8-9, 12 (Mar. 23, 2016) (considering third parties' subjective intent behind payments of candidate's expenses in evaluating whether those payments would have been made "irrespective of the candidacy"); *Matter of Hillary Rodham Clinton*, Fed. Election Comm'n MUR 4944, at 3-4 (Aug. 28, 2001) (considering "the bank's perspective" in deciding to make a loan and "the Clintons' perspective" in purchasing a house). And still other FEC rulings expressly turn on the donor's "motivation for making [a] gift" to the candidate and find that such a third-party payment is a FECA-covered contribution if, from the perspective of the donor, it "would not be made but for the recipient's status as a Federal candidate." Fed. Election Comm'n, Advisory Op. 2000-08 (Harvey) at 3. Thus, contrary to defendant's claim, subjective intent is directly relevant in evaluating whether a third party paid a candidate's expenses "irrespective of the candidacy" and thus made a contribution "for the purpose of influencing any election."

Defendant's contrary arguments misapprehend federal law. First, defendant's extended discussion of the meaning of "for the purpose of influencing [a federal] election" (Def.'s Mem. 22-26) is beside the point. For purposes of a third party's payment of a candidate's expenses, the FEC has defined such a payment to be a "contribution"—i.e., "anything of value made by any person for the purpose of influencing any election for Federal office," 11 C.F.R. § 100.52(a)—if it was not "made irrespective of the candidacy," *id.* § 113.1(g)(6). In other words, such a third-party payment is deemed to be made for the purpose of influencing a federal election so long as it

does not meet the "irrespective of the candidacy" test; there is not some separate test that such payment must satisfy to fall under FECA. And FEC rulings further make clear, contrary to defendant's assertion, that third-party payments of candidates' expenses do not have to be "campaign related" (Def.'s Mem. 25) to qualify as FECA-related contributions: for example, the FEC has deemed a third-party payment to be a contribution when the donor would not have made it "but for the recipient's status as a Federal candidate," even when the payment would have been "used solely for the candidate's personal expenses" and not "to defray campaign expenses." Fed. Election Comm'n, Advisory Op. 2000-08 (Harvey) at 2-3.

Second, defendant misplaces his reliance on several federal cases. His discussion of *Buckley v. Valeo*, 424 U.S. 1 (1976) (Def.'s Mem. 22-23) is wholly misguided because the campaign-finance activity at issue there bears no resemblance to the activity in this case. *Buckley* concerned federal regulation of independent expenditures for expressive *advocacy*, and the analysis quoted by defendant was driven by the Supreme Court's concerns about those regulations' harmful effect on "those who seek to exercise protected First Amendment rights." *Id.* at 77; *see also id.* at 79 (noting that "for the purpose of . . . influencing" can "encompass[] both issue discussion and advocacy of a political result"). The charged conduct here does not involve defendant's expressive advocacy.

The D.C. Circuit's decision in *Orloski v Fed. Election Comm'n*, 795 F.2d 156 (D.C. Cir. 1986), is also inapposite, for several reasons. For one thing, that case did not involve FECA or FEC provisions addressing third-party payments of candidates' expenses, but rather an entirely separate FEC test "for distinguishing between political and non-political congressional events." *Id.* at 160. For purposes of that test, the FEC had adopted "an objective, bright-line test" to accommodate certain "[a]dministrative exigencies," and the D.C. Circuit found that approach

reasonable under the circumstances. *Id.* at 165. The FEC's approach to a completely different problem has no bearing on the distinct campaign-finance issue here.

More fundamentally, even if there were some relationship, the FEC test that the D.C. Circuit upheld in *Orloski* did not, as defendant contends, exclude evidence of subjective intent altogether. To the contrary, as the court recognized, "the FEC's objective test is used to infer the probable intent of both the donor and the donee"; in this way, "the test adopted in this case does not ignore the state of mind of the donor." *Id.* at 162. Defendant is thus wrong in asserting that, even assuming that *Orloski* applies here, the parties' intent in making the McDougal and Daniels payments would be categorically "beside the point" to establishing FECA liability. Def.'s Mem. 25.

Third, defendant is wrong to say that the People's theory requires the court to adopt the conclusion that "campaign funds could have been used to make [the] hush payments" to McDougal and Daniels (Def.'s Mem. 26). The FEC's regulations make clear that a third party's payment of a candidate's expenses can be deemed a contribution even when "the use of funds for a particular expense would be a personal use under this section." 11 C.F.R. § 113.1(g)(6). In other words, the regulations expressly contemplate that two things can be true at once: an expenditure can be a personal one precluding the conversion of campaign funds, *see* 52 U.S.C. § 30114(b)(1)-(2); *and* a third party cannot make that expenditure if he is doing so not "irrespective of the candidacy," 11 C.F.R. § 113.1(g)(6). Defendant's argument to the contrary simply represents his disagreement with FECA and the FEC's regulations.

Again, in order to deny defendant's motion *in limine*, the Court need not address on the merits defendant's faulty arguments about the application of federal campaign finance law. If the Court nonetheless reaches the merits, the Court should reject defendant's misstatements of the law

and deny his motion on the ground that (as the Court already held) the evidence here would suffice to establish campaign finance violations as a matter of law.[4]

V. Evidence that the People's witnesses admitted to FECA violations or were found to have violated that statute is admissible during the People's case because it goes to the credibility of those witnesses. (Answering Def.'s Motion #10.)

Defendant seeks to "preclude evidence and arguments concerning FECA-related admissions or resolutions by AMI and Cohen." Def.'s Mem. 30. He specifically objects to evidence that Cohen pleaded guilty in federal court to FECA violations involving the payments to Daniels and McDougal; that AMI entered into a non-prosecution agreement with the federal government which admitted facts supporting a FECA violation in connection with the McDougal payoff; and that the FEC found reason to believe that AMI and Pecker knowingly and willfully violated FECA by making a prohibited corporate in-kind contribution when they purchased McDougal's story. Def.'s Mem. 30-31. This motion should be denied.

Although a codefendant's guilty plea "has no probative value as to defendant's guilt," *People v. Wright*, 41 N.Y.2d 172, 176 (1976), the Court of Appeals has expressly stated that evidence of a testifying codefendant's plea "would be admissible on general grounds as to credibility of the witness himself," *People v. Colascione*, 22 N.Y.2d 65, 73 (1968); *see also Wright*, 41 N.Y.2d at 176 (observing that a codefendant's plea "might be admissible on the question of

[4] The eleven pages of argument regarding FECA in defendant's motion *do* persuasively illustrate why the Court should grant the People's motion to preclude defendant's proposed expert from testifying at trial. The lengthy FECA discussion in defendant's motion corresponds to just one of the four topics of proposed testimony identified in the expert disclosure for Bradley Smith. *See* Ex. 1 to People's Motion. To imagine that presentation being made to the jury (and then repeating it another three times over to account for the three other legal topics in Mr. Smith's proposed testimony; and then to account for cross-examination and possible rebuttal testimony to elucidate the many legal errors in the presentation) is to make crystal clear that any testimony from defendant's proposed expert would amount to improper legal instruction and would also confuse and mislead the jury. *See* People's Mot. 6-18. It is the Court's job to decide how FECA applies here. It is the jury's job to determine whether defendant had an intent to defraud.

credibility if the codefendant takes the stand in defendant's trial"). Thus, the general principle that another's guilty plea cannot support a defendant's guilt is no basis for the categorical exclusion of *any* evidence regarding Cohen's guilty plea and the AMI resolutions.

Indeed, defendant concedes that Cohen's guilty pleas are a permissible basis for cross-examination—but he incorrectly insists that he can prevent the People from bringing out the guilty plea by somehow questioning Cohen "generally" on his convictions without "probing the facts of what Cohen claims was a FECA violation." Def.'s Mem. 31. Well-established law holds that the People may elicit evidence of a witness's guilty plea for credibility or other permissible purposes on direct examination, and that the People need not wait for, and are not dependent on, the scope of the defendant's cross-examination. In *Colascione*, for example, the codefendant testified during direct examination that he had pleaded guilty to one of the counts in the indictment. 22 N.Y.2d at 73. The Court of Appeals did not ascribe error to the admission of that testimony, and as noted found that it was admissible on credibility grounds; the only error the Court identified was the trial court's instructions on how the jury could use that evidence. *Id.* at 67, 73.

Appellate Division rulings are in accord. In *People v. Gibbs*, 210 A.D.2d 4, 4 (1st Dep't 1994), the First Department specifically found that "the prosecutor properly elicited the terms of the agreements of the cooperating witnesses to enable the jury to assess the witnesses' credibility." The Fourth Department reached the same conclusion in *People v. Rivera*, 155 A.D.2d 941, 941 (4th Dep't 1989), upholding the People's introduction of a testifying witness's guilty plea in a prior federal proceeding because that evidence "enabled the jury to assess the witness' credibility more accurately." And in still other cases, the Appellate Division has found it "not improper" for the People to have brought out on direct examination that a codefendant or accomplice had pleaded guilty, although the courts then found error in the absence of a suitable limiting instruction. *People*

v. Cwikla, 45 A.D.2d 584, 586 (1st Dep't 1974); *see also People v. Barber*, 81 A.D.2d 943, 943 (3d Dep't 1981).

Similarly, federal appellate courts "have consistently recognized that, under proper instruction, evidence of a guilty plea may be elicited by the prosecutor on direct examination so that the jury may assess the credibility of the witnesses the government asks them to believe." *United States v. Whitney*, 229 F.3d 1298, 1306 (10th Cir. 2000) (quoting *United States v. Halbert*, 640 F.2d 1000, 1004 (9th Cir. 1981)). That makes sense, because "[i]n any criminal trial, the credibility of the prosecution's witnesses is central." *United States v. Gambino*, 926 F.2d 1355, 1363 (3d Cir. 1991). Accordingly, "even in the absence" of an attack on the codefendant's credibility, eliciting testimony about the plea is proper, as the jury "must know about the plea's existence in order to evaluate the witness's testimony." *Id.* (citation omitted). "Thus, when the prosecution examines the codefendant as its witness in support of its case-in-chief, a question about the guilty plea is legitimate as the purpose is to support the reasonableness of the witness' claim to firsthand knowledge because of admitted participation in the very conduct which is relevant. The fact a witness has formally admitted personal responsibility enhances the circumstances adding up to that witness's believability." *Halbert*, 640 F.2d at 1005; *see Whitney*, 229 F.3d at 1304 ("informing the jury of the circumstances under which [the co-defendant] was testifying and his knowledge of the offense" is a "proper use of evidence of a co-defendant's guilty plea").

The Third Circuit, sitting *en banc*, has rejected an argument essentially identical to defendant's claim here. In *United States v. Universal Rehabilitation Services (PA), Inc.*, 205 F.3d 657 (3d Cir. 2000) (en banc), defendants filed a motion *in limine* in which they represented that they would not challenge on cross-examination the credibility of two participants in the charged scheme who had pleaded guilty. Consequently, they contended, the government should be barred

from introducing evidence regarding those witnesses' guilty pleas and plea agreements. *Id.* at 661-62. The Third Circuit upheld the trial court's denial of the motion. The court reasoned that, because jurors always must assess the credibility of the witnesses, the government should be able to introduce the plea and plea agreement "even in the absence of a challenge to the witness's credibility." *Id.* at 666-67. Likewise, here the jury will have to determine the credibility of the witnesses who may testify for the People at trial, so defendant's specific choice of cross-examination topics cannot serve to bar the People from eliciting evidence regarding Cohen's guilty pleas or the AMI resolutions.

Cohen's guilty plea and the AMI non-prosecution agreement are also admissible for the entirely separate reason that they "explain why the witness possesses firsthand knowledge concerning the events to which he or she is testifying." *Universal Rehab. Servs.*, 205 F.3d at 667. "The fact that the witness has pled guilty to an offense concerning the very events that required his or her testimony makes it that much more likely that the testimony is truthful and reliable, as an individual typically does not plead guilty to an offense in the absence of culpability." *Id.* A codefendant's guilty plea may also be used in some circumstances to rebut defense reliance on prior statements by the codefendant minimizing the defendant's role in the crime, *Whitney*, 229 F.3d at 1306-07, or suggesting that the actions of the codefendant and the defendant were "innocent" and not undertaken with the requisite *mens rea*. *Halbert,* 640 F.2d at 1006.

Evidence about Cohen's guilty plea and the AMI resolutions can also serve "to eliminate any concern the jury may harbor concerning whether the government has selectively prosecuted the defendant." *Universal Rehab. Servs.*, 205 F.3d at 665. To be sure, the People have moved to prohibit defendant from advancing a selective-prosecution argument before the jury. But if the People's motion is denied, or if the defense otherwise manages to place this accusation before the

jury, evidence of Cohen's guilty plea and the AMI resolutions would be relevant to rebut such an accusation.

Defendant's request to preclude this evidence is particularly weak here because the evidence in question will address arguments that he has already raised and has not foresworn. Most importantly, "[b]y eliciting the witness's guilty plea on direct examination, the government . . . forecloses any suggestion it was concealing evidence." *Gambino*, 926 F.2d at 1363; *see Halbert*, 640 F.2d at 1005 (prosecution may elicit plea on direct examination to "dispel the suggestion that the government or its witness has something to hide"). Given that in this very motion, defendant has accused the People of seeking to suborn perjury by Cohen, defendant is in no position to bar the People from informing the jury that Cohen has pleaded guilty to federal criminal offenses in the past, including federal campaign finance violations.

Beyond defendant's general attack on admission of a codefendant's plea, he argues that the information regarding AMI should be precluded because AMI entered into the agreement, not Pecker or Howard, and that the two individuals never signed or "adopted" the agreement. He also contends that as a result, the AMI resolutions constitute "testimonial hearsay" barred by the Sixth Amendment. Def.'s Mem. 31. Defendant's effort to treat AMI as a "witness" separate and apart from its high managerial agents makes no sense in law or logic. "[A]ny attempted analogy between the criminal liability of corporations and that of individuals falters" because "the factual predicate for [corporate] liability is, invariably, the conduct of . . . its agents or employees," as corporations are "legal fictions" that "can operate only through their designated agents or employees." *People v. Byrne*, 77 N.Y.2d 460, 465 (1991); *see* Penal Law § 20.20(2)(b), (c) (basing corporate liability on conduct by corporation's board of directors, high managerial agent, or agent). Thus, AMI is not a "witness" who could be called to the stand. Rather, high managerial agents such as Pecker—who

was AMI's Chairman, President, and CEO at the relevant times—act in its stead and would be appropriate witnesses to be cross-examined regarding the company's criminal exposure. And because Pecker is available to be cross-examined, defendant is wrong that there is any risk of a Confrontation Clause violation under *Crawford v. Washington*, 541 U.S. 36 (2004).

VI. Evidence regarding false entries in AMI's books and records is relevant and admissible. (Answering Def.'s Motion #11.)

Defendant's motion to preclude evidence regarding false entries in AMI's books and records should be denied because—as the Court already held—this evidence is relevant to defendant's intent to commit or conceal another crime. *See Trump* Omnibus Decision 13, 17-18.

In deciding defendant's omnibus motions, the Court held that the grand jury evidence was insufficient to establish that defendant falsified his business records with the intent to conceal other false business records offenses, *id.* at 17-18; but further held that "the People are permitted to present evidence at trial that stems from" the falsification of AMI's records, "to the extent that the evidence advances any one or more of the first three theories." *Id.* at 13. In reaching this conclusion, the Court correctly reasoned that evidence of AMI's falsified records (along with evidence of false statements in the bank records associated with Cohen's shell company) "is intertwined and advances" the other theories of defendant's intent to commit or conceal another crime that the People identified. *Id.* at 17.

Defendant's arguments do not support a different outcome. Defendant repeats his argument that "there is no evidence" that defendant was aware of these earlier false business records offenses. Def.'s Mem. 32; *see* Omnibus Mot. 22 (same). But this Court has already rejected that argument, and defendant does not even contend that the Court's prior ruling misapprehended the facts or the law; there is therefore no valid basis for the Court to revisit that ruling. *See* Order Denying Def.'s Mot. to Reargue 2, 7 (Feb. 23, 2024).

Defendant also claims that evidence regarding AMI's records will require an "intricate," "confusing," "sideshow mini-trial concerning AMI's accounting" practices. Def.'s Mem. 33. That exaggerated claim is simply incorrect. The evidence of AMI's falsified records is in fact so straightforward that the Court described what that evidence shows in two lines of text: "AMI mischaracterized the purchase of the McDougal and Daniels stories as promotional expenses rather than editorial expenses so that Pecker could circumvent spending caps." *Trump* Omnibus Decision 17. The jury will not be confused by evidence that co-conspirators in defendant's illegal election fraud scheme took steps to conceal it by lying in corporate documents.

The Court should decline to revisit its prior ruling that evidence of AMI's falsified records is admissible to the extent it bears on defendant's intent to commit or conceal other crimes.

VII. The Court should reject defendant's attempt to limit the People's evidence that defendant and his Trust are each an "enterprise" under Penal Law § 175.00. (Answering Def.'s Motion #12.)

Defendant seeks to preclude evidence and argument that defendant or the Donald J. Trump Revocable Trust is an "enterprise" here, both on a claim that the indictment did not say so, and on the ground that neither would constitute an "enterprise" under Penal Law § 175.00(1) as a matter of law. *See* Def.'s Mem. 33.

As a threshold matter, this Court has already recognized that the Trump Organization is an "enterprise" and that the financial records of the Trump Organization, the Trust, and defendant himself are "intertwined." *Trump* Omnibus Decision 9-11. There is thus unquestionably relevant evidence concerning both defendant and the Trust that the People may introduce, regardless of whether either separately qualifies as an "enterprise." Because that legal characterization will not affect the admissibility of any evidence at trial, there is no basis for defendant's request that this Court preclude evidence on this ground. If defendant seeks to dispute this legal characterization,

the appropriate time to do so would be at the charge conference or in any motion seeking a trial order of dismissal.

In any event, defendant's arguments are meritless. There would be no constructive amendment of the indictment if the People were to rely on either defendant or the Trust as the relevant "enterprise." The indictment expressly mentions both defendant and the Trust, and indeed even refers to the relevant business records as records of the Donald J. Trump Revocable Trust, *see* Indictment (Counts One to Seven); or records of Donald J. Trump. *See id.* (Counts Eight to Thirty-Four). Moreover, characterizing either defendant or the Trust as an "enterprise" would not in any way alter the People's factual theory as expressed in the indictment or deviate from the evidence before the grand jury; defendant thus cannot argue that he failed to receive "fair notice" of the charges against him, which is the core error sought to be addressed by constructive-amendment cases. *People v. Fronjian*, 22 A.D.3d 244, 245 (1st Dep't 2005); *compare People v. Grega*, 72 N.Y.2d 489, 498 (1988) (finding constructive amendment when the People "present[ed] proof at trial that virtually ruled out" the theory of death alleged in the indictment). And although the indictment describes the relevant business records as being "kept and maintained by the Trump Organization," that allegation does not preclude either defendant or the Trust from being the relevant "enterprise" when, as this Court has found, there is significant "intermingling" of the records and finances of the Organization, the Trust, and defendant himself. *Trump* Omnibus Decision 11.

Finally, defendant's argument that neither defendant nor the Trust can be an "enterprise" because their records reflect only defendant's "personal activities," Def.'s Mem. 35, is also meritless. Defendant made the same argument with respect to the Trump Organization, and this Court squarely rejected it. *Trump* Omnibus Decision 9-11. Moreover, this Court has previously

found that defendant himself can qualify as an "enterprise" under the statute. *People v. The Trump Corporation*, Ind. No. 1473/2021, Decision & Order on Omnibus Motion 4 (Sup. Ct. N.Y. Cnty. Sept. 6, 2022). Defendant does not even acknowledge that prior ruling here, let alone provide a basis for this Court to disregard it.

VIII. [redacted] handwritten notes are admissible. (Answering Def.'s Motion #13.)

The evidence at trial will show that as one part of defendant's election fraud scheme, Cohen wired $130,000 from his Essential Consultants LLC bank account to Keith Davidson in order to suppress Stormy Daniels' account of her alleged sexual encounter with defendant. *Trump* Omnibus Decision 2-3. "Handwritten notes on the [Essential Consultants] bank statement show that amount was combined with other amounts to reach a total of $420,000, the full amount that was paid to Cohen in association with the business records at issue." *Trump*, 2023 WL 4614689, at *3. Judge Hellerstein held that this document (GJ-5) was among the evidence "strongly supporting [the People's] allegations that the money paid to Cohen was reimbursement for a hush money payment." *Id.* at *6. Despite the fact that this exhibit was "introduced without objection" during the evidentiary hearing on defendant's effort to remove this case to federal court, *id.*, defendant now seeks to exclude it from trial on hearsay grounds. Def.'s Mem. 35-36. [redacted] handwritten notes on the bank statement are admissible as a business record, and the Court should deny this motion.

The hearsay exception for business records is met where "the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter," CPLR § 4518(a), and where the person making the record had a business duty to do so accurately.

People v. Kennedy, 68 N.Y.2d 569, 579 (1986). This foundation is readily met as to [redacted] handwritten notes on the Essential Consultants bank statement.

As an initial matter, defendant's assertion that [redacted] Def.'s Mem. 35, is false—[redacted].[5] In particular, [redacted] testified that [redacted] (Tr. 883); that [redacted] (Tr. 884); that [redacted] (Tr. 884); and that [redacted] (Tr. 884-888).

[redacted] also testified that [redacted] (Tr. 153-154, 156-157); that [redacted] (Tr. 161); that [redacted] (Tr. 161); and that [redacted][6] Tr. 216-217.

[5] The Court has already admonished defense counsel not to misstate the facts in this proceeding. *See* Dec. 6, 2023 Order on Redactions; *see also* Decision on Def.'s Mot. for Recusal 4 (Aug. 11, 2023) ("The Court finds the allegations in [defense counsel's] affirmation inaccurate and the conclusions drawn therefrom misleading."). Defendant is entitled to zealous advocacy. He is not entitled to "alternative facts."

[6] Defendant's claim that there are "material differences" between [redacted] notes (GJ-5) and [redacted] notes (GJ-6), *see* Def.'s Mem. 35, is also incorrect. The only discrepancy between the notes is that [redacted]

The People can establish at trial that a document [redacted] meets the foundational elements for admissibility as a business record. The Court should deny the motion.

IX. The People do not intend to introduce Rudy Giuliani's statements. (Answering Def.'s Motion #14.)

The Court need not adjudicate defendant's motion to exclude evidence of Rudy Giuliani's statements regarding the Stormy Daniels reimbursement. Def.'s Mem. 36-40. Although those statements are admissible non-hearsay because they are the statements of defendant's agent (and although defendant expressly consented to the admission of Giuliani's statements at the evidentiary hearing on his effort to remove this case to federal court, *see* Hearing Tr. 34-36, *People v. Trump*, No. 23 Civ. 3773 (S.D.N.Y. June 27, 2023)), the People do not seek to admit those statements in our case in chief and the Court need not decide this motion at this time.

X. The Court should reject defendant's request for exclusion of his own statements or for a special pretrial hearing on their admissibility. (Answering Def.'s Motion #15.)

Defendant asserted in his criminal prosecution in D.C. that his "uniquely powerful voice has been a fixture of American political discourse for eight years, and central to the American fabric for decades." Def.'s Emergency Mot. for Stay Pending Appeal 1, *United States v. Trump*, No. 23-3190 (D.C. Cir. Nov. 2, 2023). But here, he claims his public statements are "irrelevant,

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[redacted] Tr. 162.

stale, and cumulative," and may not even be his. Def.'s Mem. 2, 42. The Court should reject defendant's request to ignore settled law and exclude his own statements wholesale, and should instead address any objections defendant chooses to raise at trial in the ordinary course.

"[A]dmissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever, or to whomsoever made." *Reed v. McCord*, 160 N.Y. 330, 341 (1899); *see also, e.g.*, *People v. Caban*, 5 N.Y.3d 143, 151 n.* (2005) ("Plainly, defendant's own statements could be received in evidence as party admissions."). Defendant's statements are therefore admissible unless irrelevant or otherwise excludable. *See generally People v. Lewis*, 69 N.Y.2d 321, 325 (1987). Despite this black-letter law, defendant seeks exclusion of his statements absent a special pretrial hearing on their admissibility, citing four complaints. Each is meritless.

First, defendant demands a pretrial offer of proof establishing the relevance of every statement. Def.'s Mem. 42. Accommodating this demand would improperly convert the People's obligation to designate case-in-chief exhibits under CPL § 245.20(1)(o) into advance disclosure of the People's trial strategy and order of proof—a reading of the statute that this Court has expressly rejected in the past. In interpreting CPL § 245.20(1)(o) in the *Trump Corporation* prosecution, the Court made clear that the People's obligation was solely to "inform defendants" of the "documents they intend to introduce into evidence," *not* to disclose trial strategy. The Court explained:

> I do not find that the People are required to do more than that. . . . The People do not have to number the exhibits or put them in any particular order. The People do not need to identify which exhibit will be introduced when and for what count. To impose that requirement on the prosecution would be to unfairly handcuff their ability to prepare for trial, and more importantly, to alter and change course during the course of the trial. Under such a scenario, the People would be committed to a predetermined script. I do not believe that is what the statute requires.

Hearing Transcript 8, *People v. The Trump Corporation*, Ind. No. 1473/2021 (Sup. Ct. N.Y. Cnty. Aug. 12, 2022) (Ex. 1). Defendant is entitled to an exhibit list, not more.

In any event, defendant's own words in the statements the People identified—about, for example, the careful attention defendant paid to his finances; his expertise regarding campaign finance requirements; his "philosophy of aggressively going after anyone who crosses him," Def.'s Mem. 41; and about the very reimbursement payments at issue in this prosecution—on their face have "any tendency" to prove any material fact. *Lewis*, 69 N.Y.2d at 325. If defendant believes he has a relevance objection to, for example, his statement in 2018 that the reimbursements to Cohen "came from me and I tweeted about it" (Blanche Aff., Ex. 5, Row 80), he should make that objection if and when the People move to admit this statement, and the Court can address it then.

Second, defendant suggests that books he authored and sold under his name may not in fact contain his own statements because he wrote some of those books with help from a ghostwriter. Def.'s Mem. 42. Any such argument would go to weight, not admissibility. *See, e.g.*, *People v. Patterson*, 128 A.D.3d 424, 425 (1st Dep't 2015); *Smolinski v. Smolinski*, 78 A.D.3d 1642, 1645 (4th Dep't 2010) ("[I]t is . . . for the jury to determine whether or not the admissions were made, the facts and conditions [that] affect the probative value, and the value itself." (quoting *Gangi v. Fradus*, 227 N.Y. 452, 458 (1920))). Defendant is free to argue at trial that he did not in fact say the things he said in his books. The jury can then assess that claim and determine how much weight the statements deserve. And in any event, defendant concedes that his ghostwriters were authorized coauthors. *See* Def.'s Mem. 42 & n.39. The statements in his books are thus admissible against defendant on the alternative ground that they are the statements of defendant's agents acting within the scope of the authorized relationship. *See* CPLR § 4549; Guide to N.Y. Evid. rule 8.03(2).

Third, defendant seeks a pretrial proffer establishing that the probative value of his own prior statements is not outweighed by unfair prejudice. Def.'s Mem. 42. As above, requiring the People to rebut defendant's abstract claim of prejudice before trial and divorced from context

would handicap the People's presentation and compel premature disclosure of the People's trial strategy. For example, defendant's statement advocating going after one's opponents "as viciously and as violently as you can," (Blanche Aff., Ex. 5, Row 21), cannot be assessed in a vacuum but instead should be weighed in context if and when the People seek to introduce it; defendant will suffer no injury from objecting and arguing undue prejudice when this exhibit is proffered.

Finally, defendant seeks to exclude "cumulative statements that make the same basic point." Def.'s Mem. 43. Courts rarely exclude evidence before trial on a claim that it is cumulative, for the obvious reason that no evidence has yet been introduced. The Court should rule on any such objections when they arise with the benefit of knowing what is actually in evidence then.

The Court should deny defendant's motion to exclude his own statements, as well as his demand for a special pretrial hearing on their admissibility.

XI. The People have scrupulously complied with the obligation to identify case-in-chief exhibits. (Answering Def.'s Motion #16.)

Defendant first complained that the People had not identified enough exhibits (Omnibus Mot. 47), and now complains that the People have identified too many (Def.'s Mem. 43-44)—while defendant still has designated none. Defendant's argument is meritless.

Consistent with this Court's holdings regarding the scope of a party's obligations under CPL § 245.20(1)(o), the People have given notice to defendant of our intended case-in-chief exhibits on four occasions dating back six full months: August 24, 2023 (designating the grand jury exhibits); January 3, 2024 (designating approximately 94 exhibits consisting of defendant's statements); January 29, 2024 (designating an additional 145 exhibits); and February 13, 2024 (substituting two exhibits for ones we previously identified).[7] We identified those exhibits on a

[7] Defendant's claim that the People's exhibit list is in "a state of disarray," Def.'s Mem. 43, is incorrect. Defense counsel filed one of the People's disclosures with the Court, *see* Blanche Aff.

rolling basis in the course of our diligent, good-faith trial preparation and consistent with the continuing duty to disclose. CPL §§ 245.20(1)(o), 245.60.

In total, the People have designated approximately 336 exhibits we may introduce. As the Court knows from experience, 300 or so exhibits for a five-week direct case on 34 felony counts is nothing out of the ordinary. Indeed, defendant claims repeatedly in his motions *in limine* that this trial should be about "documents and accounting practices." Def.'s Mem. 2, 14. It is strange to complain about documentary exhibits in a trial defendant himself says is about documents.

Defendant claims that it is "misleading" that the People's exhibit list includes the full grand jury record even though not every grand jury witness will be called at trial. *Id.* at 44. But many of the grand jury exhibits can be admitted through multiple witnesses. For example, the evidence of Robert Costello's participation in defendant's efforts to dissuade Cohen from cooperating with the federal investigation in 2018, Def.'s Mem. 44 & n.40, is of course admissible through Cohen.

Finally, defendant's assertion that the People identified "unspecified 'portions' of the huge amount of data that the People obtained from Cohen's cell phones," Def.'s Mem. 43-44, is disingenuous. The People's January 29, 2024 exhibit designation disclosed that we intended to introduce "[p]ortions to be designated from Cell Phone 001 and Cell Phone 002." In response to defense counsel's question the next day regarding that disclosure, the People explained:

> [I]n the exercise of reasonable diligence we have not yet formed a specific intention as to which portions of those phones will be designated. When we do identify those portions that we intend to introduce in our case-in-chief at trial, we will disclose those portions to the defense as soon as practicable by identifying the specific excerpts in a supplemental discovery production and listing them on a supplemental exhibit list, consistent with CPL 245.20(1)(o) and 245.60. And in the meantime we believed it was appropriate to advise the defense that we believe designations from

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Ex. 5, and the Court can see from that exhibit that the People's designation is well-organized, clear, and contains far more information than anything Article 245 requires.

those phones (along with any other potential exhibits we identify in our continued preparation for trial) would be forthcoming.

Ex. 2. To suggest to the Court that the People simply designated the entire phones as exhibits, when in fact we expressly advised defendant that we were *not* identifying the entire phones and would disclose specific exhibits from those phones as soon as practicable, is misleading. Defendant is entitled to no relief on his motion regarding the People's exhibit disclosures.

DATED: February 29, 2024

Respectfully submitted,

ALVIN L. BRAGG, JR.
District Attorney, New York County

By: */s/ Matthew Colangelo*

Steven C. Wu
Alan Gadlin
John T. Hughes
Philip V. Tisne
Of Counsel

Matthew Colangelo
Christopher Conroy
Susan Hoffinger
Becky Mangold
Joshua Steinglass
Assistant District Attorneys
New York County District Attorney's Office
1 Hogan Place
New York, NY 10013
212-335-9000

Exhibits to People's Opposition to Defendant's
Motions in Limine (Feb. 29, 2024)

Ex. 1

SUPREME COURT NEW YORK COUNTY
TRIAL TERM PART 59

THE PEOPLE OF THE STATE OF NEW YORK	INDICTMENT # 1473-21
AGAINST	CHARGE SCHEME TO DEFRAUD, ET AL
THE TRUMP CORPORATION, TRUMP PAYROLL CORPORATION, ALLEN WEISSELBERG,	
Defendants	Proceedings

100 Centre Street
New York, New York 10013
August 12, 2022

B E F O R E:

HONORABLE: JUAN MERCHAN,
JUSTICE OF THE SUPREME COURT

APPEARANCES FOR THE PEOPLE:
ALVIN BRAGG, DISTRICT ATTORNEY BY:
SUSAN HOFFINGER, ASSISTANT DISTRICT ATTORNEY
JOSHUA STEINGLASS, ASSISTANT DISTRICT ATTORNEY
GARY FISHMAN, SPECIAL ASSISTANT DISTRICT ATTORNEY

FOR THE DEFENDANTS, THE TRUMP ORGANIZATIONS:
ALAN S. FUTERFAS, ESQ.
SUSAN NECHELES, ESQ.
GEDALIA STERN, ESQ.
FOR DEFENDANT ALLEN WEISSELBERG:
NICHOLAS GRAVANTE, ESQ.
MARY E. MULLIGAN, ESQ.

THE COURT: Good morning. Your appearances

Sandoval hearing is granted.

Are there any questions regarding that?

MR. STEINGLASS: Judge, as to your dismissal of count four, does that pertain to the corporate defendant only as we conceded, or does that also apply to defendant Weisselberg?

THE COURT: That is only as to the corporate defendant.

MR. STEINGLASS: Thank you.

THE COURT: Any other questions before I continue on to the next issue?

All right, let me address the dispute over the exhibit list, and I'm referring specifically to Mr. Haggerty's letter of August fifth requesting that the Court issue an order directing the People to produce an exhibit list for their case in chief.

As indicated in the People's response of August 9th, the People do not necessarily disagree that they are required to provide such a list.

In fact, this Court requested on July 11th, and the People provided a detailed list identifying each of the grand jury exhibits on July 15th.

The Court has considered the submissions on this issue and finds that the statute is clear on its face. In fact, as Judge Dinino noted in the practice commentaries to

CPL Section 245 point 20 subdivision one, subdivision zero, if the prosecutors know that he or she intends to introduce property, then the prosecutors must so inform the defense.

In other words, the People must identify which exhibits they intend to introduce in their case in chief.

In a case such as this where the discovery has been voluminous, to say the least, it is fair that the People should inform defendants which of those many documents they intend to introduce into evidence.

However, I do not find that the People are required to do more than that. Identifying which exhibits will be offered into evidence in their case in chief, satisfies the requirements of new discovery statute.

The People do not have to number the exhibits or put them in any particular order. The People do not need to identify which exhibit will be introduced when and for what count.

To impose that requirement on the prosecution would be to unfairly handcuff their ability to prepare for trial, and more importantly, to alter and change course during the course of the trial.

Under such a scenario, the People would be committed to a predetermined script. I do not believe that is what the statute requires.

I note first and foremost that CPL Article 245, the new discovery statute, is a discovery statute. Its intention is to create fairness and prevent trial by ambush. It does not, however, require either party to disclose trial strategy.

I believe this Court's ruling more than satisfies the spirit and intent of the revised statute.

Therefore, to the extent the People have not done so already, the People are directed to immediately identify and inform defendants as to all property you intend to introduce in your case in chief.

If in the exercise of reasonable diligence the prosecution has not yet formed an intention that a particular item will be introduced at trial or pretrial hearing, then the prosecution shall notify the defendants in writing. These disclosures shall be made as soon as practicable and subject to continuing duty to disclose in CPL Section 245 point 60.

To the extent, if any, that this ruling is inconsistent with the recent decision in People v Novas Ceballos, C. E. B. A. L. L. O. S, this Court respectfully declines to follow that decision.

The only other matter I have -- well, I'll hear you on that.

MS. NECHELES: Thank you, your Honor. Your Honor,

Exhibits to People's Opposition to Defendant's
Motions in Limine (Feb. 29, 2024)

Ex. 2

From: Gedalia Stern
To: Colangelo, Matthew; Todd Blanche; Emil Bove; Stephen Weiss; Susan Necheles; Steinglass, Joshua; Hoffinger, Susan; Conroy, Christopher; Mangold, Rebecca; [redacted]
Subject: [EXTERNAL] Re: People v. Trump, No. 71543-23 - supplemental discovery, ADF, COC, and exhibit disclosure
Date: Tuesday, January 30, 2024 11:32:28 AM

We have not, although we stress that we also do not believe that the defense has any designation obligation under 245.20(1)(o).

From: Colangelo, Matthew [redacted]>
Sent: Tuesday, January 30, 2024 10:18 AM
To: Gedalia Stern [redacted]; Todd Blanche [redacted]; Emil Bove [redacted]; Stephen Weiss [redacted]; Susan Necheles [redacted]; Steinglass, Joshua [redacted]; Hoffinger, Susan [redacted] Conroy, Christopher [redacted]; Mangold, Rebecca [redacted]
Subject: RE: People v. Trump, No. 71543-23 - supplemental discovery, ADF, COC, and exhibit disclosure

Good morning Gedalia,

Thank you for your message. In the course of our continuing preparations for trial, the People believe we may identify portions of Cell Phone 001 and Cell Phone 002 as potential case-in-chief exhibits, but in the exercise of reasonable diligence we have not yet formed a specific intention as to which portions of those phones will be designated. When we do identify those portions that we intend to introduce in our case-in-chief at trial, we will disclose those portions to the defense as soon as practicable by identifying the specific excerpts in a supplemental discovery production and listing them on a supplemental exhibit list, consistent with CPL 245.20(1)(o) and 245.60. And in the meantime we believed it was appropriate to advise the defense that we believe designations from those phones (along with any other potential exhibits we identify in our continued preparation for trial) would be forthcoming.

Has the defense identified any exhibits you intend to use in your case-in-chief?

Thank you,
Matthew

From: Gedalia Stern [redacted]
Sent: Tuesday, January 30, 2024 8:52 AM
To: Colangelo, Matthew [redacted]
Cc: Todd Blanche [redacted]; Emil Bove [redacted]

Stephen Weiss [redacted] Susan Necheles [redacted]
Steinglass, Joshua [redacted] Hoffinger, Susan [redacted]
Conroy, Christopher [redacted]; Mangold, Rebecca [redacted]
[redacted]
Subject: [EXTERNAL] Re: People v. Trump, No. 71543-23 - supplemental discovery, ADF, COC, and exhibit disclosure

Matthew,

Part 4 of the People's letter yesterday provided a supplemental exhibit list; and Line 146 of that list says "Portions to be designated from Cell Phone 001 and Cell Phone 002, produced on June 15, 2023."

Can you please clarify what this means and delineate what those "portions" are? As you know, there is a massive amount of information on both of those cell phones and §245.20(1)(o) obviously requires more specificity than informing us that "some portion" of these phones will be introduced into evidence.

Best,

Gedalia M. Stern
Partner
NechelesLaw LLP
1120 6th Ave., 4th Floor
New York, N.Y. 10036

Sent from my iPhone

> On Jan 29, 2024, at 5:58 PM, Colangelo, Matthew [redacted] wrote:
>
> Counsel,
>
> We are producing a supplemental set of discovery materials to you to today via a file transfer site. Details regarding the production and how to access it can be found in the attached cover letter and index. We will send the credentials for the file transfer site in a separate email.
>
> The attached correspondence also includes a supplemental exhibit list and addresses

other discovery and pretrial matters.

We are also serving today a Supplemental Certificate of Compliance pursuant to CPL 245.50(1), and an updated Addendum to the Automatic Discovery Form. Please find those documents attached to this email. We will file the Supplemental Certificate of Compliance with the Court shortly.

Thank you,
Matthew