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March 15, 2024

Via Email
Hon. Juan M. Merchan
Judge - Court of Claims
Acting Justice - Supreme Court, Criminal Term, Part
100 Centre Street
New York, NY 10013

Re: People v. Trump, Ind. No. 71543/23

Dear Judge Merchan:

We respectfully write in response to the People's March 15, 2024, Supplemental Notice regarding the untimely production of a large quantity of records relating to Michael Cohen obtained from the U.S. Attorney's Office for the Southern District of New York ("USAO-SDNY").

The USAO-SDNY's production of an additional approximately 31,000 pages of records further supports the relief sought by President Trump in the March 8, 2014 motion for discovery sanctions, and our March 14 response to the People's Notice—including dismissal. We write, however, to draw attention to the People's continued references to our January 18, 2024 subpoena to the USAO-SDNY, which is a meritless and counter-factual effort to shift fault for their discovery violations.

In the January 19, 2024 letter attached as Exhibit 11 to our motion for discovery sanctions, the USAO-SDNY rejected our subpoena because "sovereign immunity bars direct enforcement by a state court of a subpoena," and directed us to submit a *Tuohy* request. In the People's February 7, 2024 letter to the USAO-SDNY opposing our subsequent *Tuohy* request, which is attached as Exhibit 14 to our motion for discovery sanctions, the People agreed with the USAO-SDNY's approach:

> "Because a state court may not validly subpoena the federal government, *see, e.g.*, In re Elko Cnty. Grand Jury, 109 F.3d 554, 556 (9th Cir. 1997), we understand that the Department has advised defendant's counsel that the government will treat his subpoena as if it were a properly-submitted *Touhy* request under the Department's regulations at 28 C.F.R. part 16 subpart."

Id. at 1.

The Court should reject the People's efforts to re-write the record. The submissions demonstrate that all parties treated the subpoena as ineffectual. The USAO-SDNY produced this large volume of records voluntarily, in response to a straightforward request by President Trump

that the office exercise its discretion under federal regulations in a manner that promotes the interests of justice and the truth-seeking function at the criminal trial in this case. The People compounded their discovery violations by opposing that request—strenuously, and based on federal principles they have no valid interest in invoking—in a failed effort to deny President Trump access to discoverable material and prevent the truth from coming out at the proceedings Your Honor is presiding over. Seeking to make the Court complicit in that unethical strategy was an afront to Your Honor and a violation of President Trump's rights.

The fact that the USAO-SDNY produced these materials in response to a *Tuohy* request, without any enforceable compulsory process from the defense, is strong evidence that the People failed in their obligation to "make a diligent, good faith effort to ascertain the existence of material or information discoverable [under CPL § 245.20(1)]." CPL § 245.20(1). For example, the People suggested in yesterday's Notice that they requested certain materials from the USAO-SDNY. We expect there will be factual disputes about the timing and scope of any such requests, which will require a response from the USAO-SDNY and credibility determinations by Your Honor. But, for now, the two salient points are as follows.

First, the People had adequate access to the files of the USAO-SDNY to obtain some discoverable materials, and therefore an obligation to obtain *all* discoverable materials. Second, the People were on notice of these problems, which further demonstrates that their obligations required additional actions they did not take. The People were aware of search warrants relating to Cohen executed by the USAO-SDNY, because they included publicly filed versions of those warrants in discovery, and they were on notice that they had not collected materials seized pursuant to those warrants from the USAO-SDNY, because, *inter alia*, no such materials are included in the discovery. Similarly, the People were on notice that the USAO-SDNY possessed documents relating to additional interviews with Cohen, as those interviews are referenced in public filings in matters relating to Cohen that the People have identified in discovery and are closely monitoring. We explained in the discovery motion that we immediately identified exculpatory information in the newly produced reports based on a preliminary review of those materials. The legal analysis of the discovery violations relating to [redacted] arrangements for the [redacted] and [redacted] outstanding communications [redacted] is substantially similar. Here, for example, the People still have not explained the steps they took to collect obviously discoverable materials from electronic devices used by [redacted], and the multiple late productions of such materials strongly suggests that those efforts were inadequate. The People had an obligation to do everything within their power to collect all of these materials, rather than making disingenuous augments contrary to their obligation to do justice, as they sought to obstruct our efforts to collect evidence we are entitled to review and use in connection with our trial defense.

Irrespective of wholly appropriate efforts by President Trump to seek discovery and defend himself, the People had an independent obligation to collect the materials that were outstanding and obviously constituted, at least, impeachment materials discoverable under CPL § 245.10(k). *See* CPL § 245.20(2), CPL § 245.55(1) (requiring the People to "ensure that a flow of information is maintained"), CPL § 245.60 (imposing "[c]ontinuing duty to disclose" where the prosecution "subsequently learns of additional material or information"). The People are wrong to suggest that they were under no obligation to collect these materials—including through recent suggestions

that the USAO-SDNY produced materials in response to a defense subpoena—and it strains credulity to suggest that President Trump bears any responsibility for their discovery violations.

Respectfully Submitted,

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