Trump's Best Hush Money Appeal Options Still Likely To Fail

By **Ethan Greenberg** (August 15, 2024)

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In the aftermath of his hush money trial in New York Supreme Court, former President Donald Trump and his lawyers proclaimed that they will soon appeal his conviction for 34 counts of falsifying business records in the first degree.

There has been a great deal of public speculation as to what grounds for reversal will be urged on that appeal. Undoubtedly, Trump's attorneys will, as they should, raise a host of arguments for reversal.

However, most of those anticipated arguments — for example, that venue was improper because Manhattan is a largely Democratic county, that the trial judge had a conflict of interest and that Trump was the victim of selective prosecution — involve fairly well-settled areas of the law, and do not appear to hold much promise for the former president.

The most interesting and most promising issue that Trump can raise on appeal involves the jury instructions. In a very real sense, the jury instructions in Trump's case allowed the jury to find him guilty without unanimously agreeing as to how, precisely, he had broken the law.

As an intuitive matter, the former president has what seems like a strong potential argument here. Given that the trial judge's instructions seemingly allowed different jurors to find Trump guilty based on different criminal acts, was the jury's verdict truly unanimous?

So, for example, would the guilty verdict be unanimous if some jurors believed that Trump falsified business records in order to conceal a federal campaign finance law crime, while others believed he did so in order to conceal a New York state tax law crime?

The issue is a substantial one, and no one can say with any certainty what the ultimate result will be on appeal. Nevertheless, on closer analysis — and keeping in mind the traditional distinction between the elements of a crime on the one hand, and the means by which a crime is committed on the other[1] — it appears that in the end, Trump's likely arguments on this front will fail, and that Trump's conviction will be upheld.

The Prosecution's Multilayered Theory

The issue of unanimity grows out of the fact that the trial judge — Justice Juan M. Merchan — permitted the prosecutors in New York v. Trump to pursue a complex, multilayered legal theory of the case that, for each count in the indictment, presented many alternative bases for a verdict of guilty.

As to the first layer, Trump was, as noted, charged with the felony of falsifying business records in the first degree. That charge required proof that Trump falsified business records with the intent to conceal another crime.

As to the second layer, the prosecution contended that the crime that Trump intended to conceal was the misdemeanor of violating New York Election Law Section 17-152, titled "Conspiracy to promote or prevent election." It prohibits engaging in a conspiracy to promote the election of a candidate "by unlawful means."

The third layer of the prosecution's theory was the identification of those unlawful means. The prosecution alleged that when Michael Cohen, Trump's "fixer" and attorney, formed a shell company that paid Stormy Daniels hush money, Cohen and others (including Trump) conspired to promote the election of Trump as president by any of three unlawful means.

Those three unlawful means included: (1) by violating federal campaign finance law, (2) by violating New York State tax law, or (3) by falsifying additional business records.

The fourth and final layer was to provide several alternative theories as to how each of these three possible unlawful means were allegedly employed by Trump and his co-conspirators.

Thus, as to violating federal campaign finance law, Justice Merchan instructed the jury that federal campaign finance laws were allegedly violated in either of two ways, namely: (1) by an individual person (i.e., Cohen) making a disguised campaign contribution of over $2,700 to Trump; or (2) by a corporation making a disguised campaign contribution to Trump.

As to violating New York's tax law, Justice Merchan instructed the jury that they could find that New York's tax laws were violated if material false information was included in any tax return or associated statement or document related to the hush money payment.

And as to falsifying additional business records, Justice Merchan instructed the jury in substance that they could consider:

- The bank records associated with the formation of either of the two shell companies created by Cohen to facilitate the Daniels hush money payment;
- Bank records generated in connection with the transfer of the hush money by Cohen to Daniels' lawyer;
- An invoice that was sent by one Cohen shell company to the other in connection with the hush money payment; or
- The 1099-MISC tax form issued by the Trump Organization to Cohen for the year in question.

In other words, by using this complex multilayered approach the prosecution put forth multiple alternative theories as to precisely how Trump broke each of three different groups of laws at issue — that is, federal campaign finance law, state tax laws and the falsification of business records statute.

Indeed, taken as a whole, based on the prosecution's multilayered theory, for each count in the indictment Justice Merchan's instructions to the jury identified by informal count at least 10 different ways in which Trump had allegedly violated the law as part of his conspiracy to promote his own election by unlawful means.

Trial Judge Permits Conviction Based on Alternative Theories of Guilt

Crucially, Justice Merchan's final instructions to the jury also told the jurors that they could convict Trump so long as the jurors unanimously agreed that he had conspired to promote his election by unlawful means — even if the jurors did not unanimously agree as to which of the suggested alternative unlawful means Trump and his co-conspirators had intended to employ.

Specifically, Justice Merchan told the jury, "Although you must conclude unanimously that the defendant conspired to promote or prevent the election of any person to a public office by unlawful means, you need not be unanimous as to what those unlawful means were."

Accordingly, pursuant to Justice Merchan's instructions, the jury could find Trump guilty even if, for example, some jurors believed that Trump had intended to violate campaign finance law, while the rest of the jurors instead believed that Trump intended to violate New York tax law.

And similarly, by way of further example, the trial judge's instructions also allowed jurors to convict even if some believed Trump conspired to violate federal campaign law by making a corporate contribution, while others believed he conspired to violate federal campaign law by making a contribution that exceeded the $2,700 limit set by federal law.

Troubling Issues of Fairness

As an intuitive matter, this result is troubling. A criminal charge in an indictment is supposed to be relatively simple and clear, so that the defendant can know what the accusation is and then mount an appropriate defense. And a jury verdict must be unanimous.

Yet, at first blush, Justice Merchan's jury instructions at least appear to contemplate that each count of falsifying business records in the Trump indictment in effect incorporated approximately 10 or more different alleged acts of wrongdoing by Trump — all of which Trump was required to defend against, and any one of which was sufficient for a guilty verdict.

Moreover, Justice Merchan's instructions indicated that the jurors could convict Trump unanimously even though they did not agree as to what, specifically, Trump had done to break the law.

Undoubtedly, this problem will be a key focus of Trump's appeal.

These concerns about the fundamental fairness of the Trump trial fall under two legal rubrics: (1) the prohibition against "duplicitous" charges, and (2) the constitutional requirement of jury unanimity.

Unanimity and Duplicitousness

By way of background, New York's Criminal Procedure Law requires that a jury verdict in a criminal case — whether guilty or not guilty — must be unanimous.[2]

Moreover, as a matter of constitutional law, the U.S. Supreme Court held in its 2020 Ramos v. Louisiana decision that — pursuant to the Sixth Amendment's guarantee of the right to trial by jury, and the 14th Amendment's due process clause — a state court criminal jury's verdict of guilty must be unanimous.[3] Thus the guilty verdict in Trump's state court hush money trial had to be unanimous.

New York law further requires that "[e]ach count of an indictment may charge one offense only" and prohibits "duplicitous counts."[4] A "duplicitous count" is not — as the name might suggest — a misleading or a false charge. Rather, in legal terminology, a duplicitous count is a single count that accuses the defendant of more than one criminal act.

New York courts have explained that the rule against duplicitous counts is intended to serve three purposes:

1. To clearly identify the crimes alleged, so that they will not be charged again in a subsequent prosecution in violation of the defendant's right against double jeopardy;

2. To guarantee the defendant fair notice of the charges, so that the defendant can prepare and present an adequate defense; and

3. Most important for present purposes, to guarantee a truly unanimous verdict by ensuring that different jurors cannot vote to convict a defendant on a given count based on different criminal acts.[5]

Trump's Likely Arguments

On appeal, Trump will likely advance three closely related arguments. First, he may assert that Justice Merchan's jury instructions rendered each count of falsifying business records duplicitous because those instructions permitted the jury to convict based on numerous, clearly different theories as to how Trump broke the law.

Second, Trump may assert that, for essentially the same reasons, his right under New York state law to a unanimous jury verdict was violated, because the trial judge's instructions did not require the jury to agree unanimously as to how Trump broke the law.

And third, Trump may similarly argue that his right under the U.S. Constitution to a unanimous jury verdict was also violated.

This last point will likely be crucial if and when Trump ultimately seeks U.S. Supreme Court review of his conviction, because the Supreme Court is the final arbiter of questions of constitutional law.

Schad, Unanimity and Trump

That said, under Supreme Court precedent, Trump's arguments may not hold up.

The U.S. Supreme Court's 1991 decision in Schad v. Arizona held that, while a jury must agree unanimously that the defendant committed each element of a charged crime, a jury does not have to agree unanimously as to which of several alternative means was used to commit that crime.

So, by way of a simple example, if Jane Doe is charged with murdering John Smith by stabbing Smith to death with either a sword or a knife, the jury may properly find Doe guilty of murder, even if some jurors believe that Doe used a knife, while others believe that she used a sword. The jury's disagreement is merely over the means used to commit the crime, but not over any essential element of the crime.

This same reasoning can be applied to the much more complex Trump case. And, as it happens, the statutory language at issue in the Trump case dovetails almost perfectly with Schad in a way that is very helpful to the prosecution.

As noted, the prosecution's theory is that Trump falsified business records in order to conceal the crime of conspiring to promote an election by unlawful means.[6] The language of the New York Election Law statute thus almost precisely mirrors the requirements of the Schad decision.

That is to say, pursuant to the statutory definition of the crime, in order to prove Trump guilty of violating Section 17-152, the prosecution needed to prove only that Trump conspired to promote his own election by unlawful means. But the particulars of the unlawful means used are just that — merely means to commit the crime, and not elements of the crime.

And, according to Schad, a jury does not have to agree unanimously about what means were used to commit a crime.

Accordingly, on appeal, the prosecution will likely counter Trump's unanimity argument by asserting that the Trump jury was indeed unanimous as to all the elements of the crime of falsifying business records — namely, that Trump (1) falsified business records (2) with the intent to conceal the crime of conspiracy to promote election by unlawful means.

And the prosecution will likely further argue that — consistent with Schad — the jury was not also required to be unanimous as to the precise means by which Trump committed the crime of conspiracy to promote election.

That is to say, pursuant to Schad the Trump jury could properly find Trump guilty, even though, for example, some jurors believed that the hush money payment violated federal campaign finance law, while other jurors believed that it violated New York state tax law instead.

Thus, based on existing precedent, there is a very good likelihood that Trump's potential unanimity argument will ultimately be rejected on appeal.

Duplicitousness and Trump

That still leaves the question of whether the trial judge's instructions rendered the charges in Trump's case duplicitous. Again, as an intuitive matter, Trump's argument seems like a strong one, because each count of the indictment, as explained by Justice Merchan, would appear to embrace 10 or so alternative criminal acts.

But legal precedent points in a different direction. To begin with, the case law that expounds the doctrine of duplicitousness draws essentially the same distinctions that Schad draws between the elements of a crime and the mere "means" by which a crime is committed.

As the U.S. Court of Appeals for the Second Circuit held in its 1992 decision in U.S. v. Aracri,

> An indictment is duplicitous if it joins two or more distinct crimes in a single count. ... [However, a] duplicitous indictment, which alleges several offenses in the same

> count, must be distinguished from "the allegation in a single count of the commission of a crime by several means." ... The latter is not duplicitous.[7]

Thus, the prosecution would likely meet Trump's duplicitousness argument on appeal by again asserting that the individual counts in the indictment did not each charge multiple crimes; rather, each count charged a single crime that was accomplished by any of multiple means.

And the prosecution may further argue that because multiple means, rather than multiple crimes, were charged in each count, the charges were not duplicitous.

Moreover, the case law is particularly helpful to the prosecution here because Election Law Section 17-152 prohibits a conspiracy to promote elections by unlawful means. And the long-established rule about conspiracy and duplicitousness is that "[t]he allegation in a single count of a conspiracy to commit several crimes is not duplicitous for '[t]he conspiracy is the crime and that is one, however diverse its objects,'" as noted by the Second Circuit in its U.S. v. Murray decision in 1980, quoting a series of precedent.[8]

For both these reasons, the prosecution will likely argue on appeal in Trump's case that the crime at issue here was a single conspiracy — even though the conspiracy's purpose was to commit many crimes — and a count that charges a single conspiracy to commit multiple crimes is not duplicitous.

And, based on the case law, the prosecution will likely prevail.

Trump as a Special Case

Though the case law strongly suggests that Trump's likely appellate arguments based on duplicitousness and lack of unanimity will probably fail, there is still room for a lot of doubt as to the ultimate result, for at least two reasons.

First, the legal theory of the Trump case — with its multilayered approach that has the effect of causing each count in the indictment to refer to at least 10 separate criminal acts — pushes the Schad principle, which is already very generous to the prosecution, to its extreme outer limits.

And second, the unavoidable fact is that Trump is different from any other criminal defendant. He is a former president, and he may well be president again. This year already, he has had two major legal successes at the U.S. Supreme Court level — as to his eligibility for the ballot and as to presidential immunity.

For both these reasons, perhaps we should not be completely surprised if the requirement of unanimity and the prohibition against duplicitousness is interpreted on appeal in a way that is more favorable to defendants generally, and the former president in particular, than past precedent might suggest.

As we have seen, the distinction between the means and elements of a crime, as interpreted by Schad, affords prosecutors great elasticity in formulating multiple alternative theories of guilt. But the Trump hush money case may furnish the occasion for the Supreme Court to place new limits on the Schad doctrine.

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[1] Schad v. Arizona, 501 U.S. 624 (1991).

[2] See CPL §310.80.

[3] Ramos v. Louisiana, 590 U.S.83 (2020), overruling Apodaca v. Oregon, 406 U.S. 404 (1972).

[4] CPL §200.30 (emphasis added).

[5] People v. Bauman, 12 N.Y.3d 152 (2009).

[6] N.Y. Elec. Law §17-152.

[7] United States v. Acrari, 968 F.2d 1512, 1518 (2d Cir. 1992), quoting United States v. Murray, 618 F.2d 892, 896 (2d Cir.1980).

[8] United States v. Murray, 618 F.2d at 896, quoting Braverman v. United States, 317, U.S. 49, 54 (1942).