People v. Trump May Hinge On Prior-Crimes Admissibility

By **Ethan Greenberg** (April 26, 2023)

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From a legal perspective, one of the most interesting aspects of former President Donald Trump's arraignment on April 4 is the contrast between the indictment voted on by a Manhattan grand jury, and the accompanying statement of facts that was filed with the court and released to the public by Manhattan District Attorney Alvin Bragg.

The People v. Trump indictment is narrowly focused on multiple charges of falsifying business records, all of which grow solely out of Trump's hush-money payment to adult film star Stormy Daniels.

The statement of facts casts a much wider net. It describes an alleged "catch and kill" scheme hatched by then-presidential candidate Trump and longtime ally David Pecker, then-CEO of the National Enquirer's parent company, in the summer of 2015, the purpose of which was to suppress negative press stories about Trump in order to help him win the presidency.

The statement alleges that this scheme was not limited to suppressing Daniels' story of her alleged brief affair with Trump.

The scheme also encompassed suppressing the story of former Playboy model Karen McDougal about her alleged extended extramarital affair with Trump, and suppressing an unsubstantiated story provided by an unnamed Trump Tower doorman, asserting that Trump had fathered a child out of wedlock with an unnamed mistress.

Bragg Counters the Edwards Defense

Why is Bragg attempting to make the McDougal and the unknown doorman stories a part of a case that — on the face of the indictment — would appear to be based solely on the alleged Daniels affair?

In all likelihood, the answer is this: Bragg anticipates, and perhaps is worried, that Trump may raise what has been dubbed in some quarters a "John Edwards defense."

By way of background, it appears that the principal theory behind the indictment's felony charges of falsifying business records is that Trump caused the Trump Organization's business records to be falsified in order to conceal the federal campaign finance law crime. The alleged campaign finance crime was jointly committed by Trump and his former attorney and fixer, Michael Cohen, when they failed to report the Daniels hush money payment as an in-kind campaign contribution.

But Trump may claim that he paid Daniels, through Cohen, and falsified business records in order to protect his relationship with his wife Melania Trump — and not to aid his campaign. If that were Trump's true motivation for paying Daniels, then there was no illegal campaign contribution.

If Trump does make such an argument, he will be following in the path of former presidential candidate Edwards, who was tried in 2012 for alleged federal campaign finance law crimes that grew out of his efforts to cover up an extramarital affair.

In U.S. v. Johnny Reid Edwards,[1] the jury unanimously acquitted Edwards of conspiracy, and reportedly deadlocked on four campaign finance charges — voting 8-4 to acquit — and a charge of false reporting, voting 11-1 to acquit.[2]

To date, the only publicly known evidence supporting the assertion that Trump's payment to Daniels was motivated by a desire to advance his campaign, and not by a desire to protect his marriage, is the arguably damning timing of the payment — that is, immediately prior to the 2016 election — and the testimony of Cohen, who arranged the Daniels payment, allegedly at Trump's direction.

The advantage to Bragg of bringing Pecker, McDougal and the unknown doorman into the Daniels hush money case, then, is that — according to the statement of facts — Pecker and Trump's common and expressly stated purpose in catching and killing the McDougal story, the unknown doorman story and the Daniels story was to help Trump get elected.

Pecker's anticipated testimony will thus help the prosecution to try to prove that the Daniels payment was made with the intent to advance Trump's campaign. Pecker's testimony will reduce Bragg's dependence on Cohen to prove this crucial point. And that is important because Cohen, who has been convicted of perjury, among other crimes, has substantial built-in credibility issues.

McDougal and Molineux

But there is a significant legal obstacle for Bragg to overcome before he can broaden the Daniels case to include Pecker, McDougal and the unknown doorman. Ordinarily, a defendant's uncharged prior bad acts and crimes — here, Trump's alleged payoffs to McDougal and the unknown doorman — are inadmissible as evidence at the defendant's criminal trial.

The traditional and sound reason for this rule of evidence is the danger that when a jury learns about a defendant's prior bad acts and crimes, the jury will assume that the defendant has a general propensity to commit crimes, and will therefore convict the defendant — even if the evidence on the current charge is weak.[3]

It seems likely that Bragg will try to circumvent this principle of the rules of evidence by pointing to a well-worn exception to the principle, namely, the Molineux rule.

This rule, first set out in the New York Court of Appeal's 1901 decision in People vs. Molineux,[4] holds that evidence of a defendant's prior bad acts and crimes can be admissible in limited circumstances and subject to various procedural safeguards, outlined below, provided that such evidence goes to a genuine relevant issue at trial, and is not offered merely to prove that the defendant has a general propensity to commit crimes.

Where a court finds that evidence of past crimes is genuinely relevant to issues at trial, the court must then conduct a balancing test: It must weigh the evidence's probative value against its potential to unfairly prejudice the defendant in the jury's eyes by portraying the defendant as a habitual criminal.

And where, after conducting this balancing analysis, the court determines that Molineux evidence of prior uncharged crimes should be admitted, the court must next fashion careful limits on the nature and quantity of such evidence.[5]

If the case becomes too top-heavy with Molineux prior-crimes evidence, that can overwhelm the evidence directly related to the case on trial.

If a court allows into evidence too much Molineux material, and especially too much information about prior crimes of a kind that may excite revulsion in the jury, then any conviction obtained at trial will likely be reversed on appeal.[6]

Generally speaking, Molineux evidence usually falls into one of five recognized categories: motive, intent, common scheme or plan, identity and modus operandi.[7]

The first three categories would appear to be potentially relevant to the evidence in the Trump case about payments made to McDougal and to the unknown doorman.

Bragg will likely argue, with some logical force, that Pecker's testimony about McDougal and the doorman will establish the existence of a common scheme and plan to aid Trump's campaign by suppressing scandalous stories about Trump, and that such evidence will further show that Trump's motive in paying off Daniels was — consistent with that common scheme — to advance Trump's campaign for the presidency.

Trump's lawyers will likely argue in turn, also with some logical force, that evidence about McDougal and the doorman is largely irrelevant to the Daniels case — a case that should stand or fall on its own merits.

Moreover, Trump's lawyers will likely maintain that there is a very real danger that the salacious and inflammatory nature of the McDougal and doorman evidence creates a substantial risk of prejudicing Trump with the jury, a risk that far outweighs whatever probative value this evidence might arguably have.

These competing arguments will leave the trial judge — presumably, New York Supreme Court Justice Juan Merchan — with some very difficult legal decisions to make.

Should Pecker's testimony, and the McDougal and doorman evidence, be admitted pursuant to the Molineux rule? And, if so, what limits should the court place on such evidence?

It will be up to the trial judge in the first instance to decide these tough questions, and if there is a conviction, an appellate court will likely have to examine them, too.

Conclusion

Whether the Trump trial will, or will not, feature testimony from Pecker — and perhaps from Karen McDougal as well — about McDougal and the unknown doorman will likely shape the way both the Trump jury and the country at large will look at the case and at Trump himself.

The legal issues presented by Molineux, McDougal and Melania are close ones. Only time will tell how they will be resolved.

Ethan Greenberg is a shareholder and co-chair of the white collar criminal practice at Anderson Kill PC. He previously served as an acting New York State Supreme Court Justice presiding over criminal cases, and as an assistant district attorney in the New York County District Attorney's Office.

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[1] U.S. v. Johnny Reid Edwards, C.M.D.N.C.1-11-cr-161-1.

[2] J. Gerstein, Politico, "How Edwards Prosecution Stumbled," June 1, 2012, https://www.politico.com/story/2012/06/how-the-edwards-prosecution-stumbled-076942.

[3] People v. Hudy, 73 N.Y. 2d 40 (1988).

[4] People vs. Molineux, 168 N.Y. 2d 264 (1901).

[5] People v. Alvino, 71 N.Y. 2d 233 (1987).

[6] People v. Stannard, 32 N.Y. 2d 777 (2d Dept. 1983).

[7] People v. Carter, 77 N.Y. 2d 95 (1990).