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

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| THE PEOPLE OF THE STATE OF NEW YORK<br>- against –<br>DONALD J. TRUMP<br>Defendant | Indictment No. 71543-23<br>Decision and Order |

JUAN M. MERCHAN, A.J.S.C.:

## BACKGROUND

Defendant is charged with 34 counts of Falsifying Business Records in the First Degree in violation of Penal Law § 175.10. The charges arise from allegations that Defendant attempted to conceal an illegal scheme to influence the 2016 presidential election. Specifically, the People claim that Defendant directed an attorney who worked for his company to pay $130,000 to an adult film actress shortly before the election to prevent her from publicizing an alleged sexual encounter with Defendant. Defendant then reimbursed the attorney for the payments through a series of checks and caused business records associated with the repayments to be falsified to conceal his criminal conduct.

Trial on this matter is scheduled to commence on March 25, 2024. On December 15, 2023, the District Attorney of New York County (hereinafter "DANY" or the "People") moved this Court for an order directing Defendant to provide notice of his intent to rely on an advice-of-counsel defense and to produce all discoverable communications related to that defense. Defendant opposed the motion on December 29, 2023.

## THE PEOPLE'S MOTION

The People allege that Defendant has repeatedly indicated in court filings and public statements that he may rely on an advice-of-counsel defense at trial. They cite three specific instances: First, Defendant argued in his reply memorandum of law in support of his omnibus motions that he lacked the necessary intent to defraud because he had "relied on experienced election counsel."[1] Second, in a social media post on January 31, 2023, Defendant stated: "With respect to the 'Stormy'

[1] People's affirmation in support of motion (hereinafter People's Affirmation) at Page 2.

nonsense, … I placed full reliance on the JUDGMENT & ADVICE OF COUNCIL [sic]."[2] Third, in a social media post on December 13, 2018, Defendant stated "I never directed Michael Cohen to break the law. He was a lawyer and he is supposed to know the law. It is called 'advice of counsel.' And a lawyer has great liability if a mistake is made."[3]

Additionally, on December 4, 2023, Defendant turned over to the prosecution a list of potential trial witnesses which included six individuals who are or were practicing attorneys.[4] Although the list was later modified and eliminated the names of five attorneys, it still contained the name of Alan Garten, the Trump Organization's Chief Legal Officer.[5] Defendant did not disclose and has not disclosed, any statements from Mr. Garten pursuant to Criminal Procedure Law (hereinafter "CPL"), § 245.20(4) nor did he produce any other documents or records pursuant to CPL § 245.20(1)(o). Instead, Defendant represented that "[a]s to Mr. Garten, we have no non-privileged statements of his regarding the subject matter of this case[.]"[6]

The People point out that in order to avail himself of the defense, there must be "sufficient facts in the record" to establish that the defendant "honestly and in good faith sought the advice of counsel," "fully and honestly laid all the facts before his counsel," and "in good faith and honestly followed counsel's advice."[7] Citing *United States v. Scully*, 877 F.3d 464, 476 (2d Cir. 2017) (quoting *United States v. Colasuonno*, 697 F.3d 164, 181 (2d Cir. 2012)). To satisfy these requirements, it follows that a defendant wishing to assert the defense must waive "the attorney-client privilege with respect to all communications to or from counsel concerning the transactions for which counsel's advice was sought."[8] *Vill. Bd. Of the Vill of Pleasantville v. Rattner*, 130 A.D.2d 654, 655 (2d Dep't. 1987). The People further argue that the waiver applies to all communications, whether they support or undermine the defense. Because the attorney-client privilege is waived, the defendant's reciprocal discovery obligations apply, and the defendant must disclose all relevant and material statements as required under Article 245 of the CPL.

The People ask this Court to direct Defendant to provide pretrial notice of his intent because he has already "injected" the defense in his omnibus reply to the Court and in public comments about the merits of this case. "To avoid the risk of trial disruption and prejudice, and to ensure that

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[2] People's Affirmation Page 2.
[3] People's Affirmation Page 2.
[4] People's Affirmation Page 3.
[5] People's Affirmation Page 3.
[6] People's Affirmation Pages 3-4.
[7] People's Affirmation Page 5.
[8] People's Affirmation Page 5.

defendant has timely complied with his pretrial discovery obligations, the Court should direct defendant to notify the People by February 12, 2024, of any intent to rely on an advice-of-counsel defense, and to produce all related statements and communications within defendant's possession or control by the same date."[9] "If defendant asserts the defense for the first time during trial or at the start of trial – thereby waiving the privilege and requiring disclosure of all related communications – the People may be unable to review those previously privileged communications and conduct reasonable further investigation absent a continuance."[10] The People argue that requiring pretrial notice will cause no prejudice to the defendant.

Conceding that the CPL does not require a defendant to give pretrial notice of the defense, the People ask this Court to act pursuant to its inherent authority. Citing *People v. DePalo*, 187 A.D.3d 649 (1st Dep't 2020), the People submit that the First Department has already affirmed this Court's power to assert its inherent authority to require advance disclosure of a defendant's intent to assert the advice-of-counsel defense. In addition, the People argue that *DePalo* is consistent with the holdings in numerous federal trial courts.

## DEFENDANT'S OPPOSITION

Defendant denies that he has indicated that he will invoke the defense. In fact, Defendant argues that "any determination to assert the advice-of-counsel defense would be premature here, where [the] Court has yet to rule on" Defendant's omnibus[11] and pretrial motions. Defendant notes that CPL Article 250 requires pretrial notice of three defenses, none of which is advice-of-counsel. While acknowledging that some federal courts have considered whether a court may invoke its inherent authority to require pretrial notice of the defense, Defendant contends that "[t]here do[es] not appear to be any published cases in the history of New York jurisprudence deciding whether courts are specifically vested with inherent authority to impose pretrial notice and discovery requirements relating to an advice-of-counsel defense."[12] Lastly, Defendant argues that "[t]he First Department's recent decision in *DePalo* did not, as the People suggest, affirm … this Court's authority to require advance disclosure of an advice-of-counsel defense and is"[13] therefore distinguishable and not controlling.

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[9] People's Affirmation Page 5.
[10] People's Affirmation Page 11.
[11] Defendant's opposition to the People's motion (hereinafter "Defense Opposition) Pages 2-3.
[12] Defense Opposition Page 4.
[13] Defense Opposition Page 13.

## DISCUSSION

As a threshold matter, both parties agree that the CPL does not require a defendant to provide pretrial notice of his intent to rely on the defense of advice-of-counsel. Additionally, this Court agrees with Defendant that *People v. DePalo* is distinguishable from the instant matter and therefore not controlling.

In *DePalo*, the defendant declared approximately one month before trial that he would *not* invoke the defense of advice-of-counsel. The People relied on that representation, as did this Court. Nonetheless, during *voir dire*, DePalo turned over a witness list which contained the names of several attorneys and a law firm. That disclosure alerted the People to the possibility that DePalo, despite his previous assurance, intended to invoke the defense. As a result, this Court imposed a deadline by which DePalo would have to give notice and he was warned that witness testimony would likely be precluded if the defense were raised mid trial. Depalo was convicted after trial and the First Department affirmed the conviction. In doing so however, the First Department did not specifically address this Court's ruling vis a vis advice-of-counsel. Instead, the First Department stated "[a]lthough defendant challenges the [trial] court's rulings concerning ... [the] advice-of-counsel defense, thereby waiving defendant's attorney-client privilege, those challenges are moot because the witness invoked his Fifth Amendment right not to testify at trial." *DePalo* at 650. Therefore, contrary to the People's assertion, *DePalo* did not address, or affirm, this Court's authority to require a defendant to provide pretrial notice of his intent to rely on the defense and to produce all discoverable communications related to that defense.

Defendant notes that the next scheduled conference on this matter will not occur until February 15, 2024, at which time the Court will hand down its decision on omnibus motions. Defendant argues that "the People's request for pretrial notice [by February 12, 2024] three days [prior to the scheduled conference] is a transparent effort to obtain disclosure even if the Court adjourns the trial date."[14] This Court finds that it would be premature to require Defendant to give notice of his intent to invoke the defense by the People's requested deadline, before ruling on omnibus motions – six weeks before the start of trial.

Nonetheless, the question remains, whether this Court possesses the inherent authority, to impose a deadline for disclosure where Defendant (and his counsel) have given clear indication that it is possible, if not likely, that the defense will be imposed. As noted by the People, Defendant has on

[14] Defense Opposition Page 2, Footnote 1.

at least two occasions actually invoked the term "advice-of-counsel" when arguing the merits of this case. Likewise, defense counsel argued in his reply memorandum of law – a persuasive pleading filed with this Court - that Defendant lacked the necessary intent to defraud because he had "relied on experienced election counsel."[15] Thus, Defendant has arguably already raised the defense. Lastly, this Court cannot ignore that Defendant, on December 4, 2023, turned over to the prosecution, a list of potential trial witnesses which identified six individuals who are or were practicing attorneys[16] and although the list was later modified, it still contained the name of Alan Garten, the Trump Organization's Chief Legal Officer.[17]

The People argue that requiring Defendant to provide pretrial notice of his intent to rely on the defense "will avoid the risk of significant trial disruption that could be caused if defendant attempts to invoke the defense at the start of or during trial[.]"[18] That is in part because a defendant who invokes the defense waives attorney-client privilege and must disclose all related communications – whether those communications support or undermine the defense. "[S]elective disclosures is not permitted as a party may not rely on the protection of the privilege regarding damaging communications while disclosing other self-serving communications." *Vill. Bd. Of the Vill of Pleasantville v. Rattner*, 130 A.D.2d 654, 655 (2d Dep't 1987). Therefore, if Defendant asserts the defense, the People would be entitled to discovery of all related communications from the Defendant, and they would also have the right to subpoena documents from all witnesses and law firms related to the defense. For that reason, it is not difficult to envision the significant disruption last minute disclosure could create. Such delays would extend the length of this trial by many weeks, if not months and disrupt the integrity of the fact-finding function of the trial. It would also inconvenience all those involved, including the jurors, who will be told at the start of jury selection that the trial is expected to last about six weeks.

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[15] People's affirmation in support of motion (hereinafter People's Affirmation) at Page 2.
[16] People's Affirmation Page 3.
[17] People's Affirmation Page 3.
[18] People's Affirmation Page 4.

To avoid such disruption, it falls upon this Court to craft a remedy that is fair to all parties. To do so, this Court must invoke its inherent authority, "consistent with constitutional constraints" to implement pretrial procedures "where the purpose and effect of those rules is to enhance the search for truth, to reduce the importance of secrecy and surprise, and to expedite and make more efficient pretrial procedures." *People v. Atwood*, 101 Misc. 2d 291, 293 (Sup. Ct. N.Y. Cnty. 1979).[19] See, *People v. Knowles*, 88 N.Y.2d 763 (1996). Therefore, under the unique facts and circumstances of this case, where Defendant has already injected the defense and communicated what appears to be an intent to invoke it, this Court agrees with, and adopts Defendant's proposal,[20] that this Court refrain from imposing any deadline for notice and disclosure until two to three weeks before the scheduled start of trial.[21] As noted by Defendant, "[t]his timing is consistent with the decisions of other courts that have ordered pretrial notice and disclosure requirements about an advice of counsel defense."[22]

THEREFORE, it is hereby

ORDERED that Defendant is to provide notice and disclosure of his intent to rely on the defense of advice-of-counsel by March 11, 2024,[23] and to produce all discoverable statements and communications within his possession or control by the same date; and it is further

ORDERED that Defendant is to raise any objections or issues regarding a claim of attorney-client privilege to this Court for *in camera* review no later than March 7, 2024; and it is further

ORDERED that any subpoenas issued by the People as a result of Defendant's notice and disclosure, if such is made, shall be returnable *no earlier* than March 21, 2024; and it is further

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[19] People's Affirmation Pages 6 and 7.
[20] Defense Opposition Pages 11, 15 and 16.
[21] Defense Opposition Page 16.
[22] Defense Opposition Page 16.
[23] This is three and a half weeks after the Court hands down its decision on omnibus motions and two weeks before the scheduled trial date.

ORDERED that any challenges to the People's subpoenas, if any are issued, shall be made within seven days of the issuance of the subpoena.

The foregoing constitutes the Decision and Order of the Court.

Dated: February 7, 2024
New York, New York

FEB 07 2024

ENTERED

Juan M. Merchan
Judge of the Court Claims
Acting Justice of the Supreme Court

HON. J. MERCHAN