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

PART 59 NOV 03 2023

THE PEOPLE OF THE STATE OF NEW YORK

-against-

DONALD J. TRUMP,

Defendant.

PEOPLE'S OPPOSITION TO DEFENDANT'S MOTIONS FOR RECONSIDERATION AND ANCILLARY RELIEF

Ind. No. 71543-23

INTRODUCTION

Defendant's October 3, 2023 motions for reconsideration and ancillary relief request that the Court (1) schedule an in-person status conference to discuss adjourning the trial date, and (2) disclose the substance of the Court's communications with Judge Chutkan, the presiding judge in defendant's federal criminal case in the District of Columbia. The Court's broad discretion to manage its calendar includes the discretion to hold any scheduling conference only *after* future developments confirm whether a new trial date is or is not needed—particularly where defendant has continued his persistent requests, including just yesterday, to adjourn the federal criminal trial that he claims will conflict with the trial date here. And defendant mischaracterizes the Code of Judicial Conduct in claiming that this Court must or should memorialize its communications with Judge Chutkan. The Court should deny these motions.

RELEVANT BACKGROUND

I. The Court's orders regarding the trial date in this case.

A New York County grand jury indicted defendant on March 30, 2023, and defendant was arraigned on April 4. At arraignment, the People advised the Court that "[t]he People intend to request a trial date in January of 2024." Apr. 4 Tr. 18. Defense counsel responded: "We think later in the spring next year might be a more realistic, a more realistic plan at this point." *Id.*

At a hearing on May 4, 2023, the Court asked the parties to confer and agree on a trial date in either February or March, 2024. May 4 Tr. 49-50. The Court emphasized that "once a trial date is selected, I'm directing now that all of the parties are to refrain from engaging in anything that will preclude you, prevent you in any way from commencing the trial, continuing the trial and finishing the trial and that will include taking on new cases, agreeing to start a trial, booking vacations, anything that would interfere . . . ." *Id.* at 50.

On May 11, 2023, defense counsel confirmed that the defense team and defendant would be prepared to commence trial on March 25, 2024. The Court then ordered as follows: "[T]his matter is hereby set down for trial to begin on March 25, 2024. All parties, including Mr. Trump, are directed to not engage or otherwise enter into any commitments: personal, professional or otherwise, that will prevent you from starting the trial on the designated date – and continue without interruption, through its completion. This is a date certain." May 11, 2023 Order. At a hearing on May 23, 2023, the Court reiterated its order that "all parties, including Mr. Trump, are directed to not engage or otherwise enter into any commitments, personal, professional, other otherwise, that would prevent you from starting a trial on March 25, 2024, and completing it without interruption. This is a date certain for the commencement of this trial." May 23 Tr. 7.

One of defendant's eleven defense attorneys in this matter[1] subsequently entered appearances on behalf of Mr. Trump in two other criminal cases in which he is a defendant. *See* Mot. for Todd Blanche to Appear Pro Hac Vice, *United States v. Trump*, No. 9:23-cr-80101-AMC

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[1] In an email to the Court's Principal Law Clerk on April 5, 2023, defense counsel identified eight attorneys as the defense team on this matter: Susan Necheles, Gedalia Stern, Todd Blanche, Joe Tacopina, Chad Seigel, David Warrington, Mike Columbo, and Gary Lawkowski. The defense team has since included three additional attorneys on correspondence and filings with the Court: Emil Bove, Stephen Weiss, and Steven Yurowitz.

(S.D. Fla. June 13, 2023) (ECF No. 14); Mot. for Todd Blanche to Appear Pro Hac Vice, *United States v. Trump*, No. 1:23-cr-00257-TSC (D.D.C. Aug. 3, 2023) (ECF No. 7).

II. Defendant's requests for a status conference to discuss the trial date.

On July 21, 2023, the presiding judge in the Florida criminal case, Judge Cannon, set that case for trial beginning on May 20, 2024. On August 28, 2023, the presiding judge in the D.C. criminal case, Judge Chutkan, set that case for trial beginning on March 4, 2024. At the hearing to discuss the trial schedule in that case, Judge Chutkan stated: "I realize that Mr. Trump's criminal case in New York is scheduled for trial on March 25. I did speak briefly with Judge Merchan to let him know that I was considering a date that might overlap with his trial." DX-2 at 55.[2]

On August 30, defense counsel advised this Court of the trial dates in the Florida and D.C. criminal cases, and requested a "status conference to discuss the current trial date, and other deadlines, in this case." DX-3. After correspondence regarding possible dates for a conference in September, the Court entered an order on September 1, 2023, providing that "[i]n light of the many recent developments involving Mr. Trump and his rapidly evolving trial schedule," the Court would "adhere to the existing schedule," under which the parties can "discuss scheduling and make any necessary changes when we next meet on February 15, 2024, for decision on motions." DX-4. The September 1 Order noted that "[w]e will have a much better sense [in February] whether there are any actual conflicts and if so, what the best adjourn date might be for trial." *Id.*

ARGUMENT

Defendant asks the Court to reconsider its decision not to hold a scheduling conference before February 2024, on the ground that an earlier scheduling conference is necessary to avoid

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[2] Citations to "DX-__" are to the exhibits accompanying defendant's motions for reconsideration and ancillary relief. Citations to "Def.'s Aff." are to the affirmation accompanying defendant's motion.

denying defendant "his right to adequately assist in his defense, his right to assistance of counsel, and his right to be personally present at the trial proceedings." Def.'s Aff. 5. Defendant also asks the Court to document and disclose its communications with Judge Chutkan, alleging that the communications may have impaired his rights. Def.'s Aff. 2. Although the People are prepared to appear at any case conference the Court schedules, defendant is not entitled to any relief here, and both requests should be denied. If an actual conflict appears likely when the Court holds the February 15, 2024 hearing in this case, the People would not object at that point to the shortest possible adjournment to clear that conflict.

I. The Court did not abuse its discretion in setting a scheduling conference for February 2024, and none of defendant's constitutional rights are impaired by that schedule.

A trial court has broad discretion to control its calendar and manage its courtroom. *See, e.g.*, *People v. Spears*, 64 N.Y.2d 698, 699-700 (1984); *People v. Singleton*, 41 N.Y.2d 402, 405-07 (1977). That discretion necessarily includes determining whether and when to set or adjourn case conferences and other pretrial proceedings. *See Singleton*; 41 N.Y.2d at 405; *People v. Milord*, 115 A.D.3d 774, 774-75 (2d Dep't 2014). Defendant essentially argues that this Court abused its discretion by setting a scheduling conference for February 15, 2024, rather than sooner. Def.'s Aff. 1. But the Court's decision to conference this case for February is reasonable and well within the Court's discretion—particularly given defendant's ongoing efforts to adjourn the deadlines in the other criminal cases that he claims will present an unavoidable conflict here.

First, the Court reasonably concluded that defendant's request for a scheduling conference is, under the current circumstances, premature. The September 1 Order noted that "the many recent developments involving Mr. Trump and his rapidly evolving trial schedule" make it impossible to know at this time whether the calendars in defendant's other criminal cases will in fact present a conflict with the trial date here, and explained that "[w]e will have a much better sense [in

February] whether there are any actual conflicts and if so, what the best adjourn date might be for trial." DX-4. The Court's discretion to manage its docket surely includes discretion to defer a scheduling conference until critical facts that bear on any scheduling decisions are known. Here, those facts include whether the D.C. criminal trial will or will not proceed on March 4, 2024; and whether the trial schedule in the Florida criminal case will or will not be adjusted.

Those facts are no more settled today than they were at the time of the September 1 Order. Defendant has repeatedly requested and renewed his requests for adjournments in both the D.C. and Florida criminal cases, including as recently as yesterday. *See, e.g.*, Def.'s Mot. to Stay Case 1, *United States v. Trump*, No. 1:23-cr-00257-TSC (D.D.C. Nov. 1, 2023) (ECF No. 128) (requesting that the court "stay all proceedings in this case" pending resolution of a motion to dismiss on grounds of absolute immunity); Def.'s Mot. for Extension of Time to File Pretrial Motions 6 n.4, *United States v. Trump*, No. 1:23-cr-00257-TSC (D.D.C. Nov. 1, 2023) (ECF No. 129) (reasserting objection to "the current trial setting, and the accompanying pretrial calendar"); Defs.' Mot. to Extend Deadlines, *United States v. Trump*, No. 9:23-cr-80101-AMC (S.D. Fla. Oct. 15, 2023) (ECF No. 183); Def.'s Mot. for a Revised Schedule, *United States v. Trump*, No. 9:23-cr-80101-AMC (S.D. Fla. Sept. 22, 2023) (ECF No. 160).[3] Were there any question about the wisdom of the Court's decision to defer any scheduling modifications until February, yesterday's developments should eliminate all doubt: defendant argued at a hearing in his Florida criminal case that the deadlines in his D.C. case require delaying the Florida trial; and then just hours after leaving the Florida courtroom, filed a motion in his D.C. case asking for an indefinite stay of that

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[3] The Florida court held a hearing on defendant's motions to adjourn the deadlines in that case yesterday, November 1. The court has not yet ruled on defendant's motions, but the court indicated from the bench that she was considering delaying the trial date and pretrial deadlines. *See* Alan Feuer, *Judge Hints at a Delay in Trump Documents Trial*, N.Y. Times (Nov. 1, 2023), https://www.nytimes.com/2023/11/01/us/trump-documents-trial-judge.html.

entire proceeding. *See* U.S. Notice of Def.'s Mot. to Stay, *United States v. Trump*, No. 9:23-cr-80101-AMC (S.D. Fla. Nov. 2, 2023) (ECF No. 203). The reasoning that supported the September 1 Order is therefore just as sound today as it was in September—it remains entirely unclear "whether there are any actual conflicts and if so, what the best adjourn date might be." DX-4. It would be a poor use of the Court's resources to discuss scheduling before the dust settles on defendant's efforts to delay his other criminal cases.

To be sure, in managing any criminal proceeding, the Court's exercise of its discretion must be mindful of a defendant's fundamental rights. *See Spears*, 64 N.Y.2d at 700. But the argument that defendant will suffer constitutional injury if a status conference is deferred until February is incorrect and should be rejected.

First, there is no merit to defendant's contention that his right to assistance of counsel is impaired where one of the eleven attorneys on his defense team is also representing defendant in the D.C. and Florida criminal cases. Def.'s Aff. 3, 5-8. The ten other attorneys on the defense team include experienced and capable counsel, many of whom have represented defendant and the Trump Organization for years, including in a criminal prosecution that was tried before this Court from October 2022 to December 2022. That one of the eleven defense attorneys here has other professional obligations arising from defendant's other criminal cases (Def.'s Aff. 3)—obligations that arose after this Court directed all parties and counsel "to not engage or otherwise enter into any commitments, personal, professional, or otherwise, that would prevent you from starting a trial on March 25, 2024, and completing it without interruption" (May 23 Tr. 7)—does not impair defendant's constitutional rights, particularly where he has provided no reason to believe that the other ten attorneys on his large and proficient defense team are incapable of adequately preparing and presenting a defense at trial in five months' time (and nearly a year after arraignment).

Defendant's assertion of his "right to be represented by counsel of his own choosing," Def.'s Aff. 6 (citing *People v. Arroyave*, 49 N.Y.2d 264, 270 (1980)), does not undermine that conclusion. Defendant chose all of the eleven attorneys representing him in this case—not merely the attorney who is also engaged on the D.C. and Florida criminal cases. Defendant is therefore entirely unlike the defendants in *Arroyave*, *Fretag*, *Powell*,[4] *Hannigan*, *McLaughlin*, and *Price*, who were denied the right to be represented by *any* counsel of their choosing, and were instead represented by court-appointed attorneys or no attorney at all. And even if the Court's decision to defer a scheduling conference until February impinged at all on defendant's right to assistance of counsel in these circumstances—which it does not—the Court of Appeals has recognized that this right may cede to "concerns of the efficient administration of the criminal justice system" where a defendant invokes the right "as a means to delay judicial proceedings." *People v. O'Daniel*, 24 N.Y.3d 134, 138 (2014). This Court therefore has "wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar." *Id.*

Second, defendant argues that reconsideration of the Court's order is necessary to protect his right to be present at trial. Def.'s Aff. 5. But the Court has not entered any order that risks impairing defendant's right to attend his New York criminal trial. To the contrary, the September 1 Order expressly notes that if "there are any actual conflicts" with the trial date, the Court intends to discuss at the February hearing "what the best adjourn date might be for trial." DX-4.

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[4] As Judge Chutkan noted, *Powell v. Alabama* is the landmark Scottsboro Boys case, in which the Supreme Court reversed the convictions of defendants whose trials began six days after indictment, in an atmosphere of explicit racial hostility, where "the trial court failed to give the defendants reasonable time and opportunity to secure counsel and the defendants were incapable of making their own defense." DX-2 at 54 (citing *Powell v. Alabama*, 287 U.S. 45, 51, 71 (1932)). Just as Judge Chutkan observed, "[t]his case, for any number of reasons, is profoundly different from *Powell*," DX-2 at 54; and *Powell* does not support defendant's argument that deferring a scheduling conference until February impairs his right to be represented by his counsel of choice.

Finally, defendant's contention that his right to a fair trial is impaired by his need to review the discovery in this case (Def.'s Aff. 3 n.1, 8) dramatically overstates the volume and nature of the discovery here. The bulk of that discovery is material that the People received from the Trump Organization, with which defendant and his counsel are plainly familiar. The grand jury minutes, grand jury exhibits, and notes of witness interviews comprise about 65,000 pages of discovery in this case—a fraction of one percent of the total volume of records produced. And discounting the thousands of pages of repetitive phone and bank records in that subset, there are only approximately 5,000 pages of testimony, exhibits, and witness notes that comprise the core materials in this case. In addition, because the People exceeded their Article 245 discovery obligations by producing discovery on a rolling basis in advance of their deadline, defendant received these core materials on May 23, 2023—more than five months ago, and a full ten months before trial. Just as Judge Chutkan rejected defendant's argument that a considerably larger and more complicated discovery production in the D.C. criminal case was grounds to delay that trial (DX-2 at 28), this Court should do the same.[5]

The People would not object to an appropriate adjournment should an actual conflict arise. If, for example, another criminal trial begins and will interfere with the March 25, 2024 trial date in this case, it would be reasonable in that circumstance for the Court to adjourn this case for the shortest period of time necessary to allow that conflict to clear. But because the schedules in defendant's other criminal cases remain unsettled based on defendant's own requests to modify them—and because the Court's September 1 Order does not impair any of defendant's

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[5] Defendant also argues that "[n]otably, the People have indicated that further productions will be made on an ongoing basis." Def.'s Aff. 3 n.1. The People's compliance with their continuing duty to disclose under CPL § 245.60 is neither a source of constitutional injury nor a basis for reconsidering the date of the scheduling conference.

constitutional rights—the decision to defer a status conference until more information is known was well within the Court's discretion and need not be revisited.

II. The Code of Judicial Conduct does not require disclosure of the Court's communications with Judge Chutkan.

The Court's communication with Judge Chutkan was proper, and defendant is not entitled to any disclosures from this Court.

During an August 28, 2023 hearing in the D.C. criminal case, Judge Chutkan stated that she "realize[d] that Mr. Trump's criminal case in New York is scheduled for trial on March 25," and that she "did speak briefly with Judge Merchan to let him know that [she] was considering a date that might overlap with his trial." DX-2 at 55. Defense counsel did not ask Judge Chutkan for more information regarding that communication during that proceeding; did not object or express any concerns on the record about the completeness of Judge Chutkan's disclosure or the propriety of her communication with this Court; and (based on the People's review of the public court docket in that action) has never requested additional information or any other relief from the federal court based on that communication. Instead, more than five weeks after the federal court hearing, defendant filed a motion requesting that this Court "inform the parties about the substance of Your Honor's communications with Judge Chutkan," on the grounds that the communications impacted his "constitutional and statutory rights" and will "prejudice him severely should Your Honor not move the trial." Def.'s Aff. 10.

Defendant's claim that disclosure is required mischaracterizes the Code of Judicial Conduct. The Code generally prohibits a judge from considering "ex parte communications" or "other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding," subject to certain exceptions. 22 N.Y.C.R.R. § 100.3(B)(6). One of the exceptions to the general rule is that "[a] judge may consult . . . with

other judges." *Id.* § 100.3(B)(6)(c). Communications that fall within this exception are not subject to any disclosure requirement under the Code. *See id.* Because Section 100.3(B)(6)(c) expressly permits the Court's communication with Judge Chutkan and does not require disclosure, the Court may reject defendant's request without more.

Defendant acknowledges that the Code "permit[s] a judge to consult with other judges," but argues that "the judge should generally disclose the substance of any such communications with the parties"—citing an entirely different provision of the Code for that point. Def.'s Aff. 9 (citing 22 N.Y.C.R.R. § 100.3(B)(6)(a)). That provision, Section 100.3(B)(6)(a), authorizes *ex parte* communications between a judge and one party to a proceeding "for scheduling or administrative purposes," if the judge "insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers." But the Court's communication with Judge Chutkan was not a conversation with a party to this case, and Section 100.3(B)(6)(a) by its plain language does not apply.[6]

Finally, defendant appears to have received the disclosure he is requesting already: Judge Chutkan put the substance of her communications with this Court on the record during the August 28 hearing in the D.C. criminal case. DX-2 at 55. If more information was necessary to protect against "severe prejudice," *see* Def.'s Aff. 10, defense counsel could have asked that court to make a further record; instead, counsel accepted Judge Chutkan's disclosure without objection or follow-

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[6] Defendant also cites the New York State Bar Association Commentary on the Code of Judicial Conduct for the proposition that "the substance of any oral communication" between judges "should be provided to all parties," Def.'s Aff. 10, but the cited comment refers to yet another different section of the Code dealing with a different circumstance—Section 100.3(B)(6)(e)—and not to Section 100.3(B)(6)(c), which expressly permits the communication at issue here. In any event, the NYSBA Commentary on the Code is "not intended as a statement of additional rules and has not been adopted by the Chief Administrator of the Courts." NYSBA Commentary 3 (Apr. 13, 1996), https://nysba.org/app/uploads/2020/02/CJC-1.pdf.

up. Where counsel apparently concluded at the time that Judge Chutkan's disclosure was complete, this Court need not grant relief sought five weeks later in a different proceeding.

CONCLUSION

Defendant's motions for reconsideration and ancillary relief should be denied.

Dated: New York, New York
November 2, 2023

Respectfully submitted,

Caroline S. Williamson
Assistant District Attorney
[redacted]