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 MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION REGARDING DISCOVERY OF USAO-SDNY DOCUMENTS Ind. No. 71543-23

INTRODUCTION

On January 18, 2024, defendant served a subpoena on the U.S. Attorney's Office for the Southern District of New York ("USAO") requesting the production of records relating to the *United States v. Cohen* prosecution. Between March 5 and March 15, the USAO made several productions of documents to defendant in response to that subpoena. After the production of a batch of materials on March 13, accompanied by a representation that a final production would likely not be sent until the following week, the People advised the Court on March 14 that we would not oppose an adjournment not to exceed thirty days, because the People's initial review of the previous day's production indicated that it contained materials related to the subject matter of this prosecution, and more materials from the USAO were to come. On March 15, this Court agreed to adjourn the trial to April 15, 2024. Later that same day, the USAO made the final production ahead of schedule and informed the parties that it had fully responded to defendant's request for documents.

Defendant has reacted to the USAO's disclosures by demanding that this Court dismiss the charges, preclude witnesses, or adjourn the trial for at least ninety days; and by leveling wild and untrue allegations of misconduct and malfeasance. Def.'s Mar. 8 Motion to Dismiss at 4. Defendant's accusations are wholly unfounded, and the circumstances here do not come close to

warranting the extreme sanctions he has sought. This Court acted appropriately in granting a modest thirty-day adjournment after the March 13 USAO production given the timing, size, and apparent relevance of that production, as well as the fact that another production would likely not be sent until the following week (although the USAO subsequently completed that production ahead of schedule). That adjournment is a more than reasonable amount of time for defendant to review the information provided he received in response to his January 2024 subpoena.

Indeed, in just the last few days, the People have conducted a more thorough review of the March 13 production. Although that review is still ongoing, the People now have good reason to believe that this production contains only limited materials relevant to the subject matter of this case and that have not previously been disclosed to defendant: fewer than an estimated 270 documents, most of which are inculpatory and corroborative of existing evidence.[1] The overwhelming majority of the production is entirely immaterial, duplicative or substantially duplicative of previously disclosed materials, or cumulative of evidence concerning Michael Cohen's unrelated federal convictions that defendant has been on notice about for months. Given the limited amount of new information in the recent productions and the USAO's completion of its productions, no relief beyond the adjournment already ordered by the Court is warranted.

Contrary to defendant's arguments, the USAO's responses to his subpoena do not support any claim of a discovery violation by the People or prosecutorial misconduct that would warrant more drastic relief. As a threshold matter, there cannot be a discovery violation here because the USAO's materials are not part of the People's disclosure obligations: CPL 245.20 requires the

[1] As discussed below, of the 31,000 pages produced on March 13, 2024, our review so far indicates that fewer than 270 documents are related to the subject matter of this case and have not previously been disclosed to defendant. Our review is ongoing and the People are still in the process of determining how many relevant, undisclosed documents were within the information sources the USAO previously declined to provide.

People to disclose only items or information in their actual or constructive possession, and documents held by the USAO are not in the People's possession at all. Even assuming that the People's possession extended to records held by an independent federal prosecutor, the People engaged in good-faith and diligent efforts to obtain relevant information from the USAO, including by requesting and obtaining extensive evidence about Michael Cohen's campaign finance convictions—all of which was then disclosed to defendant. Moreover, the belated nature of the recent USAO productions is entirely a result of defendant's own inexplicable and strategic delay in identifying perceived deficiencies in the People's disclosures and pursuing independent means to obtain that evidence. There is thus no basis to find that the People engaged in a discovery violation here that warrants *any* remedies under CPL 245.80, let alone the extreme sanctions of dismissal or preclusion.

Ultimately, defendant's focus on purported discovery violations is a red herring. Evidence relevant to a case can come from many sources, and is not limited to the discrete materials in the People's possession that are subject to automatic disclosure under CPL 245.20. As result, not every late revelation of evidence means that the People have violated CPL 245.20. Instead, the appropriate question when, as here, evidence belatedly arrives from other sources is how to provide the defendant (and the People) with a meaningful opportunity to review the new evidence in advance of trial. As a result, although the People are certainly prepared to provide this Court with information about their requests for information to the USAO—information that will show that the People diligently sought to obtain evidence relevant to the charges here, and then produced that evidence to defendant—the pertinent question at this stage of the proceeding is how to characterize the nature and scope of any new data provided in the recent USAO productions. The People intend to provide this information at the March 25 hearing and to explain why the

adjournment already ordered by this Court is more than sufficient time for both sides to review the limited amount of relevant information in the recent USAO productions.

This Court should accordingly deny defendant's motion for discovery sanctions and a further adjournment based on the USAO productions.

FACTUAL BACKGROUND

I. DANY's requests for records from the USAO.

On August 21, 2018, Michael Cohen pleaded guilty to various crimes in the United States District Court for the Southern District of New York. That day, the federal government's Information and Cohen's plea and allocution were made public and reported on by various news outlets. *See* Information, *United States v. Cohen*, No. 18-cr-602 (S.D.N.Y. Aug. 21, 2018); Hearing Tr., *United States v. Cohen*, No. 18-cr-602 (S.D.N.Y. Aug. 21, 2018). The Information, the facts admitted at the plea allocution, and public reporting indicated the possibility of state law violations in connection with the underlying New York-based conduct, and DANY opened its initial inquiry into this matter in response. *See* Conroy Aff. ¶ 5. We then paused our investigation to avoid interfering with an ongoing federal investigation into the same conduct, until learning from public reports in or around the middle of July 2019 that the federal government had concluded its investigation into the conduct for which Cohen pled guilty. *See id.*

In or around late October 2022, the Office began taking steps to impanel an additional grand jury to hear evidence in a number of investigations, one of which related to defendant and involved the facts ultimately charged in the indictment in this case. *See id.* ¶ 7. Between mid-December 2022 and late January 2023, in anticipation of presenting evidence to the grand jury in this investigation, the People served grand jury subpoenas on third parties for witness testimony and documents and scheduled various witness interviews to advance this investigation. *See id.* The grand jury was impaneled on January 23, 2023; heard evidence in this matter between January 25

and March 30, 2023; and indicted the defendant on 34 counts of falsifying business records in the first degree on March 30, 2023. *See id.*

During this time period, DANY contacted the U.S. Attorney's Office for the Southern District of New York ("USAO") to request access to evidence in the federal government's possession that had been developed in the course of the USAO's investigation and prosecution of the campaign finance counts in *United States v. Cohen*, where appropriate and consistent with the law. *See* Conroy Aff. ¶¶ 8-9. Rule 6(e)(3)(E)(iv) of the Federal Rules of Criminal Procedure permits a federal court to authorize disclosure of a matter occurring before a federal grand jury "at the request of the government if it shows that the matter may disclose a violation of State . . . law, as long as the disclosure is to an appropriate state [or] state-subdivision . . . government official for the purpose of enforcing that law." As discussed more fully in the accompanying Affirmation of Christopher Conroy, the offices met and discussed DANY's investigation, the underlying state-law violations that would support a request for grand jury evidence under Rule 6(e), and forthcoming requests for evidence. *See* Conroy Aff. ¶¶ 10-13. The offices were clear, as had been the case since 2018, that at no point had our offices jointly investigated the underlying events or formed a joint prosecution team, and discussed the importance of maintaining the separate and independent nature of any investigation DANY was continuing to pursue. *See id.* ¶ 10.

In a series of subsequent discussions between mid-December 2022 and mid-January 2023, DANY identified for the USAO certain of the potential state-law violations at issue to permit the USAO to determine if the Rule 6(e)(3)(E)(iv) standard would be met. We also detailed evidence from the *United States v. Cohen* matter that we would be seeking, including (as related to Cohen's campaign finance convictions) summaries of witness interviews, evidence supporting search

warrant affidavits, and data from Cohen's phones, email, and iCloud accounts. The People also noted the need for any exculpatory information in the USAO's possession. *See id.* ¶¶ 10-13.

To facilitate the USAO's disclosure of these materials, DANY submitted to the USAO a draft petition and supporting affidavit under Rule 6(e)(3)(E)(iv). The affidavit listed the requested grand jury material as (1) grand jury minutes and tapes; (2) witness lists and other documents identifying the names or identities of grand jury witnesses; (3) any grand jury subpoenas and documents returned pursuant to those subpoenas; (4) exhibits presented to the grand jury; (5) to the extent within the scope of Rule 6(e), summaries of witness interviews occurring outside the grand jury; and (6) to the extent within the scope of Rule 6(e), search warrant affidavits or other applications that contain evidence from the grand jury, and evidence seized pursuant to those warrants. The petition noted that the applicable standards were met and that we anticipated conferring with the government to limit the requested material only to that needed for the ongoing investigation, *i.e.*, the records related to the campaign finance counts to which Cohen pleaded guilty. We asked for the USAO's position on our petition and the USAO indicated that it would file a request for a sharing order. *See id.* ¶¶ 14-16.

On information and belief, the USAO then obtained an ex parte sharing order from a federal court on or about January 25, 2023, authorizing disclosure pursuant to Rule 6(e)(3)(E)(iv). *See* Conroy Aff. ¶ 16. Pursuant to that order, which remains under seal, the USAO made several productions in response to our requests between January 2023 and March 2023. The USAO produced these materials to DANY in a series of productions on January 25, February 2, February 24, and March 26, 2023. *Id.* ¶ 17. Those materials consisted of core grand jury records including grand jury minutes, Form 302s, witness notes, and several proffer agreements and immunity orders

related to Cohen's convictions for campaign finance violations. *Id.* ¶¶ 18-19. The materials DANY obtained from the USAO are described in more detail in the accompanying affirmation. *Id.* ¶ 19.

The USAO did not provide DANY with data from Cohen's phones in response to our requests. In the course of the USAO's productions, DANY followed up, including on January 31, 2023 and February 6, 2023, to repeat our requests for data from Cohen's phones that the USAO obtained pursuant to search warrant. *See id.* ¶ 18. The USAO declined to provide that information because it would be unduly burdensome and because DANY had obtained the phones by consent.[2] *See id.*

The USAO's productions to DANY included [redacted] *Id.* ¶ 20. The USAO did not produce to DANY any of the FBI 302s recording Cohen's interviews taken in connection with the investigation by Special Counsel Robert S. Mueller III into Russian interference in the 2016 presidential election (the "SCO 302s"). *Id.* On information and belief, when DANY requested records from the USAO in the period from January 2023 to March 2023, the USAO possessed only one of the SCO 302s recording statements of Michael Cohen. *Id.* That SCO 302 did not relate to the campaign finance counts that DANY was investigating, and the USAO did not produce that document to DANY in response to our request. *Id.* On information and belief, the USAO only later came into possession of five additional SCO 302s in or about December 2023, in the course of an intra-agency FOIA consultation that was coordinated by a different office of the Department of Justice. *See id.* ¶ 21. (As noted below, the USAO then produced the SCO 302s in its possession to defendant in response to defendant's later subpoena.)

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[2] That determination underscores that DANY and USAO are two independent prosecutorial entities not conducting a joint investigation, but rather engaging in the good faith discharge of their respective duties.

II. The People's productions of the USAO materials to defendant in discovery.

On May 23, 2023, DANY disclosed Cohen's federal convictions to defendant on the Addendum to the People's Automatic Discovery Form. *See id.* ¶ 22. On June 8, 2023, DANY produced to defendant in discovery all evidence we obtained from the USAO as described in this Affirmation. *See id.* ¶ 23. Also on June 8, 2023, DANY produced to defendant in discovery all case files in our possession that we obtained from the public court dockets [redacted]. On July 24, 2023, December 21, 2023, and January 19, 2024, DANY made supplemental productions of all materials subsequently obtained from those public court files as we obtained them, pursuant to the continuing duty to disclose under CPL § 245.60. *See id.* ¶ 24.

At no point did defendant identify any complaints or objections regarding the sufficiency of DANY's efforts to request or obtain materials from the USAO until March 6, 2024. *See id.* ¶¶ 25-27. In a "notice of discovery violations" sent on that date, defendant referred without elaborating to "DANY's failure to timely collect obvious impeachment material relating to Michael Cohen" from the USAO. Two days later, on March 8, defendant filed his motion for discovery sanctions in connection with the USAO materials.

III. Defendant's January 2024 subpoena to the USAO.

On January 18, 2024, defendant served a state-court subpoena duces tecum on the USAO seeking records related to the federal government's investigation and prosecution of Michael Cohen, as well as records related to the investigation by the Special Counsel into Russian interference in the 2016 presidential election. *See* Conroy Aff. ¶ 28. The USAO responded on January 19 and explained that third-party demands for documents in cases in which the federal government is not a party are governed by the Justice Department's so-called *Touhy* regulations at 28 C.F.R. part 16 subpart B. *See* Conroy Aff. ¶ 29; *see also* 28 C.F.R. § 16.21(a)(2); *United States*

ex rel. Touhy v. Ragen, 340 U.S. 462 (1951). In accordance with those regulations, the USAO notified DANY of defendant's request and invited us to provide our views regarding whether defendant's request for records satisfied the applicable standards for disclosure. *See* Conroy Aff. ¶ 29; *see also* 28 C.F.R. § 16.24(c); Justice Manual § 1-6.220.

DANY's correspondence explained the state-law standard for disclosure in response to a trial subpoena issued pursuant to CPL 610.20(4); described this Court's prior holdings applying that standard to other third-party subpoenas issued by defendant; and explained where we thought the requests in defendant's subpoena fell short of the required showing for disclosure under state law and applicable federal law—including in instances where defendant sought the same records from the USAO that he had previously subpoenaed from other third parties and that this Court had quashed. *See* Conroy Aff. ¶ 31. DANY also identified certain categories of targeted requests in defendant's subpoena—including witness statements relevant to Cohen's credibility, proffer agreements, and privilege waivers—that we believed may meet the standards for disclosure if they included evidence not already obtained by the People and produced to defendant in discovery. *Id.* ¶ 32.

On February 23, 2024, the U.S. Attorney issued a determination in response to the requests in defendant's subpoena. *Id.* ¶ 33. That determination declined to authorize disclosure in response to certain of the requests, and authorized disclosure in response to other requests in defendant's subpoena. The disclosures were made subject to the entry by a federal court of a Privacy Act and Protective Order incorporating the provisions of this Court's May 8, 2023 Protective Order. *Id.* ¶ 34. With the consent of both defendant and DANY, the USAO then filed a proposed Privacy Act and Protective Order with the U.S. District Court for the Southern District of New York. That court entered the Privacy Act and Protective Order on March 4, 2024. *See* Privacy Act & Protective

Order, *In re Subpoena Duces Tecum to U.S. Attorney's Office for the Southern District of New York*, No. 24 mc 97 (S.D.N.Y. Mar. 4, 2024). *See* Conroy Aff. ¶ 35 & Ex. 9.

Following entry of the Privacy Act and Protective Order on March 4, the USAO began a series of rolling productions of the materials authorized for production. Those productions, grouped by request number in defendant's subpoena (rather than by date of production) are as follows.

Request 3 in the subpoena sought "the documents discussed or relied upon in any way to establish probable cause in the [search warrant for Cohen's devices and premises], including bank records and emails from [nine identified] financial institutions." The USAO declined to authorize disclosure of records discussed or relied upon to establish probable cause because "[i]t would be a painstaking and extremely time-intensive task" and "[i]n many cases, may not be possible to identify" those records. As to the request for records from nine identified financial institutions, the USAO concluded that the request may seek relevant information if related to the campaign finance counts, but that "[t]his Office is not in a position to determine which materials have been obtained by the People and produced to the defendant in discovery, and it would be unreasonably burdensome for this Office, as a non-party, to review the materials to identify documents that are related to Mr. Cohen's campaign finance offenses." The USAO also concluded that the requested materials may be covered by grand jury secrecy and could only be shared directly with a law enforcement agency under an existing sharing order. For those reasons—and expressly disclaiming any determination as to relevance or materiality—the USAO authorized disclosure of these records directly to DANY, "with the understanding that any relevant, material and/or discoverable materials will be shared with the defense." *See* Conroy Aff. ¶ 37 & Ex. 8 at 7-8.

The USAO then produced documents responsive to Request 3 directly to DANY in a rolling production in the following tranches: (a) 16,888 pages on March 5; (b) 38,857 pages on March 7; (c) 23,296 pages on March 8; and (d) 91,326 pages on March 15. *See* Conroy Aff. ¶ 38. (The first three productions are part of the "73,000 pages" that defendant has described in his motion. *E.g.*, Def.'s Mar. 8 Mot. at 15. The fourth production was done after this Court's adjournment.) Given the fact that these materials were produced in response to requests in defendant's subpoena, the fact that they were produced in the period from 20 days to 10 days before the scheduled start of trial, and in light of the presumption of openness in CPL 245.20(7), DANY did not conduct any relevance, materiality, or discoverability analysis or review of the 170,366 total pages in these productions before producing them to the defense in full. *See* Conroy Aff. ¶ 39. Instead we immediately produced them to the defense as promptly as possible after we received them (on the same day of receipt for two of the productions, and the following day for the other two productions). *Id.*

Requests 4 to 10 sought documents seized from five identified iPhones and email accounts associated with Michael Cohen. The USAO acknowledged the overbreadth of the requests and the burden of reviewing those records for potentially relevant records; noted that "the overbreadth and burden alone would be sufficient bases to deny this request"; but authorized disclosure "under the extraordinary circumstances of this case." Conroy Aff. ¶ 40 & Ex. 8. at 7-8. The USAO produced documents responsive to Requests 4 to 10 in a production of 31,015 pages on March 13, 2024. The USAO produced those documents to both defendant and DANY on the same day. *See* Conroy Aff. ¶ 41. The March 13 production prompted the People's March 14 Notice to the Court.

Request 11 sought agreements with Mr. Cohen or his counsel, including proffer agreements and privilege waivers. *Id.* ¶ 42 & Ex. 8 at 8. The USAO authorized disclosure "[w]ithout

conceding" that the request "satisfies the standards of CPL § 610.20(4)." *Id.* The USAO produced 10 pages of responsive records on March 4 in response to this request, which it produced to both defendant and DANY on the same day. *See* Conroy Aff. ¶ 42 & Ex. 8 at 8.

Request 12 sought documents memorializing statements by Cohen, including statements by Cohen to state and federal agencies including the Special Counsel's Office. The USAO authorized disclosure "[w]ithout conceding" that the request "satisfies the standards of CPL § 610.20(4)." The USAO produced 172 pages of responsive records on March 4 in response to this request, which it produced to both defendant and DANY on the same day. *See* Conroy Aff. ¶ 43 & Ex. 8 at 8.

ARGUMENT

Defendant's motion for sanctions or dismissal based on the production of records from the USAO is meritless. The People had no disclosure obligations at all under CPL 245.20 with respect to those records, which were not in our actual or constructive possession; and the People satisfied any obligation that might exist by diligently requesting records from the USAO relevant to the subject matter of this prosecution. Defendant's accusations of a discovery violation are a distraction from the only issue actually presented here, which is how this Court should respond to the late arrival of potentially relevant evidence from sources outside of the People's direction or control. On that question, the appropriate remedy is the brief adjournment that this Court has already granted, which is more than enough time for the parties to review what the People now have good reason to believe is the limited number of relevant records in the USAO's recent productions. This Court should accordingly deny defendant's request for more extreme sanctions.

I. The People exceeded our obligations under Article 245 by obtaining and producing grand jury evidence from the *United States v. Cohen* prosecution.

A. CPL 245.20 does not apply to documents held by the USAO because the People do not actually or constructively possess records that are in the sole possession of the federal government.

Defendant's claim that the People have violated their discovery obligations under CPL 245.20 (Def.'s Mar. 8 Mot. at 33) founders at the outset because the documents that the USAO have produced to defendant were not part of the People's disclosure obligations at all.

Automatic discovery under CPL 245.20(1) is limited to items and information that are in the People's actual or constructive possession. Evidence is in the People's actual possession if it is "in the possession, custody or control of the prosecution or persons under the prosecution's direction or control." *Id.* § 245.20(1). Evidence is in the People's constructive possession only when it is "in the possession of any New York state or local police or law enforcement agency." *Id.* § 245.20(2). Documents held by the USAO are not encompassed by this carefully circumscribed language: the USAO is neither a "New York state or local police or law enforcement agency," *id.* § 245.20(2), nor an entity under the "direction or control" of DANY, *id.* § 245.20(1). Indeed, the USAO has itself confirmed that defendant's attempt to apply CPL 245.20 here is misguided: in response to defendant's request for records, the USAO expressly found that CPL 245.20(1) "is not applicable to this Office, which is not 'the prosecution' but rather a third party to the criminal proceeding." Ex. 8 at 2 n.1. The independence of the USAO from the People here and the absence of any evidence of "a joint investigation between the People and the Federal authorities" thus foreclose defendant's assertion that the People had any disclosure obligations with respect to material solely in the USAO's possession. *People v. Leo*, 249 A.D.2d 251, 252 (1st Dep't 1998); *compare People v. Rutter*, 202 A.D.2d 123, 131 (1st Dep't 1994) (prosecutor had

obligation to disclose materials in another prosecuting office's files when prosecutor had "been afforded unfettered access to the documents"); *see* Conroy Aff. ¶¶ 6, 10, 18.

By contrast, applying the standard defendant requests would impose an "open file" disclosure obligation on every U.S. Attorney's Office and other federal law enforcement agency in any New York state prosecution where a witness is or was a federal criminal defendant or the subject or target of a federal criminal investigation. There is no indication that the Legislature intended CPL 245.20 to sweep so broadly. To the contrary, controlling appellate law has long provided that the People have no statutory or constitutional obligation to obtain or disclose materials that the People themselves never possessed and that are instead held by "an independent Federal law enforcement agency not subject to State control." *People v. Santorelli*, 95 N.Y.2d 412, 421 (2000); *see also People v. Rodriguez*, 155 A.D.2d 257, 259 (1st Dep't 1989) ("[T]he prosecutor could not be held responsible for not producing a file which he had never possessed or seen, and which neither he nor the state courts could gain access to without the consent of the appropriate federal agency."); *People v. Frazier*, 233 A.D.2d 896, 898 (4th Dep't 1996) ("With respect to records in the possession of the Federal Bureau of Investigation, the People are not responsible for producing such records where, as here, they never possessed them, and 'neither [the People] nor the courts of this State could gain access to [them] without the consent of the appropriate Federal agency'" (quoting *People v. Guido*, 209 A.D.2d 332, 334 (2d Dep't 1992))); *People v. Olivero*, 289 A.D.2d 1082, 1082 (4th Dep't 2001); *People v. Napolitano*, 282 A.D.2d 49, 56-57 (1st Dep't 2001); *People v. Ortiz*, 209 A.D.2d 332, 333-34 (1st Dep't 1994). Courts have recognized that CPL 245.20 preserves this foundational principle that the People have no disclosure obligations beyond materials in their actual or constructive possession. *See, e.g.*, *People v. Davis*, 67 Misc. 3d 391, 397 (Crim. Ct. Bronx Cnty. 2020) (no obligation to disclose materials

in sealed case); *People v. Lustig*, 68 Misc. 3d 234, 243 (Sup. Ct. Queens Cnty. 2020) (no obligation to disclose OCME materials).

Defendant does not dispute that much of the USAO's recent production was possessed only by the USAO and not by DANY. He nonetheless argues that, because DANY was previously able to request some materials from the USAO, it had an obligation under CPL 245.20(2) to continue to "ascertain the existence" of the USAO's materials and then "cause [it] to be made available for discovery." Def.'s Mar. 8 Mot. at 2, 41; *see also* Def.'s Mar. 15 Ltr. at 2. Two provisions of the statute, however, defeat defendant's argument that the People's *ability* to access some information not under their possession means they had an *obligation* to do so under Article 245. First, CPL 245.20(2)'s ascertainment obligation is explicitly limited to "material or information discoverable *under subdivision one of this section*"—thus incorporating the requirement of actual or constructive possession that defines the scope of the People's disclosure obligations in CPL 245.20(1). Second, CPL 245.20(2) further provides that "the prosecutor shall not be required to obtain by subpoena duces tecum material or information which the defendant may thereby obtain." Here, defendant not only could but *did* obtain these materials by subpoena.[3] Defendant's own ability to obtain the USAO materials thus confirms that the People had no disclosure obligations under the statute with respect to those materials. *See, e.g.*, *People v. Cortes*, 2023 N.Y. Slip Op. 50656(U), at *4 (N.Y. Crim. Ct., Queens Cnty., June 21, 2023) (denying motion to strike certificate of compliance for failure to satisfy CPL § 245.20(2) requirements where the prosecution did not promptly subpoena towing company paperwork, on the ground that "[d]efendant could have taken their own immediate steps to secure these items if they felt those were crucial to their defense")

[3] Defendant's objection that his request should not be deemed a "subpoena" is meritless for the reasons given immediately below in the text.

cf. People v. Hayes, 17 N.Y.3d 46, 51 (2011) ("There is a difference between preserving evidence already within the possession of the prosecution and the entirely distinct obligation of affirmatively obtaining evidence for the benefit of a criminal defendant.").

Defendant makes two additional arguments regarding his own effort to obtain information from the USAO. Neither has merit.

First, Defendant's repeated assertion that the People sought to "obstruct" his effort to obtain information from the USAO (Def.'s Mar. 8 Mot. at 14, 20, 33, 41, 46; Def.'s Mar. 14 Ltr. at 2; Def.'s Mar. 15 Ltr. at 2) is false. Consistent with the Justice Department's *Touhy* regulations and procedures, DANY responded to a request from the USAO to provide our views on whether defendant's request for records to be used in the *People v. Trump* prosecution satisfied the applicable standards for disclosure. *See* Ex. 5 at 1; 28 C.F.R. § 16.24(c); Justice Manual § 1-6.220. As the USAO's *Touhy* determination makes clear, for several of defendant's requests, the People expressly acknowledged that disclosure might be appropriate if there were additional documents "not already obtained by the People and produced to defendant in discovery." Ex. 8 at 7; *see also* Ex. 5 at 2. Also false is the claim (Def.'s Mar. 8 Mot. at 15, 45) that DANY mischaracterized federal law as requiring Cohen's consent to the request; instead, we accurately noted that the federal Privacy Act requires either an individual's consent or a court order, which is exactly what the USAO then obtained to comply with defendant's subpoena. Ex. 5 at 7; *see also* Mar. 4, 2024 Privacy Act and Protective Order (Ex. 9). The People consented to the entry of that court order, *see* Ex. 9, which is hardly obstruction.

Second, defense counsel strenuously argues to the Court that defendant's request for records from the USAO was not a "subpoena." Def.'s Mar. 14 Ltr. at 2; Def.'s Mar. 15 Ltr. at 1. In particular, defendant claims that the People's reference to their subpoena as a subpoena (instead

of a *Touhy* request) "is a meritless and counterfactual effort to shift fault for their discovery violations"; and defendant says we are "wrong" to suggest "that the USAO-SDNY produced materials in response to a defense subpoena," and that calling it a subpoena that "seeks to make the Court complicit in that unethical strategy" and is an "afront [sic] to Your Honor." *Id.*

The import of this argument is unclear. Although CPL 245.20(2) refers to the People's ability to obtain materials "by subpoena duces tecum," there is no similar language describing defendant. The plain language of the provision thus indicates that a defendant's independent ability to obtain material by *any* means—whether by subpoena, *Touhy* request, or something else—exempts that material from automatic discovery under CPL 245.20. In any event, defendant is wrong to disclaim the "subpoena" label for his request to the USAO. The very first sentence of the USAO's *Touhy* determination says that it is responding to "the defendant's request, by subpoena duces tecum," for information. Ex. 8 at 1. And the Privacy Act and Protective Order entered by the federal court on March 4—which defense counsel reviewed and signed—states that "counsel for the defendant in *People of the State of New York v. Donald J. Trump*, Index No. 71543-23 (Sup. Ct. N.Y. Cnty.) ('*People v. Trump*'), issued a subpoena duces tecum ('Subpoena') to the U.S. Attorney's Office for the Southern District of New York"; and that "the U.S. Attorney for the Southern District of New York has authorized the disclosure of certain records in response to the Subpoena." Ex. 9. Indeed, the very name of that federal court proceeding is *In re Subpoena Duces Tecum to the United States Attorney's Office for the Southern District of New York*, No. 24-mc-97 (S.D.N.Y.). Defendant's objection to the nature of his request to the USAO is thus not only irrelevant, but wrong.

B. In any event, the People engaged in good-faith and diligent efforts to obtain relevant information from the USAO.

Even assuming that the People had some disclosure obligations with respect to the USAO materials, there would still be no basis to find any discovery violation because the People did in fact "make a diligent, good faith effort," CPL 245.20, to obtain records from the *United States v. Cohen* prosecution that would be related to the subject matter of this case. "[T]he efforts made by the prosecution"—particularly in light of the "massive volume of discovery provided" in this case—easily satisfy any due-diligence standard that may apply. *People v. Bay*, 2023 N.Y. Slip Op. 06407, at *2

Specifically, on several occasions prior to the indictment in this case, the People requested evidence from the grand jury record related to Cohen's campaign finance convictions, including summaries of witness interviews, search warrant affidavits, and evidence seized pursuant to those warrants, such as data from Michael Cohen's phones. In doing so, the People specifically noted the need for any exculpatory information in the USAO's possession. To facilitate the USAO's disclosure of these materials, the People also submitted to the USAO a draft petition under Rule 6(e)(3)(E)(iv) of the Federal Rules of Criminal Procedure, which permits the USAO to seek a court order to disclose grand jury materials to a state law enforcement agency to enforce state criminal law.

In response, and on information and belief, the USAO obtained an ex parte sharing order from a federal court authorizing disclosure pursuant to Rule 6(e)(3)(E)(iv). Pursuant to that order, which remains under seal and thus has not been disclosed, the USAO produced to the People a subset of the information we requested. Those materials consisted of core grand jury records including grand jury minutes, Form 302s, witness notes, and several proffer agreements and immunity orders related to Cohen's convictions for campaign finance violations. The USAO did

not provide data from Cohen's phones. The People followed up to repeat our request for data related to the phones that the USAO obtained pursuant to search warrant, but the USAO declined to provide that information because it would be unduly burdensome and because DANY had already obtained the phones by consent. The People timely produced all of the materials we received from the USAO to the defense in full.

To the extent the People have any obligation at all to obtain investigative materials in the sole possession of the federal government, the steps described here far exceed that obligation. The People requested information related to the subject matter of this case; those requests induced the USAO to pursue a formal legal process to obtain judicial authorization to share materials; and, when the production from the USAO did not include some material that the People had originally requested, the People made follow-up requests.[4] These extensive efforts easily distinguish the circumstances here from cases where the People "made no attempt" to obtain potentially relevant materials before filing a certificate of compliance. *People v. Rahman*, 79 Misc. 3d 129(A), at *2 (2d Dep't App. Term. June 23, 2023); *see also People v. Carrasco*, 81 Misc. 3d 1226(A), at *1 (Crim. Ct. Queens Cnty. 2024) (prosecutor "did nothing" to obtain hospital records). Far from remaining inactive, the People here took reasonable steps to obtain relevant information from the USAO and then fully disclosed all of those materials to defendant. *Cf. People v. Heverly*, 2024

[4] Defendant falsely claims (Def.'s Mar. 8 Mot. at 38, 45) that the People mischaracterized to the USAO or defendant any aspect of our collection of evidence from Cohen's phones. But both defendant's subsequent letter to the USAO and the USAO's *Touhy* determination make clear that neither defendant nor the USAO had any confusion whatsoever about the People's description of those phones. *See* Ex. 8 at 7 n.5 (noting that "[defendant has] advised this Office that you are not confident that the data obtained and produced by DANY is coextensive with the data seized by this Office"); Ex. 7 at 2 ("[Y]ou asked whether we were comfortable that DANY had produced the same set of data from one of Cohen's phones that we are seeking in the *Touhy* requests. To be clear, we are not."). As we explained to defendant repeatedly, we produced to defendant (nine months ago, on June 8, 2023) the full forensic images of both phones as we obtained them from the witness.

WL 396077, at *3 (4th Dep't Feb. 2, 2024) (recommending as "best practice" that prosecutors "take steps . . . to obtain" records not in their possession).[5]

Defendant nonetheless raises three criticisms of the People's diligence. None have merit.

First, defendant faults the People for asking the USAO only for information related to the subject matter of this case—namely, the campaign finance convictions to which Cohen pleaded guilty—without further requesting material concerning Michael Cohen's unrelated criminal convictions that defendant intends to use to impeach his credibility. Indeed, defendant goes so far as to accuse the People of "improperly selecting materials they hoped to use while leaving other materials behind at the USAO"—the "other materials" being a reference to "extrinsic evidence of criminal conduct by Cohen that is admissible in connection with defense cross-examination." Def.'s Mar. 8 Mot. at 43-44. There was no improper selectivity here whatsoever—this was never a joint investigation; the People never had access to the USAO's case file; and there was nothing to "leave behind." The People sought records related to Cohen's campaign finance violations because those violations were directly relevant to the criminal charges here; by contrast, Cohen's other federal convictions are not related to the current charges at all. Even assuming that those other convictions could be used for impeachment, there is no basis for defendant's claim that the People thereby had an obligation to ascertain and disclose the materials underlying those unrelated convictions. It is true that the People must disclose evidence and information "that tends to . . . impeach the credibility of a testifying prosecution witness." CPL 245.20(1)(k)(iv). Again,

[5] Defendant quotes language from *Heverly* as imposing a requirement that prosecutors ascertain and obtain evidence not in their actual or constructive possession. Def.'s Mar. 8 Motion at 44. In *Heverly*, however, the prosecutors actually had in their possession the materials at issue. *See* 2024 WL 396077, at *3 ("The People do not dispute that, at some point, the transcripts came into the prosecutor's possession."). The quoted language is thus dicta, and is best understood as a recommendation about ideal practices, rather than a description of binding requirements.

however, that disclosure obligation is limited to materials in the People's actual or constructive possession, or information "known to police or other law enforcement agencies acting on the government's behalf in the case." *Id.* Material about Cohen's unrelated convictions held solely by the USAO is not encompassed by this language.

Nothing in Article 245 suggests that the People have an affirmative obligation to search for and disclose the materials underlying a prosecution witness's non-New York conviction that are not in the People's possession. To the contrary, CPL 245.20(1)(p) requires only disclosure of a "complete record of judgments of conviction" for prosecution witnesses; courts have rejected the argument that this language requires the People to disclose the "underlying documents" supporting such conviction, borrowing from a long line of precedent interpreting a predecessor statute. *People v. Simmons*, 78 Misc.3d 544, 549 (Sup. Ct. Bronx Cnty. 2023); *see, e.g.*, *People v. Wilburn*, 40 A.D.3d 508, 510 (1st Dep't 2007) (under prior statute, sufficient for People to disclose "a list of a witness's prior convictions, including the names of the crimes of which he was convicted and the date of each conviction"). Reading a broader obligation into the statute would have absurd consequences. Under defendant's interpretation, for any witness with a non-New York conviction, the People would be obligated to disclose not only the fact of the conviction (which was fully disclosed here), but also all of the underlying records held by the non-New York prosecutor—a task fraught with practical and legal difficulties. *See Simmons*, 78 Misc.3d at 549-50. And the slippery slope would arguably not end there, given that impeachment "is not limited to questions about prior crimes or like misconduct" and could include any "immoral" or "vicious" behavior. *People v. Walker*, 83 N.Y.2d 455, 461 (1994). Nothing in Article 245 supports any such sweeping impeachment-related discovery obligation.

In any event, the additional impeachment material in the USAO productions is overwhelmingly cumulative or confirmatory of evidence already in defendant's possession, including the conviction, criminal information, and guilty plea colloquy on Cohen's bank-fraud convictions. The precedents recognizing that the People need not disclose the underlying records of convictions of a prosecution witness, *see Wilburn*, 40 A.D.3d at 510, reflect the well-settled understanding that the fact of a conviction standing alone can provide serious ground to question a witness's credibility, without any need to probe the underlying facts, *see, e.g.*, *People v. Stevenson*, 281 A.D.2d 323, 324 (1st Dep't 2001) (no need to recall witness despite "subsequent discovery of additional underlying facts concerning [witness's] conviction"). And the importance of the documentary evidence underlying Cohen's unrelated federal bank-fraud convictions is further diminished by the rule that such extrinsic evidence generally cannot be admitted "for the sole purpose of impeaching credibility." *People v. Schwartzman*, 24 N.Y.2d 241, 245 (1969); *see also Badr v. Hogan*, 75 N.Y.2d 629, 636 (1990). In any event, given the short adjournment ordered by this Court, defendant has ample opportunity to review this cumulative evidence of Cohen's unrelated federal convictions and to consider whether and how to incorporate them into any challenge to Cohen's credibility at trial.

Second, defendant questions the People's diligence by noting that, in response to his own January 24, 2024 request for records, the USAO has produced to defendant materials that were not previously provided to the People—including certain data from Cohen's phones at the time of the execution of the federal search warrants. But the USAO's independent decision to provide different materials, at a different time, in response to a different request in no way undercuts the adequacy of the People's prior efforts to obtain information relevant to our investigation. It can be true at the same time both that the People were diligent in initially requesting information from the

USAO, and that defendant was subsequently able to obtain additional information himself. Criticizing the People's earlier efforts based on the USAO's response to a different request for information nearly one year later is the type of hindsight review that courts have held is not appropriate in assessing the People's due diligence. *See People v. Pondexter*, 76 Misc. 3d 349, 355 (Crim. Ct. N.Y. Cnty. 2022) (declining to "evaluate the People's obligation with the benefit of hindsight" and instead "look[ing] to the entire circumstances surrounding the People's attempt to comply with CPL 245.20").

Moreover, there were significant changes in circumstances between the time of the People's request and defendant's request. The People made their initial request for materials before the indictment; the USAO thus did not have the benefit of understanding the charges currently facing defendant or various pretrial rulings this Court has made in the intervening year. By contrast, in response to defendant's request, the USAO not only *could* rely on that information, but *did* in fact do so: for example, the USAO's *Touhy* determination relied heavily on this Court's December 18, 2023 Decision and Order, as well as this Court's protective order of May 8, 2023. *E.g.*, Ex. 8 at 3-8, 9. In addition, by the time defendant made his request to the USAO, the People had already provided him with a significant amount of discovery, including disclosures that overlapped with defendant's request for further information from the USAO. For example, in responding to defendant's request for more data from Cohen's phones, the USAO was able to rely on the fact that the People had already disclosed to defendant the "full forensic images" of two phones; the USAO's response was informed by defendant's new complaint—only possible because he had already received discovery from the People—that he still needed the USAO's data because the images in the People's possession might not be "coextensive with the data seized by" the USAO. *Id.* at 7 n.5. These significant changes in circumstances between the time of the

People's initial request and defendant's subsequent one undermine defendant's attempt to rely on the USAO's recent document productions to challenge the diligence of the People's original efforts.

Third, defendant faults the People for not obtaining from the USAO materials relating to interviews that Cohen had with the Special Counsel's Office investigating Russian interference. Def.'s Mar. 8 Mot. at 34-35. But, on information and belief, the USAO simply did not have possession of five of the six SCO 302s at the time of the People's earlier request (although, on information and belief, they subsequently obtained it). Conroy Aff. ¶¶ 20-21. The People can hardly be faulted for failing to obtain records that the USAO did not possess. Defendant further accuses the People of making "strenuous and meritless objections" to defendant's more recent request for these interview materials (Def.'s Mar. 8 Mot. at 34), but the People did no such thing: to the contrary, the People's response to defendant's subpoena to the USAO acknowledged that the interview materials from the Special Counsel's Office could be disclosed. Ex. 5 at 13. The People even submitted a followup response to the USAO listing the Cohen witness statements in our possession (and produced in discovery) so the USAO could more easily identify 302s or other witness statements that defendant did not already possess. Ex. 6 at 1-2. Defendant's accusations against the People in this respect are thus just factually wrong.

C. The USAO's productions contain largely irrelevant or cumulative materials, and the limited amount of new, relevant materials do not warrant more than a modest adjournment for defendant to review.

Defendant's request for dismissal or preclusion is also unwarranted because the vast majority of the USAO's productions do not contain any material relevant to the subject matter of this prosecution; instead, the documents are either entirely irrelevant or else provide, at best, cumulative impeachment material relating to Cohen's federal convictions. For the relatively small amount of material that is actually relevant to the subject matter of the case, the brief adjournment

ordered by this Court is more than sufficient to give defendant a meaningful opportunity to review the evidence prior to trial.

The overwhelming bulk of the USAO's production since March 4 consists of records that the USAO collected in the course of investigating totally unrelated federal charges against Cohen that do not "relate to the subject matter of [this] case." CPL 245.20(1).[6] That description encompasses, by our estimate, more than 99% of the early March and final March 15 productions, as well as a significant proportion of the March 13 production. As explained above, none of these records were subject to automatic discovery under CPL 245.20; all of them are cumulative of records already in defendant's possession establishing that Cohen had been convicted and the grounds for such convictions; and defendant would not be entitled to introduce these records at the trial in any event.

A small fraction of the materials in the USAO production do consist of items relevant to the subject matter of this prosecution that were not previously disclosed. For example, from the early March productions, the major relevant items are witness statements not previously in any party's possession, consisting of about 172 pages of notes recording Cohen's meetings with the Special Counsel investigating Russian interference. The March 13 production also contains only a

[6] The mere fact that the USAO produced this material in response to defendant's request and that DANY then turned them over to defendant *in toto* is no indication that they are related to the subject matter of this case. *Contra* Def.'s Mar. 14 Ltr. at 2. The USAO expressly declined to determine whether these records were relevant to the *People v. Trump* prosecution, and instead made a bulk production directly to the People (in response to the defense subpoena) of "all bank records and emails obtained from nine identified financial institutions" on the "understanding that any relevant, material and/or discoverable materials will be shared with the defense," because "it would be unreasonably burdensome for this Office, as a non-party, to review the materials to identify documents that are related to Cohen's campaign finance offenses." *See* Ex. 8 at 6-7. The People then immediately produced those records directly to the defense—without first reviewing for relevance or discoverability—in light of the presumption of openness in CPL § 245.20(7) and because they had only been produced to the People because of defendant's subpoena. *See* Conroy Aff. ¶ 39.

small proportion of materials relevant to the charges here. Although defendant describes this production as "31,000 pages" (Def.'s Mar. 15 Ltr. at 1) taken from Cohen's phones, it is more helpful to understand the production as containing 6,871 documents. Of those documents, the People's preliminary review indicates that more than 2,000 of them are duplicates of each other. Of the non-duplicated documents, the People have identified fewer than an estimated 270 documents that are related to the subject matter of the case and that have not previously been disclosed to defendant, [redacted] In the People's judgment, most of these documents are inculpatory and corroborative of existing evidence. Most of the remaining data from the March 13 production—*i.e.*, the majority of the documents—appear to have nothing whatsoever to do with this case.

This volume of additional materials is not so excessive as to warrant any relief beyond the modest adjournment that this Court has already ordered. All of these materials are now available to defendant before trial and before any witness may testify. And the thirty-day adjournment ordered by this Court is more than enough time for defendant and the People to review the limited number of relevant, non-duplicative, non-cumulative materials in the USAO productions. On this front, the People are prepared at the March 25 hearing to provide a more detailed description of the USAO productions and to explain why the remaining time until trial gives both sides a meaningful opportunity to review those materials.

Although not necessary for purposes of this motion, the People note their strong disagreement with defendant's arguments (Def.'s Mar. 8 Mot. at 34-36) that the passages he cites from the SCO 302s are exculpatory. For example, defendant contends that "[t]he People have also

argued consistently that Cohen did not provide legal services" to defendant in 2017, and then argues that the witness statements from the Special Counsel's Office produced by the USAO rebut that argument. *Id.* at 35-36. But the Court already expressly rejected defendant's effort to mischaracterize the People's position in that exact way: "Contrary to [defendant's] assertion, it is not the People's position that Mr. Cohen performed *no* legal work for the Defendant during the period in question. Indeed, it is public knowledge that Mr. Cohen was the Defendant's personal attorney." Order on Mot. to Quash 8 (Dec. 18, 2023). The relevant materials in the March 13 production are also largely inculpatory, not exculpatory: for example, they include [redacted]. These materials thus largely confirm other evidence that the People long ago turned over to defendant in complying with our discovery obligations.

D. The belated nature of the USAO productions is a result of defendant's delay.

Finally, defendant's request for "severe sanctions" is entirely misplaced when the timing of the USAO's current production of additional materials is entirely a function of defendant's own strategic delay. The People disclosed Cohen's federal convictions on the Automatic Discovery Form in May 2023, almost ten months ago. *See* Conroy Aff. ¶ 22. We requested materials from the USAO regarding Cohen's campaign finance convictions in early 2023 and then produced all federal investigative materials in our possession on June 8, 2023, more than nine months ago. *See id.* ¶ 23. We also produced the hundreds of public filings from [redacted] last summer as well, and made supplemental productions as new filings appeared thereafter. *See id.* ¶ 24. Defendant was required under CPL 245.50(4) to advise the People and the Court "as soon as practicable" if he considered these combined disclosures insufficient; and CPL 255.20 and the Court's explicit scheduling orders required him to seek relief *at the latest* by the

September 2023 omnibus briefing deadline. Yet before March 6, 2024, defendant never once raised a concern to the People about the sufficiency of our efforts to obtain materials from the USAO. *See* Conroy Aff. ¶ 27. Instead, he waited until January 18, 2024 to subpoena additional materials from the USAO and agreed to repeated extensions of the return date. *See* Ex. 1; Ex. 3 at 1. Thus, apart from the lack of any merit, defendant's delay precludes the extreme remedies of dismissal and preclusion that he seeks here. *See, e.g.*, *People v. Chavers*, 80 Misc. 3d 1218(A), at *1-2 (Sup. Ct. Kings Cnty. 2023).

These factors easily distinguish this case from *People v. Horowitz*, Ind. No. 72426-22, which defendant inaptly cites as analogous. Def.'s Mar. 8 Mot. at 3-4. As defendant acknowledges, the belated disclosures there occurred mid-trial, after many of the People's witnesses had already testified, thus depriving the defense of the opportunity to cross-examine on those materials; here, by contrast, trial has not yet begun, and no witness has yet testified. The records in *Horowitz* were directly relevant to the charged conduct, unlike the overwhelmingly irrelevant records from the USAO here. And because the materials in *Horowitz* were shielded by attorney-client privilege, there was no avenue for the defense to obtain those materials until the privilege was suddenly and belatedly waived; in contrast, defendant here could have requested these records from the USAO at any time, and certainly should have done so upon receiving the People's production of its own USAO records more than nine months ago. The stark distinctions between this case and *Horowitz* thus further underscore the meritless nature of defendant's discovery complaints.

II. The modest adjournment already ordered by the court is the only necessary relief or response to the recent production of records from the USAO.

For the reasons given above, the current situation does not involve any discovery violation by the People, but instead the belated disclosure of potentially relevant information from other sources not subject to CPL 245.20. As a result, defendant is wrong to rely on CPL 245.80 as a

basis for his request for sanctions. Instead, under these circumstances, the relevant question is how to provide defendant with a "meaningful opportunity" to review the new material in preparing his defense. *People v. Cortijo*, 70 N.Y.2d 868, 870 (1987); *see also People v. Osborne*, 91 N.Y.2d 827, 828 (1997) (applying this standard to prior statutory disclosure requirements); *People v. Paulino*, 260 A.D.2d 162 (1st Dep't 1999) (no error when "information was disclosed in time for the defense to use it effectively"). Here, as explained above, in light of the limited nature of any new information presented in the USAO productions, the adjournment already ordered by this Court is more than enough time to ensure that defendant can meaningfully review the materials.

The remedy would be no different even if CPL 245.80 were applicable here. Any remedy under that provision must be "appropriate and proportionate to the prejudice suffered by the party entitled to disclosure." CPL 245.80(1)(a). Here, defendant has suffered no prejudice from the USAO's recent productions because the vast majority of the material has no bearing on the subject matter of this case, any impeachment material is merely cumulative of other evidence that defendant already possesses, and defendant has sufficient time before trial to review the limited amount of new material in the productions. Under those circumstances, the sole remedy contemplated by CPL 245.80 is to give defendant "reasonable time to prepare and respond to the new material." *Id.* The thirty-day adjournment ordered by this Court satisfies that requirement.

Defendant's request for more severe sanctions is meritless. "[T]he extreme sanction of preclusion" of a witness is warranted only when the defendant establishes not only prejudice, but also "bad faith on the part of the People." *People v. Ramjattan*, 219 A.D.3d 1348, 1351 (2d Dep't 2023). Neither prerequisite is established here: there is no prejudice for the reasons already given, and the People acted in good faith and with due diligence not only in requesting information from the USAO, but throughout the protracted discovery process in this case. For similar reasons, the

even more extreme sanction of dismissal is wholly unsupported. *See People v. Cajilima*, 75 Misc. 3d 438, 442 (Sup. Ct. Nassau Cnty. 2022) (People's actions were "not grossly improper as to warrant a dismissal of the Indictment"). Defendant should by no means benefit from the windfall of a dismissal by seeking information from a third party at the last minute.

Finally, although defendant does not appear to seek to invalidate the People's certificate of compliance, no such remedy would be warranted here either. A certificate of compliance is proper when the People have disclosed all discoverable material "after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery." CPL 245.50(1). For the reasons given above, the People had no ascertainment obligations with respect to the USAO materials and made reasonable efforts to obtain that information in any event. Given those good-faith and diligent efforts, the USAO's later productions have no effect on the certificate of compliance: the statute expressly provides that a late disclosure of discoverable material "shall not impact the validity of the original certificate of compliance if filed in good faith and after exercising due diligence." *Id.* § 245.50(1-a).

CONCLUSION

Defendant's motion to dismiss and for an adjournment based on discovery violations related to the USAO productions should be denied.

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Respectfully submitted,

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