PART 59 NOV 29 2023

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.	Ind. No. 71543-23

PEOPLE'S SUR-REPLY IN OPPOSITION TO DEFENDANT'S OMNIBUS MOTIONS

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The People submit this sur-reply to respond to defendant's assertion, elaborated for the first time in his reply brief, that the Court should conduct a *Singer* hearing on the claim of unconstitutional preindictment delay. The claim should be denied for the reasons asserted in the People's opposition brief; the hearing request should be denied for the reasons that follow.

Trial courts have discretion to deny a defendant's request for a *Singer* hearing where there is "no dispute as to the facts showing that the investigation proceeded in good faith"[1]; where the existing record provides the Court with "a sufficient basis to determine whether the delay was justified"[2]; where "the record was fully developed as to the reasons for the delay"[3]; where the defendant has not made a showing of prejudice[4]; or where "the seriousness of the crime is apparent."[5] Considered against this extensive authority—*none* of which defendant even cites, let alone refutes, in his reply—defendant's request for a *Singer* hearing is not remotely supportable.

First, nothing in defendant's reply actually disputes—or even *could* dispute—the Conroy Affirmation's central factual assertions, which taken as a whole provide objectively reasonable

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[1] *People v. Brown*, 209 A.D.2d 233, 233 (1st Dep't 1994), *leave denied*, 85 N.Y.2d 860 (1995); *see also People v. Morris*, 176 A.D.3d 1502, 1504 (3d Dep't 2019), *leave denied*, 34 N.Y.3d 1131 (2020); *People v. Ruise*, 86 A.D.3d 722, 723 (3d Dep't 2011), *leave denied*, 17 N.Y.3d 861 (2011); *People v. Lopez*, 15 A.D.3d 232, 232-33 (1st Dep't 2005), *leave denied*, 4 N.Y.3d 888 (2005).

[2] *People v. Ballowe*, 173 A.D.3d 1666, 1668 (4th Dep't 2019) (quoting *People v. Rogers*, 103 A.D.3d 1150, 1151 (4th Dep't 2013)), *leave denied*, 35 N.Y.3d 940 (2020); *see also People v. Albert*, 171 A.D.3d 1519, 1520 (4th Dep't 2019), *leave denied*, 35 N.Y.3d 1092 (2020); *Rogers*, 103 A.D.3d at 1151, *leave denied*, 21 N.Y.3d 946 (2013); *People v. Black*, 128 A.D.2d 715, 715 (2d Dep't 1987).

[3] *People v. Cesar*, 6 A.D.3d 547 (2d Dep't 2004), *leave denied*, 3 N.Y.3d 638 (2004); *see also People v. Gathers*, 65 A.D.3d 704 (2d Dep't 2009), *leave denied*, 13 N.Y.3d 859 (2009); *People v. Smith*, 60 A.D.3d 706, 707 (2d Dep't 2009), *leave denied*, 12 N.Y.3d 859 (2009).

[4] *See People v. McCollough*, 198 A.D.3d 1023, 1024 (3d Dep't 2021); *Lopez*, 15 A.D.3d at 232-33; *Brown*, 209 A.D.2d at 233; *People v. Grant*, 16 Misc. 3d 1117(A), at *5 (Essex Cnty. Ct. 2007).

[5] *McCollough*, 198 A.D.3d at 1024; *see also Grant*, 16 Misc. 3d 1117(A), at *5.

grounds to conclude that there were meaningful impediments to bringing this prosecution earlier. Defendant does not dispute that until July 2019, the federal government had an active criminal investigation into who else may be criminally liable for the campaign finance violations to which Michael Cohen pleaded guilty. *See* Conroy Aff. ¶ 13. Defendant does not dispute that in September 2019, he sued to block enforcement of the People's subpoena to his accounting firm; that the litigation over that subpoena was not resolved until February 2021; and that compliance with that subpoena was thereby delayed by more than seventeen months.[6] *See id.* ¶¶ 17, 23. Defendant does not dispute that he was the sitting President until January 20, 2021, or that there are open constitutional questions regarding whether a sitting President can be indicted and prosecuted. *See id.* ¶ 24. Defendant does not dispute that in May 2021, the People began a grand jury presentation in connection with its investigation of unreported income involving the Trump Corporation, Trump Payroll Corp., and Allen Weisselberg; that those defendants were indicted in June 2021; that Weisselberg pleaded guilty to fifteen felony counts in August 2022; and that the corporate defendants were convicted after trial on seventeen felony counts in December 2022. *See id.* ¶¶ 21-22, 25, 27-29. And defendant does not dispute that the current District Attorney was sworn in on January 1, 2022. *See id.* ¶ 33. Defendant thus does not dispute any aspect of the timeline depicting key developments from the date the investigation was opened to the date of the indictment. *See id.* ¶ 40. Because there is no dispute as to any material fact, the Court should deny the request for a hearing. *See Morris*, 176 A.D.3d at 1504; *Ruise*, 86 A.D.3d at 723; *Lopez*, 15 A.D.3d at 232-33; *Brown*, 209 A.D.2d at 233.

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[6] Defendant claims that this litigation is a "red herring" because the documents at issue there "have no relevance to this case." Reply 1 n.1. But defendant ignores that his argument in that proceeding was that he was entitled to "absolute immunity from state criminal process" while President, *Trump v. Vance*, 140 S. Ct. 2412, 2420 (2020)—a claim that, if accepted, would have precluded any investigation on the current charges as well.

To be sure, defendant claims to dispute the *import* of those facts, by speculating—without presenting sworn evidence of his own—that none of these factors actually influenced the People's timing, and that some hidden, potentially nefarious motive is instead at play. Reply 1-5. But a defendant's conclusory claim that he disbelieves the prosecution's sworn explanation for deferring charges does not suffice to require a *Singer* hearing; otherwise, every defendant could compel a mini-trial on the prosecution's decision-making in every case. That outcome would not only cause extensive delays and disruption to the administration of justice, but would also undermine the presumption of regularity without the necessary showing of substantial evidence, *People v. Dominique*, 90 N.Y.2d 880, 881 (1997); interfere with the "significant amount of discretion that the People must of necessity have" in deciding when to bring criminal charges, *People v. Decker*, 13 N.Y.3d 12, 15 (2009); and unjustifiably expand judicial power into routine review of a prosecutor's charging determinations, *see United States v. Armstrong*, 517 U.S. 456, 464-65 (1996); *United States v. Stone*, 394 F. Supp. 3d 1, 30 (D.D.C. 2019).

Second, even to the extent defendant's speculation could create a dispute of fact regarding the People's decision-making, the request for a *Singer* hearing should be denied because the existing record provides the Court with "a sufficient basis to determine whether the delay was justified." *Ballowe*, 173 A.D.3d at 1668 (quoting *Rogers*, 103 A.D.3d at 1151); *see also Albert*, 171 A.D.3d at 1520; *Black*, 128 A.D.2d at 715. Appellate courts routinely affirm the denial of delay claims without a hearing when the existing record is sufficient for the Court to assess the relevant *Taranovich* factors, particularly when that record includes an affirmation from the People presenting reasonable explanations for any delay:

> The court acted properly in denying, without a hearing, the defendant's pretrial motion to dismiss the indictment for lack of prompt prosecution. The only matter to be resolved by the court was whether the delay between the time the crime took place and the time of the defendant's arrest was excusable. That having been

> established by the affirmation submitted by the People, the other factors to be considered by the court provided no support for the allegation that the defendant's due process rights had been violated.

Black, 128 A.D.2d at 715 (citations omitted); *see also Smith*, 60 A.D.3d at 707; *Cesar*, 6 A.D.3d at 547. Here, the People have explained in detail and by sworn affirmation the reasons that the People did not bring charges earlier. *See* Conroy Aff. ¶¶ 4-40; *see also* Opp. 52-55.

Defendant's speculation about "exactly what occurred" instead, Reply 1, relies almost exclusively on a book by former Special ADA Mark Pomerantz, whom defendant characterizes as believing the case had legal vulnerabilities. Reply 1-5. But even if the Court were to credit the hearsay statements in that book, those statements would not support a finding of unconstitutional delay. Pomerantz left the Office nearly a full year before the grand jury presentation that led to this indictment (having worked in the Office for only about thirteen months) and was not privy to the People's thought process or the legal theories on which this case was presented to the grand jury and charged. And courts have permitted preindictment delays that were caused only by changes in "the inherently discretionary and subjective prosecutorial determination of what constituted sufficient evidence to successfully prosecute defendant." *People v. Denis*, 276 A.D.2d 237, 248 (3d Dep't 2000), *leave denied*, 96 N.Y.2d 782 (2001); *see* Opp. 55. The Court thus does not need a hearing to adjudicate defendant's claim of unconstitutional delay, particularly because the People's burden is simply to present "good faith, legitimate reasons" for their timing. *People v. Wiggins*, 31 N.Y.3d 1, 13 (2018). The existing record is sufficient to permit the Court to determine whether the People have cleared that low bar.

Third, a *Singer* hearing is not warranted because "there is no showing of prejudice." *Brown*, 209 A.D.2d at 233. Defendant's claim that his political standing is impeded by this prosecution is refuted by his own admissions elsewhere that the timing of this indictment has *helped* his political prospects. PX-39; *see* Opp. 56-57. And because defendant has been either an officeholder seeking

reelection or a political candidate for essentially the entire period of time after he allegedly committed the offenses charged in the indictment, there is no earlier date that the People could have brought charges that defendant would *not* have claimed was prejudicial. Indeed, when the People subpoenaed defendant's accounting firm during defendant's term as President, defendant argued strenuously that even pre-indictment criminal process was prejudicial given the demands of the presidency. *See* Brief for Petitioner at 29-32, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19-635); Reply Brief for Petitioner at 9-12, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19-635). Defendant's claim of prejudice, if accepted, would thus mean that it would *never* be appropriate to subject him to law enforcement scrutiny no matter his conduct. The Supreme Court has already rejected this argument by defendant, *see Vance*, 140 S. Ct. at 2431, and this Court should as well. No *Singer* hearing is warranted where defendant has made no showing of cognizable prejudice. *See McCollough*, 198 A.D.3d at 1024; *Lopez*, 15 A.D.3d at 232-33; *Brown*, 209 A.D.2d at 233; *Grant*, 16 Misc. 3d 1117(A), at *5; *cf. People v. Coffaro*, 52 N.Y.2d 932, 934 (1981) (denial of speedy trial motion without an evidentiary hearing was proper where delay did not impair defense).

Finally, defendant's request for a *Singer* hearing should be denied because "the seriousness of the crime is apparent." *McCollough*, 198 A.D.3d at 1024; *see also Grant*, 16 Misc. 3d 1117(A), at *5. Defendant suggests that the offenses he is charged with committing are not serious because he is not charged with murder. Reply 5 n.8. Conspiring to corrupt a presidential election and then lying in New York business records to cover it up, as alleged, is a serious offense. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978); Mem. & Order Granting Unsealing Requests 2-3, *United States v. Cohen*, No. 18 Cr. 602 (S.D.N.Y. July 17, 2019) (PX-40). The Court should firmly reject defendant's invitation to conclude otherwise.

The People respectfully request that defendant's request for a *Singer* hearing be denied.

DATED: November 27, 2023

Respectfully submitted,

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