

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.

DECISION AND ORDER
ON MOTION TO QUASH
DEFENDANT'S SUBPOENA
TO MARK POMERANTZ
AND FOR A PROTECTIVE
ORDER

Ind. No. 71543/2023

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

On April 4, 2023, Donald J. Trump, the Defendant, was arraigned before this Court on an indictment charging him with 34 counts of Falsifying Business Records in the First Degree, in violation of Penal Law § 175.10. On March 18, 2024, Defendant issued a subpoena *duces tecum* (hereinafter "Subpoena") to former Special Assistant District Attorney Mark Pomerantz (hereinafter "Pomerantz") seeking various documents. Pomerantz 3/18/24 Subpoena. On April 3, 2024, the People filed a motion to quash the Subpoena. Defendant responded on April 5, 2024. Pomerantz, through his attorney Roberto Finzi, joined the People's motion on April 4, 2024. From March 2022 through March 2024, the People have sought, received, and provided to Defendant a number of documents and materials from Pomerantz that pertain to the instant matter. People's Memo at pgs. 2-5.

MOTION TO QUASH

CPL § 610.20 provides that any party to a criminal proceeding may issue a subpoena. CPL § 610.20(3) specifically provides that an attorney for a defendant in a criminal action may issue a subpoena of any witness whom the defendant is entitled to call in such action or proceeding. To "sustain a subpoena," the issuing party must demonstrate "that the testimony or evidence sought is reasonably likely to be relevant and material to the proceedings and that the subpoena is not overbroad or unreasonably burdensome." *See* CPL § 610.20(4); *see also, People v. Kozłowski*, 11 NY3d 223, 242 [2008] (the proper purpose of a subpoena *duces tecum* is to compel the production of specific documents that are relevant and material to facts at issue in a judicial proceeding). When disputes arise concerning the "validity or propriety" of a subpoena, the court must resolve whether the subpoena is enforceable. *See Application of Davis*, 88 Misc2d 938, 940 [Crim. Ct. N.Y. Co. 1976]; *see also, People v. Natal*, 75 NY2d

379, 385 [1990]. Because the subpoenaed materials are returnable to the court, it follows that the court retains the ultimate authority on the outer parameters of the subpoena powers. *See People v. D.N.*, 62 Misc3d 544 [Crim. Ct. N.Y. Co. 2018], *internally citing Matter of Terry D.*, 81 NY2d 1042 [1993].

The Court of Appeals has held that a subpoena is properly quashed when the party issuing the subpoena fails “to demonstrate any theory of relevancy and materiality, but instead, merely desire[s] the opportunity for an unrestrained foray into confidential records in the hope that the unearthing of some unspecified information [will] enable [them] to impeach witness[es].” *People v. Gissendanner*, 48 NY2d 543, 549 [1979]. A subpoena *duces tecum* may not generally be “used for the purpose of discovery or to ascertain the existence of evidence.” *Id.* at 551. Conversely, courts have denied a motion to quash where the subpoena demands production of specific documents which are relevant and material to the proceedings. *See People v. Duran*, 32 Misc3d 225, 229 [Crim. Ct. Kings Co. 2011, Laporte, J] (“the defendant established that the solicited data is relevant and material to the determination of guilt or innocence, and not sought solely in the speculative hope of finding possible impeachment of witness’ general credibility”); *People v. Campanella*, 27 Misc3d 737 [Dist. Ct. Suffolk Co. 2009, Horowitz, J].

When deciding a motion to quash a subpoena, “access must be afforded to ...data relevant and material to the determination of guilt or innocence, as, for example, when a request for access is directed toward revealing specific ‘biases, prejudices or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand’ or when it involves other information which if known to the trier of fact, could very well affect the outcome of the trial ... there is no such compulsion when requests to examine records are motivated by nothing more than impeachment of witnesses’ general credibility.” *People v. Gissendanner* at 548, *quoting Davis v. Alaska*, 415 US 308, 316 [1974]. Thus, this Court must determine, among other things, whether the subpoena seeks information to be used for impeachment of general credibility or is instead directed towards revealing specific biases, prejudices or ulterior motives related directly to personalities or issues in the instant matter; whether the solicited information is material to the question of guilt or innocence, or nothing more than a ‘fishing expedition.’

“An attorney for a defendant may not issue a subpoena *duces tecum* of the court directed to any department, bureau, or agency of the state or of a political subdivisions thereof, or to any officer or representative thereof, unless the subpoena is indorsed by the court and provides at least three days for the production of the requested materials.” CPL § 610.20(3).

DISCUSSION

For the following reasons, the People's motion to quash the instant subpoena is GRANTED in its entirety.

As a threshold matter, the People's motion is granted because the subpoena is not indorsed by the court as required by CPL §610.20(3).

Pomerantz was a Special Assistant District Attorney ("SADA") with the New York County District Attorney's Office ("DANY") from February 2, 2021, until February 23, 2022. Mark F. Pomerantz Affirmation Dated March 29, 2024 (hereinafter "Pomerantz Affirmation"). The Subpoena seeks materials from Pomerantz during his time as a SADA, with some requests seeking materials up until a month after his departure. Pomerantz 3/18/24 Subpoena Requests Nos. 1-4. The requests seeking documents and materials from Pomerantz between the time period of February 2, 2021, and February 23, 2022, i.e., the time period of Pomerantz's tenure at DANY as a SADA, fall under the rubric of CPL § 610.20(3). Because the subpoena was not indorsed as required by CPL § 610.20(3), those requests are quashed.

As an alternate holding, assuming *arguendo* that Defendant did comply with the requirement of CPL § 610.20(3), the People's motion would still be granted. Defendant's First Request is impermissibly broad and calls for information protected as privileged work product. This request seeks: "all documents relating to the February 28, 2021, memorandum evaluating, *inter alia*, whether (a) Stephanie Clifford a/k/a 'Stormy Daniels,' committed 'extortion' and/or 'larceny,' and (b) whether President Trump was a 'victim of blackmail.'" In seeking this memorandum, the Court finds that the request runs afoul of CPL § 245.65. A prosecutor's work product "includes 'those portions' of documents 'which are only the legal research, opinions, theories or conclusions' of the People or its attorney's agent." The date of the memorandum (February 21, 2021) as well as the topics the memorandum covers appear to pertain to the legal analysis related to the criminal investigation. In fact, Defendant acknowledges that the memorandum is likely the prosecutor's "opinion, theory, or conclusion" on the topics requested. Indeed, Defendant uses the term "evaluating" within the request.

Defendant's Second and Third Requests are far too broad and amount to an improper fishing expedition into general discovery. For example, Defendant's Second Request seeks "all Documents" for a thirteen-month period from several individuals covering a range of topics including "Cohen's recollection of interactions with President Trump" and "any form of bias or animosity toward President Trump." Further, in light of People's Exhibit 2 (March 29, 2024, Affirmation of Mark F. Pomerantz) and given the amount of materials related to these requests already turned over to the

Defendant, there is no reasonable likelihood that the Second and Third Requests would uncover any information that is relevant and material to the proceedings. CPL § 610.20(4)

Finally, Defendant's Fourth Request seeks information on topics that are not relevant and material to the facts at issue. The Request seeks "[F]or the period from March 23, 2022, through the present ...all Documents reflecting communications with DANY personnel regarding the collection of materials for purposes of discovery, disclosure, or litigation in *People v. Trump*, Indictment No. 71543-23." This appears to be an attempt to obtain DANY's internal communications about their discovery obligations. The People's motion to quash this aspect of the Subpoena is granted.

THEREFORE, it is hereby

ORDERED that the People's motion to quash is GRANTED in its entirety.

The foregoing constitutes the Decision and Order of this Court.

May 10, 2024
New York, New York



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

MAY 10 2024

JUAN M. MERCHAN