PART 59 JAN 2 5 2024

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 MOTION TO REARGUE

Ind. No. 71543-23

INTRODUCTION

The Court should deny defendant's motion to reargue his opposition to the People's motion to quash the subpoena to Michael Cohen. As a threshold matter, the motion goes beyond the proper scope of a reargument request because (for Request 1) it seeks new records not even sought by the original, quashed subpoena; and because (for Requests 4 and 6) it presents new legal theories that defendant could have, but failed, to raise in his original papers. In any event, even if considered on the merits, defendant's motion should be rejected because it does not identify any matters of fact or law that the Court overlooked or misapprehended in its December 18, 2023 order on the motion to quash. Because defendant's motion falls short of the standard for reargument, the Court should deny the motion.

LEGAL STANDARD

Although the CPL does not expressly address reargument, courts in criminal cases have looked to the standards in CPLR § 2221(d) to determine whether to exercise their discretion to revisit a prior ruling. *See, e.g., People v. Rodriguez*, 21 A.D.3d 834, 834 (1st Dep't 2005). Under that statute, a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include

any matters of fact not offered on the prior motion."[1] CPLR § 2221(d)(2). Although a motion for reargument is within the Court's discretion, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those previously asserted." *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dep't 1992) (citing *Pro Brokerage, Inc. v. Home Ins. Co.*, 99 A.D.2d 971, 971 (1st Dep't 1984), and *Foley v. Roche*, 68 A.D.2d 558, 567 (1st Dep't 1979)).

The same principle applies to a court's inherent authority to reconsider its prior motions. *See People v. Godbold*, 117 A.D.3d 565, 567-68 (1st Dep't 2014). In particular, there is no obligation for a court to revisit a fully briefed prior ruling where a party "attempt[s] to argue new points after losing on the merits." *People v. Harrington*, 193 A.D.2d 756, 756 (2d Dep't 1993) (citing *People v. Havelka*, 45 N.Y.2d 636, 643 (1978)); *see also People v. Paul*, 139 A.D.2d 916, 918 (4th Dep't 1988).

ARGUMENT

I. The Court should not reconsider its order quashing Request 1 in part.

Defendant seeks to reargue his opposition to the motion to quash Request 1 "as narrowed and clarified." Def.'s Mem. 3. The Court should deny this request for three reasons.

First, although defendant has purported to narrow this request by seeking communications during a shorter time period with two law enforcement agencies—the U.S. Attorney's Office and the Federal Bureau of Investigation—rather than four, he has separately *expanded* his request to

[1] Defendant also moves, in the alternative, for leave to renew. Def.'s Mem. 2 n.2. A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination"; and "shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR § 2221(e)(2), (3). Defendant has identified no new facts or intervening law; nor has he provided any justification for his failure to present earlier the arguments raised in his current motion.

seek communications "between you (*or attorneys acting on your behalf*)" and those agencies. Def.'s Mem. 3 (emphasis added). Whatever else a motion to reargue may accomplish, it is not a proper vehicle for requesting new records not covered by the original, quashed subpoena. The Court cannot possibly have "overlooked or misapprehended" any matters of fact or law relating to records sought for the first time on a motion for leave to reargue. CPLR § 2221(d)(2).

Second, although defendant claims that his "narrowed and clarified" request for records "now seeks only communications" with the prosecution team in "the federal case in which he was investigated and charged with crimes involving allegations that overlap with this case," Def.'s Mem. 4-5, this representation is not correct—revised Request 1 still seeks records of communications with the FBI on matters totally unrelated to the subject matter of this case. In the time period covered by defendant's revised Request 1, and according to public records, Cohen met with the FBI seven times in connection with the Special Counsel's investigation into Russian interference in the 2016 presidential election. *See, e.g., Report on the Investigation into Russian Interference in the 2016 Presidential Election, Vol. I*, at 20 n.45, 52 nn.199 & 202, 69 nn.310-312, 70 n.329 (Mar. 2019), https://www.justice.gov/archives/sco/file/1373816/download (citing multiple FBI Form 302s recording Cohen's meetings with the Special Counsel's Office); Government's Sentencing Memorandum 3, 5, *United States v. Cohen*, No. 18-cr-850 (S.D.N.Y. Dec. 7, 2018). Those meetings fall within defendant's revised Request 1 because they were "regarding or relating to Donald J. Trump." Def.'s Mem. 3; *see generally Report on the Investigation into Russian Interference in the 2016 Presidential Election, Vol. I*. And as the Court already held, demanding these precise records from Mr. Cohen "circumvents limits on criminal discovery because [among other reasons] it is not limited to the subject matter of this case." Order

on Mot. to Quash 7 (Dec. 18, 2023). Defendant does not even attempt to present any argument that the Court's prior order misapprehended the law in this regard.

Third, as defendant acknowledges, he received in discovery all materials within the People's custody or control relating to Cohen's meetings with the U.S. Attorney's Office or the FBI, including [redacted]. Defendant's mere speculation that Cohen may possess records of other communications between Cohen or his lawyers and the federal government related to those meetings—and that those hypothetical communications would be "material to the unreliability of facts, circumstances, and Mr. Cohen's anticipated testimony in the People's case," Def.'s Mem. 5-6—is a classic "attempt to conduct a 'fishing expedition'" that exceeds the allowable scope of a trial subpoena. *People v. Gissendanner*, 48 N.Y.2d 543, 547 (1979); *see* CPL § 610.20(4). The Court did not misapprehend the law in denying defendant's attempt to fish for these records the first time.

II. The Court should not reconsider its order quashing Request 4.

Defendant also seeks to reargue his opposition to the motion to quash Request 4, which sought "documents sufficient to identify all clients that have retained you (i.e., in your individual capacity or as a member of any firm), or Michael D. Cohen & Associates, PC, or Essential Consultants LLC, including payments you received, and documents sufficient to demonstrate whether you entered into retainer agreements with each client, including copies of all retainer agreements between you and any client." Def.'s Mem. 6. On reargument, defendant narrows his request to two years of records instead of nine. *Id.* at 7.

In granting the People's motion to quash, the Court correctly concluded that "no colorable argument can be made that the documents sought are relevant or material." Order on Mot. to Quash 9. Defendant identifies no facts or law that the Court's ruling overlooked or misapprehended, and his citation to a grand jury subpoena that the People served on the Trump Organization in January

2023 (seeking retainer agreements between the Trump Organization and various law firms) is unavailing for several reasons.

First, to the extent the People's grand jury subpoena to [redacted] had any bearing on defendant's trial subpoena to Cohen, defendant's failure to raise this argument in his initial opposition to the People's motion to quash alone would authorize this Court to deny his request for reargument. *See People v. D'Alessandro*, 13 N.Y.3d 216, 219 (2009) ("It is well settled that a motion to reargue 'is not an appropriate vehicle for raising new questions . . . which were not previously advanced." (quoting *People v. Bachert*, 69 N.Y.2d 593, 597 (1987))).

Second, even if the Court were to consider this argument for the first time on a motion to reargue, it does nothing to undermine the Court's prior conclusion. Defendant is charged with lying in his business records by falsely describing the payments to Cohen as payments for legal services pursuant to a retainer, rather than truthfully describing them as reimbursements for the Stormy Daniels payoff. It is relevant to those charges whether *defendant* had retainer agreements with Cohen; and, for that purpose, it was appropriate for the People to take investigative steps to understand defendant's retention practices with his other lawyers, since that background could inform defendant's intent and his relationship with Cohen during the period covered by the indictment. By contrast, it is not relevant to those charges whether *Cohen* had retainer agreements with other, unrelated clients, since nothing about those relationships (about which defendant is plainly unaware) bears on defendant's actions or state of mind. Because the relevant question is whether defendant lied when he made and caused business records stating that Cohen was being paid pursuant to a nonexistent retainer agreement, Cohen's engagement practices with unrelated clients is immaterial. Defendant's motion to reargue does not show that the Court misapprehended the law of relevance.

Third, defendant's argument ignores that the authority to issue a trial subpoena is far narrower than the authority to issue an investigative grand jury subpoena. There is no basis to contend that the People's service of a proper grand jury subpoena to investigate facts before indictment has anything to do with whether the Court misapprehended the law on whether a trial subpoena is "reasonably likely to be relevant and material to the proceedings" under CPL § 610.20(4).

Defendant's lengthy discussion regarding whether the requested records would be protected by the attorney-client privilege, Def.'s Mem. 7-10, is entirely beside the point. The basis for the Court's decision to quash Request 4 was that records regarding Cohen's use of retainer agreements with other clients, unrelated to this case, "have no bearing on the truth or falsity of the allegations contained in this indictment." Order on Mot. to Quash 9. And as defendant concedes, the Court's observations regarding attorney-client privilege were noted only in the alternative. Def.'s Mem. 7. Because it remains the case that Cohen's retention practices with other clients have nothing to do with whether defendant lied in his business records when he characterized the payments to Cohen as payments for legal services instead of as a reimbursement for the Stormy Daniels payoff, defendant's views on attorney-client privilege are immaterial.

III. The Court should not reconsider its order quashing Request 6.

Finally, defendant seeks to reargue his opposition to the motion to quash Request 6, which he narrows on this motion to seek "[d]ocuments sufficient to show how the entire $420,000 was treated—whether as taxable income or as non-taxable reimbursement—by you on your personal tax returns." The Court's order already noted that even if Request 6 were narrowed to seek precisely these records, defendant's subpoena would be improper under CPL § 610.20(4): "How Mr. Cohen treated the alleged $420,000 payment for tax purposes is immaterial to the question of

Defendant's intent to defraud," because "Defendant's intent is separate and apart from whether his intended result actually came to fruition." Order on Mot. to Quash 10.

Defendant now argues that the Court misapplied the law because similar subsequent crimes can in some cases inform a defendant's prior intent. Def.'s Mem. 11-13. Again, however, reargument is not warranted to consider an argument defendant could have—but failed—to make in his initial opposition. *See DeSoignies v. Cornasesk House Tenants' Corp.*, 21 A.D.3d 715, 718 (1st Dep't 2005) (reversing order granting reargument because "[r]eargument is not available where the movant seeks only to argue 'a new theory of law not previously advanced.'" (quoting *Frisenda v. X Large Enters. Inc.*, 280 A.D.2d 514, 515 (2d Dep't 2001))).

Even if the Court were to consider it, defendant's argument does not establish that the Court misapprehended the law on the intent to commit, aid, or conceal the commission of another crime. As the Court's order recognized, the law is clear that defendant's intent to commit or conceal another crime is distinct from whether that other crime occurred. *People v. Thompson*, 124 A.D.3d 448, 449 (1st Dep't 2015); *see 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); *People v. McCumiskey*, 12 A.D.3d 1145, 1145 (4th Dep't 2004). That statement of black-letter law has particular force in this case, for at least two reasons.

First, in the cases cited by defendant (all of which deal with the state-of-mind exceptions to the *Molineux* rule or the rule against hearsay), courts have found actions committed after the charged crimes to be material only when they were committed by the defendant himself, *e.g.*, *People v. Ingram*, 71 N.Y.2d 474, 481 (1988) (citing cases), or when the defendant would plainly have been aware of them, *see People v. Charles*, 137 Misc. 2d 111, 114 (Sup. Ct. Kings Cnty. 1987). For example, in the main case discussed by defendant, *People v. Kyser*, 183 A.D.2d 238

(4th Dep't 1992), the court upheld the admission of evidence of violent acts perpetrated against a witness when the defendant in that case had been contemporaneously threatening the witness with violence and "the particular acts threatened actually did occur in the manner threatened." *Id.* at 243. Defendant does not claim that he has any similar connection to Cohen's subsequent reporting of the $420,000 payment for tax purposes.

Second, "evidence of other similar acts is admissible to show guilty knowledge on the occasion in question if these other acts occurred 'at or about the same time by the person charged.'" Prince, Richardson on Evidence § 4-505 (quoting *People v. Katz*, 209 N.Y. 311, 327 (1913)). Indeed, in each of the cases defendant cites, the subsequent criminal conduct occurred either contemporaneous with, or very shortly after, the charged crime. *See Ingram*, 71 N.Y.2d at 476 (18 days later); *Kyser*, 183 A.D.2d at 239 (four separate violent acts occurring within weeks of the charged crimes); *Charles*, 137 Misc. 2d at 111-12 (acts and statements by drug seekers immediately after seller's arrest). Here, by contrast, not only were Cohen's tax returns due a year and a half later, but intervening events markedly diminish any probative value that Cohen's tax returns may have on defendant's intent or state of mind. The People allege that, in early 2017, despite knowing that the payments to Cohen were not in fact income for legal services—and were instead an expense reimbursement for the Daniels payoff—defendant decided to pay Cohen double the amount he was owed in order to account for the tax consequences of that lie. People's Omnibus Opp. 38. After this agreement was reached, but before tax day in 2018—when the payments to Cohen, if reported on his personal tax return, would have been characterized in any tax records—the Wall Street Journal reported that Cohen had arranged the Daniels payoff;[2] the New York Times

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[2] Michael Rothfeld & Joe Palazzolo, *Trump Lawyer Arranged $130,000 Payment for Adult-Film Star's Silence*, Wall St. J., Jan. 12, 2018.

reported that Cohen was declining to "answer questions about whether Mr. Trump had reimbursed him";[3] and the FBI executed search warrants on Cohen's office, hotel room, and electronic devices as part of an investigation into whether the Daniels payoff violated federal campaign finance law.[4] Given these developments, and particularly because Cohen was the target of a federal criminal investigation regarding these very payments before tax day in 2018, there is no basis to conclude that his eventual tax treatment of the $420,000 reimbursement would shed any light on defendant's intent in agreeing to the "grossing up" scheme a year and a half earlier—much less that Cohen's tax records would be "relevant and material to the proceedings," as required by CPL § 610.20(4).

Defendant also speculates that because the People do not possess Cohen's tax returns, those records are somehow more likely to be exculpatory. Def.'s Mem. 13. This is an odd argument that would, if accepted, erase the statutory limits that CPL § 610.20(4) imposes on a defendant's use of trial subpoenas. If everything not in the People's possession is presumed to be potentially exculpatory, a defendant could compel production of any records from any third-party witness on a claim that if the People don't already possess those records, they must be helpful for the defense. The Court of Appeals has made clear that such "unrestrained foray[s]" to locate "unspecified information" are improper. *Gissendanner*, 48 N.Y.2d at 549

The Court should deny defendant's motion to reargue.

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[3] Maggie Haberman & Charlie Savage, *Trump Lawyer's Payment to Porn Star Raises New Questions*, N.Y. Times, Feb. 14, 2018.

[4] Matt Apuzzo, *F.B.I. Raids Office of Trump's Longtime Lawyer Michael Cohen*, N.Y. Times, Apr. 9, 2018.

DATED: January 24, 2024

Respectfully submitted,

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

By: */s/ Matthew Colangelo*
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