

5/21/2024

Proposed Instruction on Election Law § 17-152 Predicate, *People v. Trump*, Indictment No. 71543-23

People's Disputed Request

Defense Disputed Request

PART 59 MAY 22 2024

Election Law § 17-152 Predicate.

The People allege that the other crime the defendant intended to commit, aid, or conceal is a violation of New York Election Law section 17-152.

Section 17-152 of the New York Election Law provides that any two or more persons who conspire to promote or prevent the election of any person to a public office by unlawful means and which conspiracy is acted upon by one or more of the parties thereto, shall be guilty of conspiracy to promote or prevent an election.¹

Under our law, a person is guilty of such a conspiracy when, with intent that conduct be performed that would promote or prevent the election of a person to public office by unlawful means, he or she agrees with one or more persons to engage in or cause the performance of such conduct.

Knowledge of a conspiracy does not by itself make the defendant a coconspirator. The defendant must intend that conduct be performed that would promote or prevent the election of a person to public office by unlawful means. Intent means conscious objective or purpose. Thus, a person acts with the intent that conduct be performed that would promote or prevent the election of a person to public office by unlawful means when his or her conscious objective or purpose is that such conduct be performed.² Thus, a person acts with the intent that conduct constituting a crime be performed when the person acts willfully, with a conscious objective or purpose that such conduct be performed.³

¹ Election Law § 17-152.

² The prior two paragraphs are adapted from the CJI instruction on Conspiracy 6, where we have substituted for “conduct constituting a crime” (in the original CJI charge) the Election Law language “conduct to promote or prevent the election of any person to a public office by unlawful means.” See CJI 2d [NY] Penal Law § 105.00, Conspiracy to Commit a Crime.

³ Adapted from CJI 2d [NY] Penal Law Article 105, Conspiracy to commit a crime. Because DANY alleges that one form of “unlawful means” involved violations of FECA—which requires evidence of willfulness, see 52 U.S.C. § 30109(d)—the mens rea necessary to join an Election Law § 17-152 conspiracy is also willfulness. See *People v. Caban*, 5 N.Y.3d 143, 149 (2005) (“It is the individual who is prosecuted [for conspiracy] and necessarily it is the individual who must have the prescribed mens rea. The requisite intent is to join with others to commit a substantive crime.”); see also *People v. Ozarowski*, 38 N.Y.2d 481, 489 (1976) (“The inference of intent under the conspiracy doctrine presents special problems, however. As the United States Supreme Court has recently noted: We scrutinize the record for evidence of such intent with special care in a conspiracy case for, as we have indicated in a related context, charges of

Evidence that President Trump was present when others agreed to engage in the performance of a crime does not by itself show that President Trump personally agreed to engage in the conspiracy.⁴

Proof of separate or independent conspiracies is not sufficient. In determining whether or not any single conspiracy has been shown by the evidence in the case you must decide whether common goals or objectives existed which served as the focal point for the efforts and actions of any members to the agreement. In arriving at this decision, you may consider the length of time the alleged conspiracy existed, the mutual dependence or assistance between various persons alleged to have been its members, and the complexity of the goal or objective.⁵

“By Unlawful Means”

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.⁶

In determining whether the defendant conspired to promote or prevent the election of any person to a public office by unlawful means, you may consider the following unlawful means: (1) violations of the Federal Election Campaign Act; (2) the falsification of other business records; or (3) violation of tax laws.

As I mentioned, § 17-152 requires proof that the goal of the conspiracy was to promote the election of a person “by unlawful means.” The People allege that the unlawful means at issue involved (1) violations of the Federal Election Campaign Act, or FECA; and (2) the falsification of other business records.

conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes.” (cleaned up)).

⁴ CJI 2d [NY] Penal Law Article 105, Conspiracy to commit a crime.

⁵ Kevin F. O’Malley et al., *Federal Jury Practice and Instructions* § 31.09 (6th ed. 2023); *see also United States v. Parrilla*, 2014 WL 3784116, at 29-32 (S.D.N.Y. 2014) (proposed multiple conspiracies charge); *People v. Leisner*, 73 N.Y.2d 140, 150 (1989) (“Like the Federal courts, we believe that because the clarity of the charge is so crucial in these complex conspiracy trials, a charge must be given explicitly recognizing the possibility of multiple conspiracies and directing an acquittal in the event that the jury concludes that something other than a single integrated conspiracy was proven. Such a charge is required whenever the possibility of more than one conspiracy is supported by a reasonable view of the evidence.”).

⁶ *See People v. Mateo*, 2 N.Y.3d 383, 408 (2004); *People v. Jones*, 190 A.D.2d 632 (1st Dep’t 1993). A similar sample instruction on non-unanimity for accessorial liability appears in the CJI at CJI 2d [NY] Accessorial Liability.

You must reach a unanimous decision regarding whether the People have established "unlawful means" and, if so, which "unlawful means" was or were at issue. I will provide you with a verdict form so that you can indicate your conclusions on these issues.⁷

1. The Federal Election Campaign Act.

[Please see the parties' separate joint submission for the proposed charge on FECA].

2. Falsification of other business records.

In addition, under New York law, a person is guilty of Falsifying Business Records in the Second Degree when with intent to defraud, he or she makes or causes a false entry in the business records of an enterprise.⁸

I previously defined for you the terms enterprise, business records, and intent to defraud.

For purposes of determining whether Falsifying Business Records in the Second Degree was an unlawful means used by a conspiracy to promote or prevent an election here, you may consider (i) the bank records associated with Michael Cohen's account formation paperwork for the Resolution Consultants LLC and Essential Consultants LLC accounts; (ii) the bank records associated with Michael Cohen's wire to Keith Davidson; (iii) the invoice from Investor Advisory Services Inc. to Resolution Consultants LLC; and (iv) the 1099-MISC forms that the Trump Organization issued to Michael Cohen.

3. Violation of tax laws.

Under New York State and New York City law, it is unlawful to knowingly supply or submit materially false or fraudulent information in connection with any tax return.⁹

Likewise, under federal law, it is unlawful for a person to willfully make any tax return, statement, or other document that is fraudulent or false as to any material matter, or that the person does not believe to be true and correct as to every material matter.¹⁰

⁷ *Ring v. Arizona*, 536 U.S. 584, 602 (2002) ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." (citing *Apprendi v. New Jersey*, 530 U.S. 466, 482-83 (2000))).

⁸ CJI 2d [NY] Penal Law § 175.05, Falsifying Business Records 2.

⁹ Tax Law §§ 1801(a)(3), 1802 (criminal tax fraud in the fifth degree); N.Y.C. Admin. Code §§ 11-4002(a)(3), 11-4003 (criminal tax fraud in the fifth degree).

¹⁰ 26 U.S.C. § 7206(1) (felony for a person who "[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter"); 26 U.S.C. § 7206(2) (felony for any person who "[w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any

Under these federal, state, and local laws, such conduct is unlawful even if it does not result in underpayment of taxes.

matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter”).